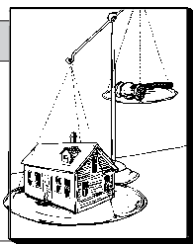


When is an Employee Not An Employee?

by Mary T. Nicholson



The question of whether to classify a worker as an independent contractor or an employee is one that many employers wrestle with. There are several factors the employer must consider when making this decision.

As all employers know, if the worker is an employee, the employer must withhold from the employee's wages amounts for Social Security (the Federal Insurance Contributions Act, or FICA), and federal and state income taxes. In addition, the employer is subject to a tax under the Federal Unemployment Tax Act

(FUTA) on the wages it pays to its employees. If the worker is an independent contractor the employer can pay a lump sum to the worker and leave the responsibility for these taxes to the worker.

Who Is An Employee?

In determining a worker's status for purposes of FICA and FUTA, the IRS relies upon years of judicial interpretation. Many states use a similar analysis, but add their own unique twists. The most important factor the IRS and the states in

Cut here and give the certificate to your employer. Keep the top portion for your records.

Form **W-4** **Employee's Withholding Allowance Certificate** OMB No. 1545-0040
 Department of the Treasury Internal Revenue Service **1988**
 For Privacy Act and Paperwork Reduction Act Notice, see reverse.

1 Type or print your first name and middle initial Last name 2 Your social security number

Home address (number and street or rural route) City or town, state, and ZIP code

3 Marital Status ☐ Single ☐ Married ☐ Married, but without at higher Single rate
 Note: If married, but legally separated, or spouse is a nonresident alien, check the Single box.

4 Total number of allowances you are claiming (from line G above or from the Worksheets on back if they apply) 5 Additional amount, if any, you want deducted from each pay 6 I claim exemption from withholding because (check boxes below that apply)
 a Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld. AND
 b This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld.
 c If both a and b apply and you satisfy the additional conditions outlined above under "Exemption From Withholding," enter the year effective and "EXEMPT" here. Do not complete lines 4 and 5 above.
 7 Are you a full-time student? (Note: Full-time students are not automatically exempt.) Yes No
 Under penalty of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate as a claiming exemption from withholding, that I am not a dependent, and that my status is as indicated.
 Employee's signature Date 1988
 8 Employer's name and address (Employer: Complete 8, 9, and 10 only if sending to IRS) 9 Office code 10 Employer identification number

If your worker qualifies as an employee under the IRS's interpretation, make sure he completes a W-4 and that you keep it on file. The W-4 determines proper income-tax withholding.

general consider is whether the employer has the right to control and direct the worker providing services, not only as to the product of his labor, but also as to the details and means by which the job is done (for example, if contractor instructs a worker to perform his work in a particular way,

such as a plumber instructing an assistant as to the method of welding to be used). Some employees may work without receiving instructions because they are experienced and conscientious. However, if the employer has the right to require compliance with his instructions, then this will contribute to a finding that the worker is an employee.

The IRS will also consider whether the person's services are integrated into the business operations of the employer. If the success or continuation of the employer's business depends to a large degree upon the performance of the services provided by the worker, the worker will generally be considered to be an employee. Another factor the Service considers is whether the employer has the right to fire the worker. An independent contractor cannot be fired as long as he produces a result which meets the contract specifications.

In addition, the Service considers whether the worker can delegate the services the employer is seeking. If the worker cannot delegate them, then presumably the employer is interested in the method as well as the result produced by the employee. In such a case, the worker is considered to be an integral part of the employer's enterprise, and an employee.

The Service also looks at factors such as the amount of skill that is required by the worker to perform the service and whether the skill provided by the worker is accepted as an independent trade.

Vigilance Is Key

The above list of factors is not all-inclusive. If the Service decides to look at your workers it may choose to look at factors listed here, or it may consider an entirely different group of factors. The only statement that is clear in this area is that the label that is placed on the worker is irrelevant if it does not represent the true relationship between the employer and the worker. In addition, the Service will lean heavily in favor of finding an employer-employee relationship.

As further bad news in this area, the IRS is actively expanding a pilot program to conduct employment tax audits of employers to uncover misclassifications of employees as independent contractors. Therefore, the employer must be even more vigilant in its determination of the status of its workers. ■

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