



Independent Contractor or Employee?

Part Two

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IRS Factors

The factors the IRS uses to determine if an individual is an independent contractor or employee are the most commonly used factors, although other governmental organizations sometimes look at other factors or look at them from a different perspective and can come up with different results than the IRS. Because the IRS factors are the most common, cover the broadest territory, and are the most widely used because they overlap into the factors used by other organizations, we are going to spend some time looking at them here.

The IRS looks at three aspects of the employment arrangement in order to analyze if a particular situation involves an independent contractor or an employment relationship. These three aspects are:

1. Financial control
2. Behavioral control
3. Relationship of the parties

Financial Control

Financial control refers to the rights the business has to control financial aspects of the workers job. These include the extent to which the company reimburses or does not reimburse expenses; the extent of the worker's investment in the work; the extent the worker makes his services available to others in the marketplace; how the worker is paid, and the extent to which the worker can realize a profit or loss in the activity. We often refer to much of this as the worker's risk of loss. In general, an employee has no risk of loss and an independent contractor does have a risk they could lose money on the work.

Behavioral Control

Behavioral control refers to the control the business has over the manner in which the work is done. This involves how much control the business has over the training; how much instruction is given regarding how the work is accomplished, and the hours the work is accomplished.

Relationship of the Parties

The relationship of the parties refers largely to how the business and worker interact. It involves facts regarding the activities of the business and the worker which indicates how their interactions are both perceived and what they are in reality. Do they act like two separate businesses or do they act like employer and employee?

IRS Twenty Factors

The IRS does have a total of twenty different factors which are used in assisting to determine the status of an individual worker. None of the twenty factors are determinative. Some of them hold more weight than others and the amount of weight an individual factor holds will vary with the circumstances of each individual situation and the job being done. There is no magic number of factors whereby if you get over half or a certain number, you win. It is very dependent on the facts and circumstances of each individual situation. Each individual factor will tend to indicate that a worker may be more likely an employee or independent contractor. They must be looked at in their entirety to determine what the real substance of the situation is. In some situations other factors may be considered as well depending on the facts and circumstances of those particular situations.

These 20 factors were originally developed by the IRS in 1987 and included in Revenue Ruling 87-41. These were developed from the results of various cases and rulings and have not changed much over time. We have listed them here as described by the Joint Committee on Taxation for a public hearing on worker classification on May 8, 2007, twenty years after they were first developed. We will describe each factor as the Joint Committee on Taxation described them as well as add additional information.

1. 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.

2. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employee status; payment by the job or a commission indicates independent contractor status.
3. 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. The risk that the organization may not pay for the services does not constitute a sufficient economic risk to support treatment as an independent contractor.
4. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.
5. 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.
6. Significant Investment: Investment in the facilities used by the worker indicates independent contractor status. Lack of such investments indicates a dependence on the organization for whom the work is performed, and this indicates an employer –employee relationship.
7. Oral or written reports: A requirement that the worker submit regular reports indicates employee status.
8. 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. Work done off-site such as at the office of the worker indicates freedom from control. How important this factor is can depend on the nature of the work and if the employers generally would require that an employee perform similar services at the employers' premises. Control over the place of work is indicated when the employer has the right to compel the worker to travel to a designated work site, work in specific locations, or be in certain locations in certain time periods.
9. Set hours of work: The establishment of set hours for the worker indicates employee status. Setting hours is the exercise of control.

10. 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. If the organization exerts significant control over the workers' ability to do other gainful work, this indicates control. An independent contractor is free to work when and for whom he or she chooses.
11. 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. Again, the right to control the order or sequence is what is important. The employer does not have to exercise that right.
12. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status. As we have mentioned in other places, if the right exists there is an indication of employee status regardless of if that right is actually exercised. If the employee is required to comply with the instructions of someone else, this indicates an employee.
13. Training: Worker training (requiring attendance at training sessions) indicates that a person for whom services are performed wants the services performed in a particular manner – which indicates employee status. Training can include requiring an experienced employee to work with the worker, corresponding with the worker, requiring them to attend meetings or training sessions, or other methods. In some work situations there may be requirements such as federal safety requirements which are placed on an organization outside of the one the worker is providing the work for. In this case, requiring the worker to undergo that training may not in and of itself indicate employee status.
14. 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 as well as the results, which indicates employee status.
15. Integration: Integration of the worker's services into the business operations of the organization for whom services are performed is an indication of employee status. This is generally because it shows that the worker is subject to direction and control.

16. Right to discharge: The right to discharge a worker is a factor indicating the worker is an employee. The threat of dismissal is an element of control belonging to an employer. An independent contractor cannot be fired as long as the independent contractor does not break the terms of the contract.
17. 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.
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, it indicates independent contractor status.
19. 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. It is possible for an individual to work for multiple organizations and be an employee of each of those organizations.
20. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status. It is possible that a continuing relationship can exist even where work is performed for inconsistent time periods as long as it is frequently recurring.

Following are three charts showing the three categories of factors and how they indicate employee or independent contractor status:

FINANCIAL FACTORS	FACTOR	EMPLOYEE INDICATIONS	INDEPENDENT CONTRACTOR INDICATIONS
1	Hiring, supervising and paying assistants	Employees tend not to be responsible for the hiring process. Employees do not pay the assistants.	Independent Contractors have the responsibility of hiring their own assistants and paying them as it becomes necessary to meet the requirements of the contract.
2	Payment by Hour, Week, Month or other	An employee is generally paid by the hour, week or month	An independent contractor is generally paid by the job or receives a commission.
3	Realization of Profit or Loss	An employee is unable to realize a profit or a loss based on the quality of the work or timeliness of the work performed.	An independent contractor can make more money or less money depending on the efficiency of the work performed.
4	Tools and Materials	An employee does not provide the tools they use or the materials required to finish a product.	Independent contractors provide their own tools and materials.
5	Expense Reimbursement	An employee does not pay for expenses or is reimbursed for them if they are incurred in the performance of the job.	An independent contractor pays their own expenses as part of the performance of the contract.
6	Significant Investment	An employees does not invest money in the facility and equipment necessary to perform the job.	An independent contractor purchases or rents its own equipment and facilities.

BEHAVIORAL FACTORS	FACTOR	EMPLOYEE INDICATIONS	INDEPENDENT CONTRACTOR INDICATIONS
7	Oral or written reports	An employee tends to be required to make reports to his or her employer in some fashion	An independent contractor is generally not required to make any form of report, but there may be provisions in the contract requiring progress reports or some form of reporting.
8	Doing work on employer's premises	An employee performs the job requirements on premises, particularly if the work could be performed elsewhere.	An independent contractor is not required to perform work in any specific location, although the nature of the work could limit the locations where they could perform the work.
9	Set hours of work	An employee's hours are set by the employer.	An independent contractor has control over the hours worked and can perform the duties at any time.
10	Full-Time	An employee may have other outside employment limited by the employer and cannot be limited by their employer regarding where they may work.	An independent contractor is free to work for whoever he chooses and whenever he chooses to do so. He may work part time or full time as he determines necessary to accomplish the contract.
11	Order or sequence	An employee is often given a set order or sequence in which to perform the tasks of the job and generally cannot change this order.	An independent contractor is not required to perform the tasks necessary to accomplish the requirements of the contract in any particular order or sequence.
12	Instructions	An employee is generally told when and where to work and given instructions about how to accomplish work.	An independent contractor does not have to comply with any specific instructions regarding how, when or where to accomplish work.
13	Training	An employee may have specific training activities they must participate in as a job requirement.	An independent contractor does not receive training nor are they required to undergo training provided by the organization the work is being performed for.
14	Services rendered personally	An employee must personally render the services required for the job.	An independent contractor is generally not required to personally render services. They may have their own employees or hire other independent contractors to render the services.
15	Integration	An employee works with other employees.	An independent contractor works without the involvement of the employees who work at the organization, or at least without their significant involvement.

RELATIONSHIP FACTORS	FACTOR	EMPLOYEE INDICATIONS	INDEPENDENT CONTRACTOR INDICATIONS
16	Right to discharge	An employee may be let go at any time or reason subject to any employment contract or legal limits	An independent contractor cannot be "fired" without failing to observe the requirements of the contract.
17	Right to terminate	An employee is free to quit at any time, subject to an employment contract limiting this right.	An independent contractor cannot quit without fulfilling the requirements of the contract which may have terms required for terminating the contract.
18	Making service available to the general public	An employee does not generally work for multiple organizations.	An independent contractor offers his or her work to other organizations.
19	Working for more than one organization at a time	An employee generally works only for one employer at a time.	An independent contractor has the ability to work for multiple other organizations at one time.
20	Continuing relationship	An employee has a continuing relationship with the employer.	An independent contractor generally ends the relationship with the organization when the contract is completed.

Court Factors

During recent years there were a variety of court cases decided regarding the independent contractor vs. employee issue. These cases are a good opportunity to compare to each other and see how the courts actually applied the various “factors” to a real situation. In each case the IRS had determined using their twenty factor tests that the workers were employees. In each case, the judges said twenty is too many factors to work with and whittled it down to seven or eight factors.

Jorge Quintanilla T.C. Memo 2016-5 January 7, 2016

Jorge Quintanilla is an exceptionally skilled production worker on approximately 150 commercials shot in Southern California in 2010. He earned it in his name and his corporation, and was contending that he was an independent contractor and not an employee. His job title varied from job to job and included “driver”, “hyphenate driver” and “set dresser”. Production companies hired him to build sets and expected him to provide any tools he needed to complete the job. However, it is also common practice for production companies to outsource paperwork to just a small handful of payroll companies to pay workers. He was paid by the same payroll company for six months, but was working on more than 20 projects run by many production companies.

1. Degree of Control. Quintanilla had a large degree of control how to accomplish the tasks he had to do throughout the year. A production company may provide a sketch drawn by a set designer, or just a director’s vision for the project, but Quintanilla had independence in how to accomplish the project. He ordered props, modified them, hired workers as needed, and didn’t use workers that were not performing. Even though producers had a vision of the set in mind, Quintanilla had a large degree of discretion how to construct it, and often told them their initial vision needed to be modified. The court determined that this degree of control indicated independent contractor.
2. Investment in Facilities. Quintanilla provided all the tools used, and he invested heavily in them. He also bought a number of high-dollar items required for his work. There was

no evidence suggesting production companies supplied tools or a budget for equipment. The court determined that a worker providing his own tools used for work weighs toward finding him to be an independent contractor.

3. Risk of loss. Production workers like Quintanilla have some real risk of profit or loss. He could accept or decline projects (and on occasion could submit a bid). At times a production company would give a fixed fee for his services and he testified he would prepare a budget to see if he could perform the work. Sometimes production companies paid him on union scale rates, which are set by collective bargaining. But on other projects he set his own rate. Some companies paid rent for the use of his tools, and others refused, so he would increase his hourly rate to compensate for their use. Some paid based on his estimates, and others paid based on hours billed and reported to them. But in all these cases, the court found that he controlled which projects he worked on and whether to accept the amounts offered, so he was considered to have risk of loss and was weighed as being an independent contractor.
4. Right to discharge. Production companies did have the right to fire Quintanilla. So although it would be considered to weigh towards employee status, it was argued that the right would be seldom exercised due to the very short-term nature of the jobs. If a production company were dissatisfied, they would rarely be fired, but would instead never get another phone call to work for that particular company again. The court didn't indicate whether they thought this indicated employee or independent contractor status.
5. Part of the regular business of the company. Normally work that is part of the principal's regular business indicates employee status, but it was difficult for the court to determine who the "principal" was on a commercial shoot. The court determined the arguments could go both ways on this factor, so they found it neutral.
6. Permanence of relationship. It was argued that Quintanilla was employed by five payroll companies during this time, but they are companies used by several different production companies, simply totaling wages for the year. A review of the detail showed that the

longest project was one month, but most were shorter, and during this time he worked on 80-100 different jobs per year. This would suggest that the jobs were so short term that the court believed this factor weighed on the side of an independent contractor rather than an employee.

7. Relationship the parties believed they were creating. Throughout the years at issue Quintanilla had relationships with many production companies and two unions. The relationships with production companies appear to be transitory and task focused and it was determined neither party intended to make a permanent or employer-employee relationship.

The court determined based on the above analysis Quintanilla is an independent contractor, and that he properly deducted items on his Schedule C, therefore the associated penalties were also reversed.

Atlantic Coast Masonry. T.C. Memo 2012.233 August 13, 2012

Atlantic Coast Masonry hired workers on a per job basis. The workers brought their own tools and equipment. They were paid based on the amount of work accomplished (bricks laid). They were paid in cash. Atlantic Coast Masonry maintained cash logs. Masons and other workers were let go when the job was completed. They could be fired at will. There were no written contracts. Atlantic Coast Masonry failed to file income tax returns, employment tax returns, or information returns (1099's). The court compared the seven factors they used as follows:

1. Degree of Control. Atlantic told the employees where and when to work including the specific hours to work. They were paid weekly rather than upon completion of the job. While the workers were skilled and did not require supervision, there was a supervisor on site and Atlantic failed to prove it did not have the right to control the work. The court determined that this degree of control indicated employees.

2. Investment in Facilities. The workers provided their own tools, but not their own facilities. The court determined that the workers had no significant investment in facilities. The court did not consider the workers using their own tools to be a significant consideration. Therefore, the court determined this factor was not important and did not consider it.
3. Risk of loss. The workers had none as far as the court was concerned; therefore, this indicated an employee.
4. Right to discharge. Atlantic could fire the workers at any time so the court thought this indicated employee status.
5. Part of the regular business of the company. The court determined that this was Atlantic's line of business and the workers were important to getting the business accomplished so this indicated employee status.
6. Permanence of relationship. Workers were let go at the end of a specific job and they were free to go work elsewhere, therefore this is the only factor the court thought weighted in favor of independent contractor status.
7. Relationship the parties believed they were creating. There was no documentation. The court determined that since they had nothing in writing to indicate what the parties believed at the time, there was no use for this factor in their analysis. The lesson from this factor is to put everything in writing.

The court determined based on the above analysis that the workers were employees. It should also be important to note that lack of adequate written records and the lack of timely filed tax returns both likely worked against the company.

Keller/Action Auto Body. TCM 2012-62

John and David Keller owned Action Auto Body. Repair technicians, painters and mechanics as well as three office/janitorial workers were all paid as independent contractors. Workers set their own hours and chose their own work. They were paid solely by commission and were free to obtain some of their own work.

The court once again used the same seven factors as the previous case but added one extra factor as follows:

1. Degree of control. Action argued that they did not have any control over the work done. The workers had specialized skills and worked their own schedules. Action was able to show that in the case of the body workers, they had no control over the means used to accomplish the work or when the work was accomplished, and this factor weighed in favor of independent contractor status. The court said it weighed “heavily” in favor of independent contractor. In the case of the 3 office/janitorial workers the record was “sparse” on the ability to control their actions and the court felt that Action had the ability to control their work.
2. Investment in facilities. The workers provided their own small tools, but Action provided heavy tools such as sprayers and lift equipment. The court found it unconvincing that the office workers provided their own equipment. The court found that this factor indicated an employer-employee relationship.
3. Risk of Loss. The court found this factor neutral in the case of auto workers because payment by commission is consistent with either an employee or independent contractor situation and the workers risk of loss was minimal. Although the workers were able to bring in their own work, Action was responsible for finding most of the work. This factor was in favor of employee status for the three office workers.
4. Right to discharge. The workers could be discharged by Action at any time and for any reason. This factor indicated employee status.

5. Integral part of the business. Even though Action was in the business of auto body work, the court felt that the main activity of Action was to estimate repairs, then refer the vehicles to the workers for repairs. Action could survive and continue the repair work without the workers if they were to leave, although at a lower volume. The court therefore found this factor to be neutral.
6. Permanency of the relationship. The court felt that this factor carried very little weight as it thought both employees and independent contractors could be discharged at will.
7. Relationship the parties thought they were creating. The court felt that everyone involved clearly thought they had created an independent contractor relationship.
8. Provision of employee benefits. No employee benefits were provided. The court thought this factor weighted in favor of independent contractor status.

The court determined that the auto body repair workers were independent contractors and the other three workers were employees and Action was liable for employment taxes on those three. The court also determined that Action was not eligible for section 530 safe harbor relief because Action had not timely filed forms 1099.

Dean Cibotti/Liberty Mortgage. TCS 2012-21

Dean Cibotti owned 33.3% of Liberty Mortgage. He was named president because he had the largest ownership share. Liberty did not provide him an office. He worked at home or at client offices or at closing locations. He was compensated solely by commission.

The court used eight factors again as follows:

1. Degree of control. Cibotti did not control Liberty Mortgage even though he was the largest individual shareholder. Liberty exercised no supervision over the means by which Cibotti sold mortgages. The court found this factor indicates independent contractor status.

2. Taxpayer investment in facilities. While the court said a home office does not constitute sufficient basis for independent contractor status, it is consistent with independent contractor status. Liberty did not provide an office. The fact that Cibotti claimed a deduction for home office expenses helped indicate independent contractor status.
3. Opportunity for profit and loss. Cibotti was paid a percentage of loans he closed. At some point, Liberty unilaterally changed the percentage paid. This factor indicates independent contractor status according to the court.
4. Permanency of relationship. The court found no records containing an agreement, but since Cibotti was paid for at least three years and was a partial owner, it appeared to the court that he had a permanent relationship with Liberty and indicative of employee status.
5. Right to discharge. There was no indication of a right to discharge therefore the court said this factor did not indicate either employee or independent contractor status.
6. Part of regular business. The business of Liberty Mortgage was the sale of mortgage loans. This indicates employee status.
7. Relationship the parties believed they were creating. Due to a lack of clear records and inconsistencies in treatment (some years a W-2 and 1099 were both issued), it was not clear to the court what relationship the parties believed they were creating.
8. Provision of employee benefits. No benefits were provided, so the court felt this indicated independent contractor status.

The court determined that these factors indicated that Cibotti was an independent contractor, therefore was entitled to deduct business expenses on his Schedule C of his individual income tax return to the extent that such expenses were substantiated.

Safe Harbors

If an organization has treated individuals as independent contractors and lets the IRS make the determination that those individuals are employees, the potential fines and penalties are significant. Code section 530 of the Revenue act of 1978 provides the taxpayer with some relief in this situation. If certain requirements are met, the employer (not the worker) can get relief from employment tax liability under Internal Revenue Code Section C along with any interest or penalties attributable to the liability for those employment taxes. This relief would apply to FICA (Federal Insurance Contributions Act) which is basically Social Security and Medicare withholding taxes, FUTA (Federal Unemployment Tax Act) taxes, Federal income tax withholding, and RRTA (Railroad Retirement Tax Act).

To obtain this relief, there are three requirements and ALL three must be met:

1. Reasonable Basis
2. Substantive Consistency
3. Reporting Consistency

1. **Reasonable basis.** The employer must have a reasonable basis for the incorrect treatment of the employee as an independent contractor. Reasonable basis includes three areas described as “safe havens”. Falling into one of these safe havens will qualify the employer for the reasonable basis requirement, but remember that once qualified here, they must also meet the other two requirements.

The first reasonable basis “safe haven” is Judicial Precedent or published rulings. The business must be able to show that it relied on a particular judicial precedent or published ruling. The facts of that case must be similar to the situation of the business. The facts do not have to be identical and do not have to deal with precisely the same industry, but must be similar. The ruling must have been in existence at the time the business began treating the workers as independent contractors. One case is sufficient even if there are other cases which support a different conclusion.

This can include relying on technical advice from an expert (attorney or CPA) and that advice should be in writing and include reference to a court case supporting the position. If relying on technical advice, it would be in the best interests of the business to be aware of the qualifications of the advisor to advise in this particular area. The taxpayer must be acting “reasonably” when they follow the advice of a professional.

The Second reasonable basis “safe haven” is a prior Internal Revenue Service examination of the taxpayer. The audit must have included an examination of the books and records of the organization and the IRS audit must have included an examination for employment tax purposes of the status of the class of workers at issue or a substantially similar class of workers. The examination must have been of the organization, not the worker. This prior audit can only be relied on for periods after the audit took place.

The Third and final reasonable basis “safe haven” is a long standing recognized industry practice. This is probably the most difficult safe haven argument and the argument which is used the most. To claim the industry practice safe haven, the practice must be long-standing. IRC Section 530(e)(2)(C) provides that practices which began before 1978 may be long-standing and practices which have existed more than 10 years are long-standing. A shorter period may be long-standing depending on the facts and circumstances.

The practice must have been an industry practice prior to the time the business joined the industry. The business cannot rely on former industry practices if the industry practices changed prior to the business joining the industry. The business must reasonably show that they relied on this industry practice most likely from its knowledge or communications with competitors or individuals knowledgeable about the industry. The business must further show that its reliance on the industry practice was reasonable. If the business relies even in good faith on industry practice and is mistaken in this belief about industry practice, they do not qualify for relief under this safe haven.

2. **Substantive Consistency.** The treatment of the workers and independent contractors must be consistent with the treatment by the business of all workers holding substantially similar positions.
3. **Reporting Consistency.** All forms 1099 required to be filed by the business with respect to the workers must be timely filed and must be filed on a basis consistent with the treatment of the workers and independent contractors. This applies to the period in question. So if in one period, 1099 forms are filed and in another they are not, Section 530 relief will only apply to the period when the forms were filed. If the business in good faith attempted but filed the incorrect type of 1099 form, they will not lose eligibility for Section 530 relief.

If a business meets all three of the above requirements and cooperates with the IRS, then the IRS bears the burden of proving that the treatment of the workers is inaccurate. If the business is entitled to relief under section 530, the IRS will halt its inquiry into the status of the workers in question. These workers can continue to be treated as independent contractors and receive 1099 forms.

The individuals may still request a determination of their individual status by filing form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. The IRS can then rule that they are employees. Also, section 530 relief is only available from the IRS. It does not apply to other governmental agencies such as state labor boards, workers compensation organizations, or state unemployment agencies.

If the employer is entitled to relief under Section 530, the employer is only relieved of the requirement to pay employment taxes and the penalties on them. The employee will remain an employee for other purposes including income tax, and benefit eligibility purposes. Section 530 relief does not make the employee a self-employed business person.

The employee must report the income on line 7 of their form 1040 rather than schedule C and they are liable for the employee's share of the FICA which must be reported on form 4137. If the employee previously filed their tax return using schedule C and paid self-employment taxes, they may claim a refund of the employer share of FICA. The employee must deduct unreimbursed employee business expenses using form 2106 as a miscellaneous itemized deduction subject to the 2% floor on miscellaneous itemized deductions and cannot deduct them on a Schedule C.

The following workers are NOT covered by Section 530:

- Engineers
- Designers
- Drafters
- Computer Programmers
- Systems analysts
- Other similarly skilled workers engaged in a similar line of work

SS-8 Additional Note:

If a worker believes they have been misclassified, there are steps they can take to get classification changed. The worker or the employer can file a Form SS-8 with the IRS. A determination letter will be sent and the ruling will apply to all employees of the same classification. If a worker was classified as an independent contractor and the IRS determines that the worker is an employee, then amended tax returns must be filed, by both parties.

**Determination of Worker Status for Purposes
of Federal Employment Taxes and
Income Tax Withholding**► Information about Form SS-8 and its separate instructions is at www.irs.gov/formss8.

OMB. No. 1545-0004

For IRS Use Only:
Case Number:

Earliest Receipt Date:

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's fax number	Firm's website	Worker's alternate telephone number	Worker's fax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ►

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I-V. All filers of Form SS-8 must complete all questions in Parts I-IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

Part I General Information

- 1 This form is being completed by: ☐ Firm ☐ Worker; for services performed _____ to _____.
(beginning date) (ending date)
- 2 Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get workers' compensation benefits, or you were audited or are being audited by the IRS). _____

- 3 Total number of workers who performed or are performing the same or similar services: _____
- 4 How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) _____
- 5 **Attach copies of all supporting documentation (for example, contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements or IRS rulings).** In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue \$ _____.
If both Form W-2 and Form 1099-MISC were issued or received, explain why. _____

- 6 Describe the firm's business. _____

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

Cat. No. 16108T

Form **SS-8** (Rev. 5-2014)

Part I General Information (continued)

- 7 If the worker received pay from more than one entity because of an event such as the sale, merger, acquisition, or reorganization of the firm for whom the services are performed, provide the following: Name of the firm's previous owner: _____
 Previous owner's taxpayer identification number: _____ Change was a: ☐ Sale ☐ Merger ☐ Acquisition ☐ Reorganization
☐ Other (specify) _____
 Description of above change: _____
 Date of change (MM/DD/YY): _____
- 8 Describe the work done by the worker and provide the worker's job title. _____

- 9 Explain why you believe the worker is an employee or an independent contractor. _____

- 10 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?
☐ Yes ☐ No ☐ N/A
 If "Yes," what were the dates of the prior service? _____
 If "Yes," explain the differences, if any, between the current and prior service. _____

- 11 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement. _____

Part II Behavioral Control (Provide names and titles of specific individuals, if applicable.)

- 1 What specific training and/or instruction is the worker given by the firm? _____

- 2 How does the worker receive work assignments? _____

- 3 Who determines the methods by which the assignments are performed? _____
- 4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution? _____

- 5 What types of reports are required from the worker? Attach examples. _____

- 6 Describe the worker's daily routine such as his or her schedule or hours. _____

- 7 At what location(s) does the worker perform services (for example, firm's premises, own shop or office, home, customer's location)? Indicate the appropriate percentage of time the worker spends in each location, if more than one. _____

- 8 Describe any meetings the worker is required to attend and any penalties for not attending (for example, sales meetings, monthly meetings, staff meetings). _____

- 9 Is the worker required to provide the services personally? ☐ Yes ☐ No
- 10 If substitutes or helpers are needed, who hires them? _____
- 11 If the worker hires the substitutes or helpers, is approval required? ☐ Yes ☐ No
 If "Yes," by whom? _____
- 12 Who pays the substitutes or helpers? _____
- 13 Is the worker reimbursed if the worker pays the substitutes or helpers? ☐ Yes ☐ No
 If "Yes," by whom? _____

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Part III Financial Control (Provide names and titles of specific individuals, if applicable.)


- 1 List the supplies, equipment, materials, and property provided by each party:
 The firm: _____
 The worker: _____
 Other party: _____
- 2 Does the worker lease equipment, space, or a facility? ☐ Yes ☐ No
 If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.) _____
- 3 What expenses are incurred by the worker in the performance of services for the firm? _____
- 4 Specify which, if any, expenses are reimbursed by:
 The firm: _____
 Other party: _____
- 5 Type of pay the worker receives: ☐ Salary ☐ Commission ☐ Hourly Wage ☐ Piece Work
☐ Lump Sum ☐ Other (specify) _____
 If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount. \$ _____
- 6 Is the worker allowed a drawing account for advances? ☐ Yes ☐ No
 If "Yes," how often? _____
 Specify any restrictions. _____
- 7 Whom does the customer pay? ☐ Firm ☐ Worker
 If worker, does the worker pay the total amount to the firm? ☐ Yes ☐ No If "No," explain. _____
- 8 Does the firm carry workers' compensation insurance on the worker? ☐ Yes ☐ No
- 9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (for example, loss or damage of equipment, material)? _____
- 10 Does the worker establish the level of payment for the services provided or the products sold? ☐ Yes ☐ No
 If "No," who does? _____

Part IV Relationship of the Worker and Firm

- 1 Please check the benefits available to the worker: ☐ Paid vacations ☐ Sick pay ☐ Paid holidays
☐ Personal days ☐ Pensions ☐ Insurance benefits ☐ Bonuses
☐ Other (specify) _____
- 2 Can the relationship be terminated by either party without incurring liability or penalty? ☐ Yes ☐ No
 If "No," explain your answer. _____
- 3 Did the worker perform similar services for others during the time period entered in Part I, line 1? ☐ Yes ☐ No
 If "Yes," is the worker required to get approval from the firm? ☐ Yes ☐ No
- 4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation. _____
- 5 Is the worker a member of a union? ☐ Yes ☐ No
- 6 What type of advertising, if any, does the worker do (for example, a business listing in a directory or business cards)? Provide copies, if applicable. _____
- 7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern? _____
- 8 What does the worker do with the finished product (for example, return it to the firm, provide it to another party, or sell it)? _____
- 9 How does the firm represent the worker to its customers (for example, employee, partner, representative, or contractor), and under whose business name does the worker perform these services? _____
- 10 If the worker no longer performs services for the firm, how did the relationship end (for example, worker quit or was fired, job completed, contract ended, firm or worker went out of business)? _____

Part V For Service Providers or Salespersons. Complete this part if the worker provided a service directly to customers or is a salesperson.

1	What are the worker's responsibilities in soliciting new customers? _____	
2	Who provides the worker with leads to prospective customers? _____	
3	Describe any reporting requirements pertaining to the leads. _____	
4	What terms and conditions of sale, if any, are required by the firm? _____	
5	Are orders submitted to and subject to approval by the firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
6	Who determines the worker's territory? _____	
7	Did the worker pay for the privilege of serving customers on the route or in the territory?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	If "Yes," whom did the worker pay? _____	
	If "Yes," how much did the worker pay? \$ _____	
8	Where does the worker sell the product (for example, in a home, retail establishment)? _____	
9	List the product and/or services distributed by the worker (for example, meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one. _____	
10	Does the worker sell life insurance full time?	<input type="checkbox"/> Yes <input type="checkbox"/> No
11	Does the worker sell other types of insurance for the firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance %	
12	If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation %	
13	Is the merchandise purchased by the customers for resale or use in their business operations?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	Describe the merchandise and state whether it is equipment installed on the customers' premises. _____	

Sign Here	Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.		
		Title ► _____	Date ► _____

Type or print name below signature.

Instructions for Form SS-8

(Rev. May 2014)



Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

Information about any future developments affecting Form SS-8 (such as legislation enacted after we release it) will be posted at www.irs.gov/formss8.

General Instructions

Purpose of Form

Firms and workers file Form SS-8 to request a determination of the status of a worker under the common law rules for purposes of federal employment taxes and income tax withholding. Generally, under the common law rules a worker is an employee if the firm has the right to control what will be done and how it will be done. See Publication 15-A, Employer's Supplemental Tax Guide, for more information on how to determine whether a worker providing services is an employee or independent contractor.

A Form SS-8 determination may be requested only in order to resolve federal tax matters. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, a determination letter will not be issued.

The IRS does not issue a determination letter for proposed transactions or on hypothetical situations or for other reasons not in the best interests of tax administration. We may, however, issue an information letter when it is considered appropriate.

Definition

Firm. For the purposes of this form, the term "firm" means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the worker directly for these services.



If the firm was not responsible for payment for services, be sure to enter the name, address, and employer identification number of the payer on the first page of Form SS-8, below the identifying information for the firm and the worker.

Note. Workers for state and local governments and/or interstate instrumentalities may be covered by a Section 218 Agreement. A Section 218 Agreement is a written, voluntary agreement between the State Social Security Administrator and the Social Security Administration. All 50 states, Puerto Rico, the Virgin Islands and approximately 60 interstate instrumentalities have Section 218 Agreements extending social security coverage to specified employees. Workers covered under a Section 218 Agreement are subject to social security and Medicare tax regardless of any determinations made under the common law rules.

Whether a state or local government worker is subject to social security and Medicare tax depends on which of the following three categories the worker falls into:

1. Subject to social security under a Section 218 Agreement, or

2. Subject to social security under mandatory coverage provisions, or

3. Excluded from social security because there is no Section 218 Agreement **and** the employee is covered by a qualified retirement plan.

If the worker is uncertain whether a Section 218 Agreement covers the state or local government entity, he or she should contact the entity before submitting Form SS-8. If the entity is uncertain about whether a Section 218 Agreement covers the position in question, the entity should contact the State Social Security Administrator for the state in which it operates.

The Form SS-8 Determination Process

The IRS will acknowledge the receipt of your Form SS-8. Because there are usually two (or more) parties who could be affected by a determination of employment status, the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. Some or all of the information provided on this Form SS-8 may be shared with the other parties listed on page 1. The case will be assigned to a technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS if there is no change in the facts or law that form the basis for the ruling. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations. In other very limited circumstances the IRS may issue a courtesy letter that the worker may rely on to fulfill his or her federal tax obligations.

Neither the Form SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any federal tax return. If the periods under consideration have previously been examined, the Form SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any federal tax return, the appeal rights available in connection with an examination do not apply to a Form SS-8 determination. If you disagree with a determination, you can identify facts that were part of the original submission that you think were not fully considered. If you have additional information concerning the relationship that was not part of the original submission, you can submit the additional information and request that the office reconsider the determination.

Completing Form SS-8

Answer all questions as completely as possible. Attach additional sheets if you need more space. Provide information for all years the worker provided services for the firm. Determinations are based on the entire relationship between the firm and the worker. Also indicate if there were any significant changes in the work relationship over the service term.

May 16, 2014

Cat. No. 66200M



Form SS-8 will be returned to the requestor if all required information is not provided.

Additional copies of this form may be obtained on IRS.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

Fee

There is no fee for requesting a Form SS-8 determination letter.

Signature

Form SS-8 must be signed and dated by the taxpayer. A stamped signature will not be accepted.

The person who signs for a corporation must be an officer of the corporation who has personal knowledge of the facts. If the corporation is a member of an affiliated group filing a consolidated return, it must be signed by an officer of the common parent of the group.

The person signing for a trust, partnership, or limited liability company must be, respectively, a trustee, general partner, or member-manager who has personal knowledge of the facts.

A Form SS-8 that is not properly signed and dated by the taxpayer cannot be processed and will be returned.

Where To File

Send the completed and signed Form SS-8 to:

Internal Revenue Service
Form SS-8 Determinations
P.O. Box 630
Stop 631
Holtsville, NY 11742-0630

Faxed, photocopied, or electronic versions of Form SS-8 are not acceptable for the initial request for the Form SS-8 determination. **Do not submit Form SS-8 with your tax return as that will delay processing time.**

Instructions for Workers

If you are requesting a determination for more than one firm, complete a separate Form SS-8 for each firm.



Form SS-8 is not a claim for refund of social security and Medicare taxes or federal income tax withholding.

If the IRS determines that you are an employee, you are responsible for filing an amended return for any corrections related to this decision. A determination that a worker is an employee does not necessarily reduce any current or prior tax liability. For more information, call 1-800-829-1040.

Time for filing a claim for refund. Generally, you must file your claim for a credit or refund within 3 years from the date your original return was filed or within 2 years from the date the tax was paid, whichever is later.

Filing Form SS-8 does not prevent the expiration of the time in which a claim for a refund must be filed. If you are concerned about a refund, and the statute of limitations for filing a claim for refund for the year(s) at issue has not yet expired, you should file Form 1040X, Amended U.S. Individual Income Tax Return, to protect your statute of limitations. File a separate Form 1040X for each year.

On the Form 1040X you file, do not complete lines 1 through 23 on the form. Write "Protective Claim" at the top of the form, sign and date it. In addition, enter the following statement in Part III: "Filed Form SS-8 with the Internal Revenue Service Office in Holtsville, NY. By filing this protective claim, I reserve the right to

file a claim for any refund that may be due after a determination of my employment tax status has been completed."

Filing Form SS-8 does not alter the requirement to timely file an income tax return. Do not delay filing your tax return in anticipation of an answer to your Form SS-8 request. In addition, if applicable, do not delay in responding to a request for payment while waiting for a determination of your worker status.

Instructions for Firms

If a **worker** has requested a determination of his or her status while working for you, you will receive a request from the IRS to complete a Form SS-8. In cases of this type, the IRS usually gives each party an opportunity to present a statement of the facts because any decision will affect the employment tax status of the parties. Failure to respond to this request will not prevent the IRS from issuing a determination letter based on the information available to it so that the worker may fulfill his or her federal tax obligations. However, the information that you provide is extremely valuable in determining the status of the worker.

If you are requesting a determination for a particular class of worker, complete the form for one individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers. Please provide a list of names and addresses of all workers potentially affected by this determination so that the IRS can contact them for information.

If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker under section 530 of the Revenue Act of 1978. However, this relief provision cannot be considered in conjunction with a Form SS-8 determination because the determination does not constitute an examination of any tax return. For more information regarding section 530 of the Revenue Act of 1978 and to determine if you qualify for relief under this section, visit IRS.gov.

How To Get Help

To get IRS forms and publications, go to IRS.gov or call 1-800-TAX-FORM (1-800-829-3676).

The Taxpayer Advocate Service Is Here To Help You

The Taxpayer Advocate Service (TAS) is your voice at the IRS. Our job is to ensure that every taxpayer is treated fairly and that you know and understand your rights.

What can TAS do for you? We can offer you free help with IRS problems that you can't resolve on your own. We know this process can be confusing, but the worst thing you can do is nothing at all! TAS can help if you can't resolve your problems with the IRS and:

- Your problem is causing financial difficulties for you, your family, or your business.
- You face (or your business is facing) an immediate threat of adverse action.
- You have tried repeatedly to contact the IRS but no one has responded, or the IRS has not responded to you by the date promised.

If you qualify for our help, you'll be assigned to one advocate who'll be with you at every turn and will do everything possible to resolve your problem. Here's why we can help:

- TAS is an independent organization within the IRS.
- Our advocates know how to work with the IRS.
- Our services are free and tailored to meet your needs.
- We have offices in every state, the District of Columbia, and Puerto Rico.

How can you reach us? If you think TAS can help you, call your local advocate, whose number is in your local directory and at www.irs.gov/advocate, or call us toll-free at 1-877-777-4778.

How else does TAS help taxpayers?

TAS also handles large-scale, systemic problems that affect many taxpayers. If you know of one of these broad issues, please report it through the Systemic Advocacy Management System at www.irs.gov/sams.

For additional information about TAS, visit www.taxpayeradvocate.irs.gov or see Pub. 1546, The Taxpayer Advocate Service of the IRS – How to Get Help With Unresolved Tax Problems.

Low Income Taxpayer Clinics

Low Income Taxpayer Clinics (LITCs) serve individuals whose income is below a certain level and need to resolve tax problems such as audits, appeals and tax collection disputes. Some clinics can provide information about taxpayer rights and responsibilities in different languages for individuals who speak English as a second language. Visit www.irs.gov/litc or see IRS Publication 4134, Low Income Taxpayer Clinic List.

Representation

You may either represent yourself or, with proper written authorization, have someone else represent you. Your representative must be someone who is allowed to practice before the IRS, such as an attorney, certified public accountant, or enrolled agent (a person enrolled to practice before the IRS). Use Form 2848, Power of Attorney and Declaration of Representative, to authorize someone else to represent you before the IRS.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on Form SS-8 to carry out the Internal Revenue laws of the United States. This information will be used to determine the employment status of the worker(s) described on the form. Subtitle C, Employment Taxes, of the Internal Revenue Code imposes employment taxes on wages, including income tax withholding. Sections 3121(d), 3306(a), and 3401(c) and (d) and the related regulations define employee and

employer for purposes of employment taxes imposed under Subtitle C. Section 6001 authorizes the IRS to request information needed to determine if a worker(s) or firm is subject to these taxes. Section 6109 requires you to provide your identification number. Neither workers nor firms are required to request a status determination, but if you choose to do so, you must provide the information requested on this form. Failure to provide the requested information may prevent us from making a status determination. If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination. Providing false or fraudulent information may subject you to penalties. Generally, tax returns and return information are confidential, as required by section 6103. However, section 6103 allows or requires the IRS to disclose or give the information shown on this form to others as described in the Code. Routine uses of this information include providing it to the Department of Justice for use in civil and criminal litigation, to the Social Security Administration for the administration of social security programs, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for the administration of their tax laws. We also may disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. We may provide this information to the affected worker(s), the firm, or payer as part of the status determination process.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law.

The time needed to complete and file this Form SS-8 will vary depending on individual circumstances. The estimated average time is: **Recordkeeping**, 23 hrs., 55 min.; **Learning about the law or the form**, 1 hr., 48 min.; **Preparing the form**, 5 hrs., 03 min.; and **Sending the form to the IRS**, 48 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can send your comments from www.irs.gov/formspubs. Click on "More Information" and then on "Give us feedback." Or you can send your comments to the Internal Revenue Service, Tax Forms and Publications, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. **Do not** send the form to this address. Instead, see *Where To File*, earlier.

About the Author

Tanya Baber, EA, PA, CTRS is the founder of Tax Edge, Inc., an accounting, tax preparation, and tax representation service in Grand Junction, Colorado. She has been a Western Colorado native all her life but enjoys traveling whenever she has the opportunity. She enjoys the great outdoors and activities like hiking, fishing, camping and horseback riding. She volunteers in her spare time for various non-profits including providing communications for Search and Rescue in Mesa County Colorado and assisting with training a search dog named Sego (Who is also the family pet).

Discovering a passion for accounting and taxes after working in an accounting company for fifteen years, she studied and passed her Enrolled Agent exam first, then went to college to achieve her Bachelor of Science degree with honors from Colorado Mesa University in Public accounting soon after. Next, she passed her CTRS certification (Certified Tax Resolution Specialist) and is only one of a handful of people across the United States that shares this distinction.

She enjoys consulting with accountants and helping clients solve a variety of tax problems with the IRS and state including audits, appeals, offers in compromise, employment tax issues, non-compliance and negotiating hardship situations where a taxpayer has difficulty making payments. Tanya has been in public accounting for over twenty-five years and helps business owners with all phases of their business needs. She also enjoys teaching classes and seminars to accountants, CPA's, EA's and business owners and sharing her vast experience and knowledge with them. You may contact her at tbaber@taxedge365.com.

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