

Paytime™



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ARE YOU SURE THEY ARE NOT AN EMPLOYEE?

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AGENDA

- **IRS 20 QUESTIONS AND 3 CONTROL FACTORS**
 - **NATIONAL LABOR RELATIONS BOARD 11 FACTORS**
 - **DOL 6 FACTORS**
 - **PENNSYLVANIA REQUIREMENTS**
 - **HOW THESE CAN BE “CAUGHT”**
 - **RECORDKEEPING**
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- A decorative graphic in the bottom right corner consisting of several overlapping, semi-transparent geometric shapes in shades of teal, blue, and purple.

Behavioral Control - Business CANNOT control or direct in any way “...what work is accomplished and how the work is done, through instructions, training, or other means.”

Financial Control - Business CANNOT “...direct or control the financial and business aspects of the worker's job. This includes:

- The extent to which the worker has unreimbursed business expenses
- The extent of the worker's investment in the facilities or tools used in performing services
- The extent to which the worker makes his or her services available to the relevant market
- How the business pays the worker, and
- The extent to which the worker can realize a profit or incur a loss”

Relationship of the Parties - Business **MUST HAVE** documentation supporting "...the type of relationship the parties had. This includes:

- Written contracts describing the relationship the parties intended to create
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay
- The permanency of the relationship, and
- The extent to which services performed by the worker are a key aspect of the regular business of the company"

1. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. Training: Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. Services rendered personally: If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
5. Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
6. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status.

7. Set hours of work: The establishment of set hours for the worker indicates employee status.
8. Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
11. Oral or written reports: A requirement that the worker submit regular reports indicates employee status.
12. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. Payment of business and/or traveling expenses. If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.
15. Significant investment: Investment in facilities used by the worker indicates independent contractor status.
16. Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
18. Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
19. Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee.
20. Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

NATIONAL LABOR RELATIONS BOARD 11 FACTORS

- 1. The extent of control which, by the agreement, the master may exercise over the details of the work.**
- 2. Whether or not the one employed is engaged in a distinct occupation or business.**
- 3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.**
- 4. The skill required in the particular occupation.**
- 5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.**
- 6. The length of time for which the person is employed.**
- 7. The method of payment, whether by the time or by the job.**
- 8. Whether or not the work is part of the regular business of the employer.**
- 9. Whether or not the parties believe they are creating the relation of master and servant.**
- 10. Whether the principal is or is not in the business.**
- 11. Whether the evidence tends to show that the individual is, in fact, rendering services as an independent business.**

SUBJECT: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.

[US DOL Administrator's Interpretation July 15, 2015](#)

III. Conclusion

In sum, most workers are employees under the FLSA's broad definitions. The very broad definition of employment under the FLSA as "to suffer or permit to work" and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor. The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee). The factors should be used as guides to answer that ultimate question of economic dependence. The correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers.

1. **The extent to which the work performed is an integral part of the employer's business.** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself.
2. **Whether the worker's managerial skills affect his or her opportunity for profit and loss.** Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment.
3. **The relative investments in facilities and equipment by the worker and the employer.** The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself.
4. **The worker's skill and initiative.** For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.
5. **The permanency of the worker's relationship with the employer.** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor.
6. **The nature and degree of control by the employer.** Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers.

Pennsylvania: Employee or Independent Contractor

If an individual performs services in the **construction industry**, the [Construction Workplace Misclassification Act \(Act 72\)](#), imposes additional criteria that must be met for the individual to be recognized as an independent contractor.

Under Act 72, **all** of the following requirements must be satisfied:

- The individual has a written contract to perform the services,
- The individual is free from control or direction over the performance of the services involved both under the contract of service and in fact, **and**
- As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

NOTE: The "written contract" must be specific to the project for which the individual will be performing services.

To show that an individual in the construction industry is customarily engaged in an independently established trade, occupation, profession or business, Act 72 requires that the following be shown:

1. The individual possesses the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed;
2. The individual's arrangement with the person for whom the services are performed is such that the individual shall realize a profit or suffer a loss as a result of performing the services;
3. The individual performs the services through a business in which the individual has a proprietary interest.
4. The individual maintains a business location that is separate from the location of the person for whom the services are being performed.
5. The individual either (a) previously performed the same or similar services for another person in accordance with (1), (2), (3) and (4) while free from direction or control over performance of the services, both under his contract and in fact; or (b) holds himself out to other persons as available and able, and in fact is available and able, to perform the same or similar services in accordance with (1), (2), (3) and (4) while free from direction or control over performance of the services;
6. Maintains liability insurance during the term of the contract of at least \$50,000.

HOW THESE CAN BE “CAUGHT”

- The Contractor files for unemployment from an Employer and their status with your Company is questioned by the examiner
- The Contractor believes they are an Employee and files [Form SS-8](#) for an official determination from the IRS - if deemed an Employee, they file [Form 8919](#) along with their Tax Return (Uncollected Social Security and Medicare Tax on Wages)
- An angry Employee reports you
- A Workers Compensation Audit
- Discovered through a Memorandum of Understanding (MOU)

DOL Wage and Hour Division works with the IRS and [37 States](#) (currently) coordinating efforts on “information sharing” if companies are caught in audits by other agencies

HOW THESE CAN BE “CAUGHT”

April 2016 – Lawsuit against Uber settled with 385,000 Drivers (\$84 million now with a second payment of \$16 million dependent on Uber profits). The original complaint was that, technically, Uber Drivers are Employees because Uber can terminate Drivers and they also have quotas for ride acceptance that, if not met, can result in termination. Uber also enforces certain workplace standards. The California Department of Labor has ruled the Drivers are Employees. Also, without Drivers, there is no Uber.

Update: Judge “stayed the case” pending appeals regarding Uber’s arbitration clause - November 18, 2016.

June 2016 – Case settled where six former Dancers of Fuego Exotic Dance Club and Extasy Exotic Dance Club in Maryland won their Case to be reclassified as Employees. The Court decision found that the dancers were illegally misclassified and deserved to be paid back wages and damages by the clubs in the total amount of \$265,000. The Dancers were charged for bathroom breaks, were charged fees for shifts, given fines, told the hours to work and “coached”, among other examples of Control.

HOW THESE CAN BE “CAUGHT”

April 2016 - Lancaster Symphony Orchestra – Court ruled that musicians were Employees and not Independent Contractors. This Case was filed by the National Labor Relations Board. As Employees, they would have the right to Unionize. It was close – but the final decision was made based on the level of Control.

“...they must not cross their legs, talk, or practice while the conductor is on the podium, or interfere with the concentration of other musicians. The list of rules for concerts is far longer: musicians must warm up quietly, remain silent after the concertmaster signals for tuning, maintain good posture and attentive appearance throughout the performance, refrain from crossing their legs, remain still until the conductor lowers his hands, and when the conductor signals for the orchestra to acknowledge applause, stand, face the audience, and smile.”

Use a Checklist or Cover Sheet (just like you would for an Accounts Payable Vendor)

- Completed W-9 form (make sure the Contractor gets a 1099 at the end of the year) – the W-9 Form can be found here [W-9](#) (**deduct 28% for Federal Withholding for each payment made without W-9**)
- Workers Compensation and/or Liability Insurance (get copies of insurance certifications and keep them on file – check dates)
- Licenses or Certifications needed for the scope of work (keep copies on file- electrician license, etc.) *PA locals – verify electrician requirements, they can vary by local
- Advertising or marketing materials provided, save this in the file (including RFPs and notes on references, why the Vendor was chosen, etc.) – showing this will also meet the PA guidelines that the Contractor “holds him/herself out to the public as a bona fide independent contractor”
- Contract signed and returned
- Check the State regulations for both the location of the work being performed and the location of the Company home office (where the payments will be issued) – comply with both and make sure the Contractor has complied with both

The following items need to be included in the Contract:

- All terms in writing;
- Specifically note that the Contractor is free from direction by the company in performing the duties assigned (required in PA);
- Specifically note that no company tools will be provided to the Contractor (required in PA);
- Identify the separate business location of the Contractor (required in PA);
- Identify the Vendor/Worker as an Independent Contractor;
- Provide a description of the work;
- Identify the expected completion date;
- Identify cost in total and any expenses to be reimbursed (avoid this).

Note: If anything changes from the original contract, amend the contract – keep this with your documentation. **GET EVERYTHING SIGNED!**

- Do not make a payment to the Contractor until a signed W-9 has been received
- Pay the Contractor from invoices ONLY – do not pay the Contractor from timesheets – the Contractor should provide you with detailed invoices
- Do not create the invoices for the Contractor
- Do not use your Company Letterhead on Contractor invoices
- Do not let the Contractor use your expense reimbursement forms
- Avoid reimbursing Contractors for expenses; the taxation (50% rule) can be tricky, you may have year-end arguments when they are reported on their 1099 AND this could border on an Employer/Employee relationship situation
- Stick to the Contract terms

QUESTIONS?

