INDEPENDENT CONTRACTORS vs. EMPLOYEE

When determining if someone should be considered an employee or independent contractor, there are two tests that can be done. However, regardless of which test is used, employee worker status is essentially based on who controls the worker’s activities.

IRS Form SS-8 can also help in making these determinations.

THE 20 QUESTIONS TEST

This IRS ruling, sometimes called the 20 Questions or the IRS Test, assists in determining if a worker is an independent contractor or an employee. The entity that controls the activities of the worker is the ultimate determining factor. The more control that the worker has over the work, the more likely it is that the worker is an independent contractor. On the other hand, the more control the employer has over the work, the more likely it is that the worker is an employee. Keep in mind that no single factor should be used in this determination. The entire test should be applied to the situation and the individual responses summarized to arrive at the final determination. The 20 factors are as follows:

- **Instructions.** When a worker must comply with instructions with respect to when, where and how to perform work provided by the compensating entity, that worker is probably an employee. When a worker has the ability or right to establish when, where and how to perform the work, that worker is probably an independent contractor.

- **Training.** If a worker must be trained or is required to have training to perform the services in the manner as prescribed by the compensating entity, that worker is probably an employee. An independent contractor does not normally need training or is not required to be trained by the employer or by a fellow employee.

- **Integration.** If a worker's services are of a kind integrated into and part of the employer’s business operation, that worker is probably under the direction and control of the compensating entity and is probably an employee. Independent contractors do not normally integrate into the workflow in this manner.

- **Services Rendered Personally.** If a worker must personally perform the services, the entity for which the services are performed is normally interested in the methods used and the results attained. This shows an exercise of control and that worker is probably an employee. In cases where a worker is not required to personally render the needed services, that worker is probably an independent contractor.

- **Hiring, Supervising and Paying Assistants.** The entity that controls hiring, supervising and paying assistants or helpers normally determines who has control of the relationship. If the entity that compensates a worker performs these functions with respect to helpers or assistants of that worker, the relationship is probably one of an employer and employee. On the other hand, if a worker hires, supervises and pays his or her assistants, that worker is probably an independent contractor.

- **Continuing Relationship.** Even an irregular relationship that recurs suggests it is one of an employer and employee. Recurring or continuing relationships do not usually occur with an independent contractor.

- **Set Hours of Work.** If the compensating entity establishes and controls the hours of work, a worker is probably an employee. Independent contractors usually control and set their own hours.

- **Full Time Required.** If the compensating entity controls the amount of time a worker spends on the job, which serves to restrict that worker from other contracts or employment, that worker is probably an employee. The opposite applies with independent contractors who normally control their own hours and when they perform the work.

- **Doing Work on Employer’s Premises.** If the compensating entity exercises control over factors like the location of the work, routes traveled or the territory canvassed, a worker is probably an employee. Independent contractors usually work from their own locations and control their own routes and territories but this is not always the case.

- **Order or Sequence Set.** If the compensating entity controls, sets or has the right to establish the schedules and routines to be followed, a worker subject to that control is probably an employee. Independent contractors establish their own schedules, routines and patterns of operation and work.
**Oral or Written Reports.** If a worker must submit either oral or written reports at specified intervals, that worker is probably an employee. Independent contractors may occasionally submit reports on a periodic basis but do not necessarily do so.

**Payment by the Hour, Week or Month.** Payments made to a worker on the basis of commission or by the job usually indicate an independent contractor relationship. Conversely, payments made to a worker by the hour, week or month usually suggest an employer and employee relationship.

**Payment of Business and Travel Expenses.** If the compensating entity controls, pays or otherwise regulates business and travel expenses, the relationship is probably that of an employer and employee.

**Furnishing Tools and Materials.** If the compensating entity provides tools and materials, that worker is probably an employee. However, if a worker provides the tools and materials, that worker is probably an independent contractor.

**Significant Investment.** If a worker invests money into facilities for the purpose of performing a service, and the facilities are not those normally provided by an employee, such as an office or building, that worker is probably an independent contractor. However, consideration must be given in cases where employees have offices in their homes to the extent that the employer furnishes those offices.

**Realization of Profit or Loss.** If a worker sustains, or is subject to the risk of, real economic loss from investments, expenses and salaries of assistants or hires, that worker is probably an independent contractor. An employee is not normally exposed to these elements and receives an established specific compensation instead.

**Working for More Than One Firm at a Time.** If workers control their own circumstances and can or do work for more than one unrelated entity at a time, they are probably independent contractors. An employee normally works for one specific employer.

**Making Service Available to the General Public.** The ability to make services available to the public normally indicates an independent contractor. Employees usually service one employer at a time.

**Right to Discharge.** Independent contractors have contractual agreements that guarantee compensation for the duration of the contract, as long as the terms and conditions of the contract are met. If the compensating entity has the right or ability to discharge a person, this normally indicates an employer and employee relationship.

**Right to Terminate.** In an independent contractor relationship, the contractor cannot terminate at will. It must comply with the terms of the contractual agreement. On the other hand, an employee can be terminated at will.
THE COMMON LAW TEST

Facts that provide evidence of the degree of control and independence fall into three categories:

- **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- **Financial**: Are the business aspects of the worker’s job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- **Type of Relationship**: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Here are some additional common law determination questions that can be asked when deciphering:

- What is the extent of the compensating entity’s control over the work details? The more control it exercises, the more likely that a worker is an employee.
- Do the services performed by a worker suggest a distinct occupation or business? If so, the worker is probably an independent contractor.
- Does a worker normally perform the service without supervision? Most employees have some degree of supervision but independent contractors usually do not.
- Is a high level of skill or training needed for the service performed? If the answer is yes, does the worker already have the skill or is the compensating entity responsible for providing it? Employers usually train employees. Independent contractors usually already have the skill or are already trained.
- Who furnishes tools and materials? This is similar to the IRS test. If the compensating entity provides tools and materials, a worker is probably an employee. If that worker provides the tools and materials, this suggests an independent contractor.
- What is the length of time the services are provided? If a specific time period is negotiated or arranged, it is probably a contractual relationship and suggests that workers are independent contractors. On the other hand, if the services are provided permanently or indefinitely, the relationship is probably that of an employer and employee.
- How is payment arranged? Payments made to a worker on a commission basis or by the job usually suggest an independent contractor relationship. Payments made on an hourly, weekly or monthly basis usually indicate an employee relationship.
- Is the work a normal part of the business operations of the compensating entity? If so, a worker is probably an employee. If not, that worker is probably an independent contractor.
- Do the parties understand or believe that an independent contractor relationship exists? If the answer to this question is yes, that is probably what it is.
- Is the hiring entity in business? If not, a worker is probably an independent contractor.