

# Employee vs. Independent Contractor

## What is the Common-Law Test?

The Common-Law Rules is a set of guidelines used by the IRS to classify workers as either employees or independent contractors. The factors measure how much behavioral and financial control an employer has over an individual and the type of relationship that exists between the parties. A worker who meets the guidelines of the Common-Law Test will determine whether the worker meets the guidelines of an employee or independent contractor. Find more information [here](#) on the IRS website.

## What is an Employee?

An employee performs work for you under your direct or indirect supervision, during hours you specify, and under conditions you control. The employer withholds income tax, Social Security, and Medicare from the wages they are paid. As an employer, you pay the employer's portion of Social Security and Medicare which are an expense to you. An employee is generally eligible for benefits offered by the employer such as health insurance or retirement plans. An independent contractor generally is not entitled to benefits.

## What is an Independent Contractor?

The general rule is that an individual is an independent contractor if the person paying them has the right to control or direct ***only*** the result of the work and not what will be done and how it will be done. An independent contractor is self-employed and the earnings as an independent contractor is subject to self-employment tax. An independent contractor is responsible for paying all income and self-employment tax on their earnings.

Independent Contractors are individuals who perform a service for you, usually at a pre-arranged fee, and who also meet the following general criteria:

- They have a business card for their business, not yours.
- They submit an invoice to you for each occurrence of services rendered.
- You have no control over the hours worked, the tools used, or who provides the services.
- They perform similar services for others.
- They do not have any major responsibility within your organization, such as management or supervision of your employees.
- A contract or work order should exist between you and the Independent Contractor.
- They supply you with a general liability insurance certificate.
- They supply you with a business license number (issued to them by the county in which they work).
- They may also show evidence of being licensed by the State. (For example, doctors, lawyers, electricians, subcontractors, etc.)

The above items are intended to be a quick guideline and are only a portion of what determines worker status.

## Why is Correct Worker Status Important?

It is important to properly classify the people you pay. If you pay someone as an Independent Contractor and they are later determined to be an employee, an audit by State or Federal agencies may prove costly to you. Back taxes which should have been withheld will generally be assessed against you even if previously paid by the employee/subcontractor. Penalties for failure to report employee earnings could be assessed, as well as penalties and interest for delinquent withholding payments.

It is also important to note that an audit by Florida will generally result in a Federal examination because they share information. Florida also investigates reasonable compensation for S corporation shareholders on behalf of the IRS as part of their state unemployment tax audits. Essentially, FDOR is performing contract audit work for the IRS.

### ***Classifying a worker as an employee or a contractor is not simply a choice you make.***

It is a legal determination based on the facts and circumstances. Whether a worker is part-time or temporary generally has no bearing on their classification.

If you are unsure about the correct worker classification, you should check with an HR specialist or labor attorney. **We do not provide legal advice on this or any other matter.**

## What Are You Required to Do?

### **For Employees:**

- Have each employee complete a Form W-4, I-9, and Florida New Hire Reporting Form before beginning employment or making your first payment to them.
- On each paycheck withhold the appropriate taxes.
- At year-end provide each with a W-2 Wage and Tax Statement.
- Make sure benefits are applied consistently based on the contractual obligations of the benefit. There are exceptions, but generally, discrimination is not allowed.

### **For Independent Contractors:**

- Have each Independent Contractor provide a copy of their Certificate of Insurance.
- Have each Independent Contractor fill out a W-9 PRIOR TO PAYING THEM ANY MONEY. If the contractor will not fill out the form, or if for any other reason you cannot get their Identification number, you are required to withhold 24% of each payment. This is called Backup Withholding. This money is forwarded to the IRS, just like payroll taxes. Once it is withheld from the payment, you do not refund it to the contractor or pay it back to him in any way.
- **Within 20 days of the first payment to the contractor or the date on which the engagement is entered into to provide services, the “new hire” must be reported to the Florida Department of Revenue. This law change was effective October 1, 2021.**
- At year-end provide each with a Form 1099

We recommend that you take a firm stance that any Independent Contractor must supply you with a signed Form W-9 before services are rendered and definitely before you make any payment. Remember **“NOT A DIME WITHOUT A W-9”!**

## **What Information is Needed For the Vendor to Complete a Form W-9?**

- Name (as it appears on their social security card or on their business tax return).
- Address.
- Social Security Number or Federal Identification Number.
- If an LLC other than a single-member disregarded entity, whether it is classified as a C corporation, S corporation, or Partnership (LLC’s that have a single-member and are considered a disregarded entity should not select LLC but must report under the owner of the LLC).

Failure to collect this information and file all Form 1099’s must be reported to the IRS on your business return. Answering “no” to the question on the tax return “Did the taxpayer make any payments in 20XX that would require it to file Form(s) 1099” dramatically increases your risk of audit and can result in substantial penalties for each Form 1099 that is filed late or not filed. In 2022 the penalty **per form** will range from \$50 for up to 30 days late up to \$570 for intentional disregard.

## **Florida New Hire Reporting**

Florida Form CS-EF315 Florida New Hire Reporting Form was designed to gather information to assist in collecting unpaid child support. [The FDOR Child Support Services for Employers webpage is available here.](#) This form is required to be completed for both new employees ***and independent contractors***. Some payroll service providers prepare this reporting as part of their service for employees only.

## **Salary vs Hourly and Overtime**

Employees who work more than 40 hours per week are required to be paid overtime unless they are exempt employees. Paying someone a salary does not automatically mean they are exempt from overtime! Only certain employees can be classified as exempt and not subject to the overtime rules. Audits from the Department of Labor (DOL) have increased significantly in the past few years and can become extremely expensive, if you have employees classified wrong.

If you are unsure about the correct worker classification, you should check with the appropriate federal or state Department of Labor or an HR specialist or labor attorney. **We do not provide legal advice on this or any other matter.**