

TEXAS A&M UNIVERSITY-KINGSVILLE

Title: Employee vs. Independent Contractor
Procedure No.: PP-590

Approved by:
Date: 6/5/96
Page No: 1 of 2

I. Purpose

To define employee relationships.

II. Scope

This definition applies University wide.

III. General

The Internal Revenue code provides that employment taxes are imposed on wages received by employees. The Code defines the term "employee" for FICA purposes as any individual whose employment status meets the common law requirements for an employer-employee relationship. Generally, an employer-employee relationship exists if the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the results of the work but also the details and means by which the results are accomplished. It is unnecessary for the employer to actually direct or control the manner which the services are performed; it is sufficient if the employer has the right to do so.

If an employer-employee relationship exists, the designation of the parties as anything other than that of employer and employee is immaterial. Thus, if that relationship exists, it is of no consequence that the employee is designated as a partner, co-venturer, agent, or independent contractor.

Twenty factors have been identified by the courts in indicating whether sufficient control is present to establish an employer-employee relationship under the common-law rules. The importance of each factor varies depending on the occupation, the factual context in which the services are performed, and even the interpretation of the particular IRS examiner. As expected, the IRS leans toward classifying individuals as employees.

Twenty Common-Law Factors (as excerpted from "Current Employment Tax Issues in Higher Education")

A worker will generally be deemed an employee if the individual:

1. Must comply with an employer's instruction about the work;
2. Receives training from or at the direction of the employer;
3. Provides services that are integrated into the business;
4. Provides services that must be rendered personally;

5. Hires, supervises, and pays assistants for the employer; (An independent contractor usually must have the right to choose whether and who to hire as assistants.)
6. Has a continuing relationship with the employer;
7. Must follow set hours of work;
8. Works full-time for an employer;
9. Does the work on the employer's premises;
10. Must work in a sequence set by the employer;
11. Must submit regular reports to the employer; (If a contract between the employer and an independent contractor specifies that the job must be completed to the satisfaction of the customer, the employer may avoid the need for reports from the independent contractor. Reports are usually indications of employee status.)
12. Receives payments of regular amounts at set intervals; (If the worker is an independent contractor, the contract should call for payment by the job. Payment by the hour, week, or month usually indicates an employer-employee relationship. Additionally, fringe benefits are generally paid by employers to employees.)
13. Receives payments for business or traveling expenses;
14. Relies on the employer to furnish tools and materials;
15. Lacks a major investment in facilities used to perform the service; (An independent contractor usually has a significant investment in his/her own business.)
16. Cannot make a profit or suffer a loss from the services; (An indication of independent contractor status is being subject to real risk of economic loss. Thus, independent contractors usually have control over the economic results and contractually agree to bear the risk of loss.)
17. Works for one employer at a time;
18. Does not offer services to the general public; (Any requirement of exclusivity detracts from the argument that the worker is an independent contractor. Advertising by the independent contractor that he/she is available to the general public is an indication of independent contractor status.)
19. Can be fired by the employer; (The general common-law rule is that only employees may be terminated immediately; independent contractors cannot be fired as long as they live up to their contractual obligations.)
20. May quit work at any time without incurring liability. (According to the IRS, only employees may terminate without incurring any liability; independent contractors are contractually bound to complete the specific job.)