

# Independent Contractor or Employee?

*Handout for Mike Tanchek, Nevada Labor Commissioner  
Department of Business and Industry*

When considering whether or not someone is an “independent contractor,” consider the following twenty-factor test developed by the IRS. If a preponderance of the questions are generally answered “yes” it probably indicates that the worker should be classified as an employee. No one question is definitive by itself; the questions need to be viewed as parts of a whole. There are always exceptions, close cases and, on occasion, the question may not apply. As a rule of thumb, independent contracting is a business-to-business relationship even if the “contractor” is an individual. Common sense should be used, but keep in mind that the key word in “independent contractor” is independent.

- 1) Is the worker required to comply with instructions about when, where and how the work is to be done?  
*If yes, this indicates that the business is exerting a high degree of direction and control over the actions of the worker and the worker is not truly independent. This should not be confused with legitimate contract requirements such as deadlines, place of delivery or technical specifications.*
- 2) Is the worker provided training that would enable him or her to perform a job in a particular method or manner?  
*If yes, this indicates that the business is controlling the method and manner of the work rather than leaving it to the discretion of the worker. An independent contractor is in the business of providing the service under consideration required and should not require training because they already understand what needs to be done. At the same time, there may be legitimate reasons for the training such as a unique manufacturing process.*
- 3) Are the services provided by the worker an integral part of the business’s operation?  
*This is an important consideration. If the person is being retained to do something that the business normally does, it indicates an employer-employee relationship. For example, a restaurant that has independent contractor waitresses or a grocery store that has independent contractor checkers would be pretty suspect. On the other hand, if the restaurant hired someone to put on a new roof, the relationship would tend towards independent contracting because restaurants are not normally in the business of roofing. In some cases, accepted business practices include the use of independent contractors as is the case in the trucking industry where companies use independent owner-operators.*
- 4) Must the services be rendered personally?  
*If yes, this indicates further control over the worker by the business. The interest of the business should be that a particular task is completed and who actually does the work should be irrelevant.*
- 5) Does the business hire, supervise or pay assistants to help the worker on the job?

- If an independent contractor needs assistance in performing the work, it should be the independent contractor's responsibility hire, supervise, and pay their own employees.*
- 6) Is there a continuing relationship between the worker and the company for whom services are performed?  
*This is a little weak, but can be used to trigger additional inquiries. An assumption regarding independent contractors is that they are generally free to work for whoever will pay for their services. If there is a sole client, there should be a reasonable explanation as to why.*
- 7) Does the recipient of the services set the work schedules?  
*If yes, then the business is scheduling the worker's time and the worker is not necessarily independent. At the same time, there could be a legitimate business reason for scheduling the time. For example, a cleaning crew that comes in after business hours.*
- 8) Is the worker required to devote full time to the company for whom he performs services?  
*Again, the assumption regarding independent contractors is that they are generally free to work for whoever will pay for their services. Bear in mind there is a difference between devoting all of your time to a company and being required to do so.*
- 9) Is the work performed at the place of business of the company, or at specific places designated by the company?
- 10) Does the recipient of the services direct the sequence in which the work must be done?  
*If yes, the business is controlling the method of production rather than leaving it up to the discretion of the worker to meet the terms of the contract.*
- 11) Are regular, oral, or written reports required to be submitted by the worker?  
*The nature of the reports is significant. If they are progress reports for long-term projects, that wouldn't be unusual. Reports that are not necessarily related to the project that the contractor is working on could be an indication of employment.*
- 12) Is the method of payment hourly, weekly or monthly (as opposed to commission or by the job)?  
*Being paid based on time worked rather than on the task performed is an indicator of employment. However, there may be circumstances where the cost is based on time as is the case with "billable hours" for attorneys, for example.*
- 13) Are business and travel expenses reimbursed?  
*Independent contractors generally cover their own expenses as part of the cost of doing business. Reimbursement may be covered in the agreement.*
- 14) Does the company furnish tools, materials and supplies used by the worker?  
*A strong indication that a person is an independent contractor is that they have invested in the equipment and facilities that they need to provide their services. In some*

*instances, because of the requirements of the client business, the client may provide some specialized equipment.*

- 15) Has the worker failed to invest in equipment or facilities used to provide the services?  
*A strong indication that a person is an independent contractor is that they have invested in the equipment and facilities that they need to provide their services*
- 16) Does the arrangement put the person in the position of realizing either a loss or a profit on the work?  
*Employees are paid wages, employers are generally dependent on profits for their income.*
- 17) Does the worker perform services exclusively for the company rather than working for a number of companies at the same time?  
*Multiple clients is a strong indicator of an independent business. However, it is not out of the question for one client to generate a large enough volume of work, that the independent contractor ends up providing services to a single client.*
- 18) Does the worker in fact not make his services regularly available to the general public?  
*If the independent contractor makes the services available to the general public, this is a strong indicator of a legitimate business. For example, a CPA who does the books for a number of different clients.*
- 19) Is the worker subject to dismissal for reasons other than non-performance of contract specifications?  
*Independent contractors are engaged to perform a task. Dismissal for reasons unrelated to completing the contract indicate an employment relationship. However, there can be circumstances where the independent contractor commits some act, for example stealing something from the client, that would justify terminating the relationship.*
- 20) Can the worker quit his relationship without incurring a liability for failure to complete a job?  
*An employee can quit and the responsibility for completing the work is the employer's problem. If an independent contractor quits, they can be in breach of contract.*

Generally the burden of proof is on the employer to prove independent contractor status. The IRS also produces Form SS-8 using the above criteria to help employers determine if workers are independent contractors. If so desired, an employer can submit the form to the IRS for a determination.