

# Employee versus Independent Contractor

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If you require legal advice, or need other professional assistance, you should always consult your attorney to discuss your particular facts, circumstances, and business needs.

Tax Professionals who require continuing education (CE) from the IRS, please note this seminar has been approved by the IRS for CE credits.

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# Examples of Workers Who May Qualify as Independent Contractors

- Lawyers
- Construction workers, repairmen, and other laborers
- Truck drivers and automobile transporters
- Auctioneers
- Credit investigators

# Employer Tax-Related Obligations for Workers Classified as Employees

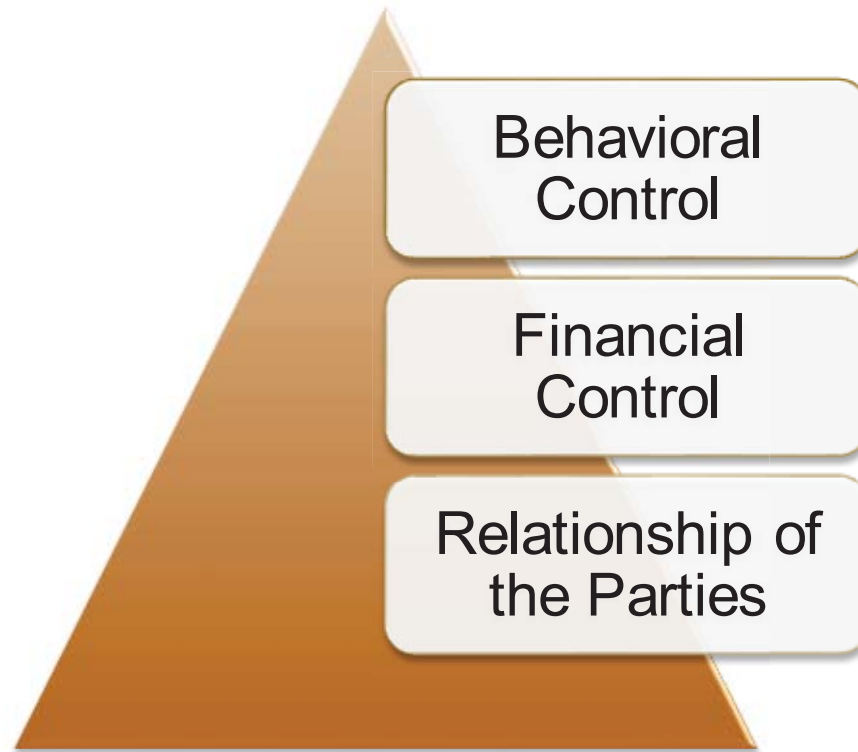
- Withhold income taxes
- Pay half of the tax mandated under FICA
- Withhold employees' shares of FICA
- Pay the full tax required under FUTA and any state-related laws
- Pay for workers' compensation insurance
- File returns with appropriate tax authorities
- Provide Forms W-2 to employees



# Employee or Independent Contractor?

- Employers control how an employee performs the work.
- Independent contractors generally determine for themselves how work/services is performed.

# Categories of Evidence





# Behavioral Control

Determine whether the business has retained the right to control the details of a worker's performance.

- Instructions
- Training



# Behavioral Control – cont.

Determine whether the business has retained the right to control the details of a worker's performance.

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# Financial Control

The ability to realize a profit or loss may be the strongest evidence that a worker controls the business aspects of services rendered.





# Financial Control

This determination can be made by considering:

- Significant investment
- Unreimbursed expenses
- Services available to the public
- Method of payment



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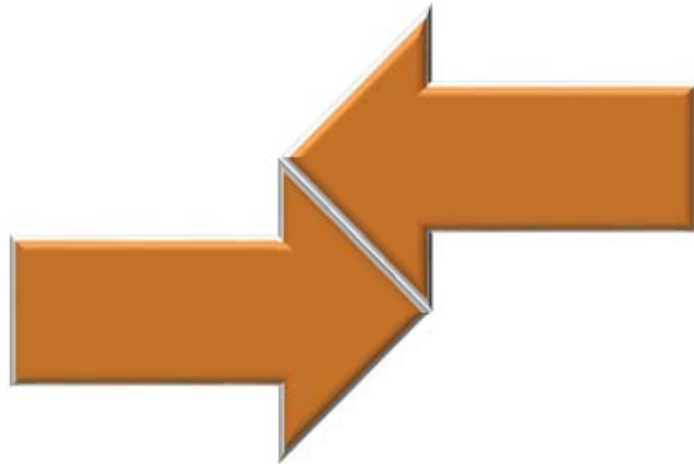


# Financial Control

Not all financial control facts need to be present to have the ability to realize a profit or loss.

# Relationship of the Parties

This relationship reflects the parties' intent concerning control.





# Relationship of the Parties

- Intent of Parties
- Employee Benefits



# Relationship of the Parties

- Discharge or Termination
- Continuing Relationship

# Relationship of the Parties

Regular Business Activity



# Proper Classification

Employees	Independent Contractors
<ul style="list-style-type: none"><li data-bbox="401 630 982 776">▪ Employers withhold social security and Medicare taxes for employees</li><li data-bbox="401 846 642 886">▪ Form W-2</li></ul>	<ul style="list-style-type: none"><li data-bbox="1014 630 1633 824">▪ Must pay their own social security and Medicare (FICA) taxes, income taxes, and self-employment taxes</li><li data-bbox="1014 894 1570 984">▪ 1099-MISC, Miscellaneous Income</li></ul>



# Tax Risks in Misclassifying an Employee

## Liabilities

- 1.5% for federal withholding\*
- 20% of the employee's portion of FICA\*

\* these amounts double if a Form 1099 was not filed for a worker who earns more than \$600/year.



# Risks in Misclassifying an Employee

Liabilities if misclassification is determined to be willful

- the full amount of income tax that should have been withheld
- the full amount of employer and employee shares for FICA
- interest and penalties



# Play it Safe

When an employer is in doubt about how to classify a worker, it may be wisest to seek the advice of an attorney.



# Form SS-8

Employers can obtain a definitive ruling from the IRS as to a newly hired worker's status as an employee or an independent contractor by completing Form SS-8.

# Common Mistakes

Employers should not treat a worker as an independent contractor just because:

- the worker wanted to be treated as an independent contractor
- the worker signed a contract
- the worker does assignments sporadically
- the worker is paid commission only
- the worker does assignments for more than one company



# Safe Harbors

Established as a defense for employers who misclassify a worker as an independent contractor.



## Safe Harbors – cont.

Established as a defense for employers who misclassify a worker as an independent contractor.



# Classification Settlement Program

The program gives IRS examiners more authority to try to resolve worker classification issues at the field level and more flexibility in applying the safe harbor provisions.



## **Voluntary Classification Settlement Program (VCSP)**

The Voluntary Classification Settlement Program (VCSP) can offers partial relief from past federal employment tax obligations for misclassified workers, to eligible employers when they agree to prospectively treat those workers as employees.

# VCSP Eligibility

To be eligible to apply for the VCSP, an applicant must:

- Have consistently treated the workers in the past as non-employees
- Have filed all required Forms 1099 for the workers for the previous three years, and
- Not currently be under audit by the IRS, the Department of Labor, or a state agency concerning the classification of these workers.



# VCSP Application Process

- Interested employers can apply for the program by filing Form 8952, *Application for Voluntary Classification Settlement Program*, at least 60 days before they want to begin treating the workers as employees.
- Details of the VCSP can be found at [irs.gov](https://irs.gov).

**Note:** As of publication, only the IRS is offering this federal tax relief. It is unclear whether state or local tax agencies or DOL wage and hour divisions at the federal or state level will offer similar relief. Employers are encouraged to seek professional assistance including legal counsel to evaluate the benefits and consequences of participating in the VCSP and how it would impact their business.



# Conclusion

It is important for businesses to understand worker classifications. Correctly classifying workers before they perform services can save a business confusion, significant expenses, and possible fines down the road.

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