

## Employee Status Under Common Law: Rev. Ruling 87-41: 20 Factors

### Revenue Ruling 87-41: 20 Factor Test For Employee or Independent Contractor Status

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In 1987, based on an examination of cases and rulings, the Internal Revenue Service (“IRS”) issued Rev. Rul. 87-41, 1987-1 C.B. 296 that lists 20 factors that may be examined in determining whether an employer-employee relationship exists. The 20 factors identified by the IRS are as follows:

- 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, then such right may be indicative of employee status.

The IRS warns that the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed; factors other than the listed 20 factors may also be relevant.

More recently, the IRS in Independent Contractor or Employee? Training Materials, Training 3320-102 (10-96) TPDS 842381, at 2-7 has identified three categories of evidence that may be relevant in determining whether the requisite control exists under the common-law test and has grouped illustrative factors under these three categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties. The IRS emphasizes that factors in addition to the 20 factors identified in 1987 may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.

Best Advice: Employers should strenuously and objectively check their independent contractors against the 20 common-law factors, knowing that these are intended as guidelines, not as strict rules. The focus here is on the real substance of the arrangement—whether the person for whom the services are performed exercises sufficient control to classify the worker as an employee.

Employers need to be objective and look closely at the factors that they are currently not meeting. An organization is just looking for problems when they merely designate a worker as an independent contractor when a majority, but not all, of the 20 common-law factors shows he or she is an employee.

Employers need to speak with their accountant or tax attorney to make an objective assessment of their exposure where there is any possibility of misclassification of workers.

- See more at: [http://www.sjfpc.com/revrul87-41\\_20factor-test\\_.html#sthash.aUgvSZaj.dpuf](http://www.sjfpc.com/revrul87-41_20factor-test_.html#sthash.aUgvSZaj.dpuf)