

Are your independent contractors really employees?

17 “Tests” to Decide: Employee or Independent Contractor

“I don’t have any employees; they are all independent contractors.”

“What makes them independent contractors,” the agent asks.

“I pay them using a 1099.”

OK, so most readers know that the reality of an “independent contractor” is not dependent on how the person is being paid – even if they are paid in mustard. The reality of an independent contractor relationship is based on the facts of the relationship.

What follows are 17 “tests” to aide in deciding if the relationship is truly that of an independent contractor or an employee. If more than one or two “tests” are failed, the person is likely an employee based on the facts. And when employee status exists, workers’ compensation must be provided, and a premium must be paid.

1. **Degree of control.** When the worker is a true independent contractor, the contracting party does not have the right to control the method or manner of job performance – only the outcome. If the methods and manner are controlled, that’s an indication of employee status.
2. **Right to discharge.** The contracting party does not have the right to discharge an independent contractor as long as contractual obligations are being met. The right to discharge for or without cause is sign of an employee.
3. **Right to delegate work.** An independent contractor has the right to bring in whomever it wants to accomplish the purpose of the contract. The lack of such ability indicates employee status.
4. **Right to hire and fire.** An independent contractor has the right to hire and fire help in the performance of the contract. Lack of this right is a sign of employment.
5. **Payment practices.** Independent contractors are paid by the job not by the hour, week, month, etc.
6. **Training.** The contracting organization should not provide or require training for the contractor or any inexperienced employees of the independent contractor.
7. **Skills.** Independent contractors are generally seen as skilled workers.
8. **Duration of the relationship.** Independent contractors are hired for a specified time period. Continuous, ongoing work indicates employee status.
9. **Hours worked.** An independent contractor is allowed to set work hours. Employees are told when to show up, take breaks, and leave.
10. **Independence.** An independent contractor is allowed to and does work for a number of persons simultaneously. If not allowed, that indicates employee status.
11. **Tools.** Independent contractors provide their own tools.
12. **Bids.** Independent contractors generally bid for work. Lack of a bidding process often indicates employment status.
13. **Profit or loss.** Independent contractors may enjoy a profit or suffer a loss from the work bid.
14. **Contractual intent.** The intent of the parties to create a independent contractor relationship must be in writing.
15. **In business.** The independent contractor is a principal of his/her own business.
16. **Sequence of work.** An independent contractor is allowed to determine the sequence of its work (not the sequence in which the trade is to be performed).

17. **Reports.** Independent contractors are not required to submit oral or written reports or attend meetings (other than safety meetings) held by the contracting party.

Compare the reality or facts of the relationship to these "tests," if any "test" points to an employer/employee relationship, investigate more closely. Calling someone an independent contractor doesn't make it so; paying them with a 1099 doesn't make it so. To be a true independent contractor requires true independence from the contracting party.

Neither the IRS nor the jurisdictional workers' compensation authority look kindly upon such deception. The IRS will get its money and so will the regulatory authority. Ask yourself these questions and make sure they truly "pass the test."

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Independent Insurance Agents & Brokers of America