

Employee or Independent Contractor?

Sometimes an employer will classify workers as contractors instead of employees. In these cases, contract workers are responsible for paying their own payroll taxes, including federal and state income taxes and both the employer and employee portion of Social Security taxes. In most cases, contractors are responsible for providing their own Workers Compensation Insurance and are not eligible for Unemployment Insurance if their services are no longer needed.

Generally, a worker who performs services for an employer is an employee if the employer can control both *what* will be done and *how* it will be done. The key factor is that the employer has the right to control the details of how the services are performed, even if the employee has substantial freedom of action.

By contrast, an independent contractor performs services required by an employer but is not subject to the employer's control about how the services are performed.

The Virginia Unemployment Compensation Act, § 60.2-212C provides that "Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon application of the 20 factors set forth in Internal Revenue Service Ruling 87-41".

Generally speaking, a worker is an employee if his or her employer:

- Furnishes tools, materials and equipment needed to do the work;
- Sets the hours of work;
- Withholds payroll federal and state income taxes and Social Security taxes;
- Receives direction and training from the employer about how to do the work; and
- Is paid by the hour, week, or month instead of being paid at the completion of a job.

To help determine whether a worker is an employee, [the IRS identified 20 factors](#) that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. Not all the factors must be present to find an employee/employment relationship, but the factors are guides to assess the likelihood as to whether an individual is an employee or an independent contractor. The 20 factors and Virginia's exemptions to employee classification can be found [here](#). *An employer who misclassifies workers may be subject to penalties under Section 60.2-513 of the Virginia Unemployment Compensation Act.*

If you need help determining if you have been classified properly please contact our employer Ombudsman at 804-786-4313 or by e-mail ombudsman@vec.virginia.gov . A Tax Representative will review your situation and be able to determine proper worker status.

IRS 20 Factors and Virginia Exemptions for Employee Classification

Revenue Ruling 87-41: The Twenty Factors

To help determine whether a worker is an employee under the common law rules, the IRS identified 20 factors that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. These factors, set forth in Revenue Ruling 87-41, were based on the circumstances that the courts identified and relied upon to decide whether an employment relationship existed. Not all the factors must be present to find an employee/employment relationship, but the factors are guides to use to assess the likelihood as to whether an individual is an employee or an independent contractor.

- (1) **Instructions.** An employee must comply with instructions about when, where and how to work. The control factor is present if the employer has the right to require compliance with the instructions.
- (2) **Training.** An employee receives on-going training from, or at the direction of, the employer. Independent contractors use their own methods and receive no training from the purchasers of their services.
- (3) **Integration.** An employee's services are integrated into the business operations because the services are important to the business. This shows that the worker is subject to direction and control of the employer.
- (4) **Services rendered personally.** If the services must be rendered personally, presumably the employer is interested in the methods used to accomplish the work as well as the end results. An employee often does not have the ability to assign their work to other employees, an independent contractor may assign the work to others.
- (5) **Hiring, supervising and paying assistants.** If an employer hires, supervises and pays assistants, the worker is generally categorized as an employee. An independent contractor hires, supervises and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.
- (6) **Continuing relationship.** A continuing relationship between the worker and the employer indicates that an employer-employee relationship exists. The IRS has found that a continuing relationship may exist where work is performed at frequently recurring intervals, even if the intervals are irregular.
- (7) **Set hours of work.** A worker who has set hours of work established by an employer is

generally an employee. An independent contractor sets his/her own schedule.

(8) **Full time required.** An employee normally works full time for an employer. An independent contractor is free to work when and for whom he or she chooses.

(9) **Work done on premises.** Work performed on the premises of the employer for whom the services are performed suggests employer control, and therefore, the worker may be an employee. Independent Contractor may perform the work wherever they desire as long as the contract requirements are performed.

(10) **Order or sequence set.** A worker who must perform services in the order or sequence set by an employer is generally an employee. Independent Contractor performs the work in whatever order or sequence they may desire.

(11) **Oral or written reports.** A requirement that the worker submit regular or written reports to the employer indicates a degree of control by the employer.

(12) **Payments by hour, week or month.** Payments by the hour, week or month generally point to an employer-employee relationship.

(13) **Payment of expenses.** If the employer ordinarily pays the worker's business and/or travel expenses, the worker is ordinarily an employee.

(14) **Furnishing of tools and materials.** If the employer furnishes significant tools, materials and other equipment by an employer, the worker is generally an employee.

(15) **Significant investment.** If a worker has a significant investment in the facilities where the worker performs services, the worker may be an independent contractor.

(16) **Profit or loss.** If the worker can make a profit or suffer a loss, the worker may be an independent contractor. Employees are typically paid for their time and labor and have no liability for business expenses.

(17) **Working for more than one firm at a time.** If a worker performs services for a multiple of unrelated firms at the same time, the worker may be an independent contractor.

(18) **Making services available to the general public.** If a worker makes his or her services available to the general public on a regular and consistent basis, the worker may be an independent contractor.

(19) **Right to discharge.** The employer's right to discharge a worker is a factor indicating that the worker is an employee.

(20) **Right to terminate.** If the worker can quit work at any time without incurring liability, the worker is generally an employee.

Virginia Exemptions to the Definition of “Employment”

- Truck owner-operators or lessees
- Commission-based real estate and insurance sales
- Elected Officials
- Most farm labor, except for certain crew arrangements (unless the employer has 10 or more Workers in 20 different weeks or a quarter of at least \$20,000 payroll in a calendar year)
- Fee-based licensed clinical social workers and certain other licensed counselors
- Domestic services in private homes or college fraternity/sorority houses (unless the employer pays \$1,000 or more in any quarter in a calendar year)
- Crew members on certain fishing vessels
- College students working for the school in which they are enrolled or at an organized camp
- Medical interns
- Commission-based petroleum wholesalers
- Court reporters
- Taxicab and limo drivers