Prior to 2006, the Internal Revenue Service (IRS) had a “Twenty Factor” test for determining whether an individual was an independent contractor or an employee. Since then, the IRS has simplified this traditional test by consolidating the 20 factors and organizing them into three categories (listed below).

To determine whether an individual is an employee or an independent contractor under the common law, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: Behavioral Control, Financial Control, and the Type of Relationship of the parties.

**Behavioral Control** encompasses facts that show whether the business has a right to direct and control how the work is done through:

- Instructions. An employee is generally subject to the business’ instructions about when, where, and how to do the work. A key consideration is whether the business has retained the right to control the details of a worker's performance or has given up that right.
- Training. Employees may be trained to perform services in a particular way. Independent contractors generally use their own methods.

**Financial Control** includes facts that show whether the business has a right to control the business aspects of the worker's job, and include:

- The extent to which the worker has unreimbursed business expenses. Fixed ongoing costs that are incurred
regardless of whether work is currently being performed are particularly important to examine. Independent contractors bear the cost of doing business and are, therefore, more likely to have unreimbursed expenses.

- The extent of the worker’s investment. An independent contractor may have a significant investment in facilities or equipment, but a significant investment is not necessary for independent contractor status.
- The extent to which a worker makes his or her services available to the relevant market. An independent contractor is free to seek out other business opportunities.
- How the worker is paid. An employee is generally guaranteed a regular wage while an independent contractor is usually paid a flat fee for the job. It is common in some professions, such a law, to pay independent contractors hourly.
- The extent to which the worker can realize a profit or loss. Independent contractors are generally more likely to make a profit or loss.

The **Type of Relationship** is shown by:

- 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. A relationship that is to last indefinitely is generally considered evidence of an employment relationship rather than an independent contractor relationship which usually lasts for a specific project or period.
- The extent to which services performed by the worker are a key aspect of the regular business of the company. A worker who provides services related to a key aspect of the business is more likely to be an employee, since employers usually want to direct and control the work that is key to the organization.

The IRS rules for independent contractor status are not much different from the old “Twenty Factor” test. Determination must be made on a case-by-case basis considering the particular facts and agreements of the case and consists of a weighing of the factors set out above. To further complicate matters, the Department of Labor and FLSA has its own set of factors to consider related to independent contractor status. The most heavily weighted factor in all the factors is the right to direct and control the work.

If you want the IRS to determine whether a specific individual is an independent contractor or an employee, file **Form SS-8** (PDF), *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*.

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