

IRS 20 Factors and Virginia Exemptions for Employee Classification

Revenue Ruling 87-41: The Twenty Factors

To help determine whether a worker is an employee under the common law rules, the IRS identified 20 factors that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. These factors, set forth in Revenue Ruling 87-41, were based on the circumstances that the courts identified and relied upon to decide whether an employment relationship existed. Not all the factors must be present to find an employee/employment relationship, but the factors are guides to use to assess the likelihood as to whether an individual is an employee or an independent contractor.

- (1) **Instructions.** An employee must comply with instructions about when, where and how to work. The control factor is present if the employer has the right to require compliance with the instructions.
- (2) **Training.** An employee receives on-going training from, or at the direction of, the employer. Independent contractors use their own methods and receive no training from the purchasers of their services.
- (3) **Integration.** An employee's services are integrated into the business operations because the services are important to the business. This shows that the worker is subject to direction and control of the employer.
- (4) **Services rendered personally.** If the services must be rendered personally, presumably the employer is interested in the methods used to accomplish the work as well as the end results. An employee often does not have the ability to assign their work to other employees, an independent contractor may assign the work to others.
- (5) **Hiring, supervising and paying assistants.** If an employer hires, supervises and pays assistants, the worker is generally categorized as an employee. An independent contractor hires, supervises and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.
- (6) **Continuing relationship.** A continuing relationship between the worker and the employer indicates that an employer-employee relationship exists. The IRS has found that a continuing relationship may exist where work is performed at frequently recurring intervals, even if the intervals are irregular.
- (7) **Set hours of work.** A worker who has set hours of work established by an employer is generally an employee. An independent contractor sets his/her own schedule.
- (8) **Full time required.** An employee normally works full time for an employer. An independent contractor is free to work when and for whom he or she chooses.

(9) **Work done on premises.** Work performed on the premises of the employer for whom the services are performed suggests employer control, and therefore, the worker may be an employee. Independent Contractor may perform the work wherever they desire as long as the contract requirements are performed.

(10) **Order or sequence set.** A worker who must perform services in the order or sequence set by an employer is generally an employee. Independent Contractor performs the work in whatever order or sequence they may desire.

(11) **Oral or written reports.** A requirement that the worker submit regular or written reports to the employer indicates a degree of control by the employer.

(12) **Payments by hour, week or month.** Payments by the hour, week or month generally point to an employer-employee relationship.

(13) **Payment of expenses.** If the employer ordinarily pays the worker's business and/or travel expenses, the worker is ordinarily an employee.

(14) **Furnishing of tools and materials.** If the employer furnishes significant tools, materials and other equipment by an employer, the worker is generally an employee.

(15) **Significant investment.** If a worker has a significant investment in the facilities where the worker performs services, the worker may be an independent contractor.

(16) **Profit or loss.** If the worker can make a profit or suffer a loss, the worker may be an independent contractor. Employees are typically paid for their time and labor and have no liability for business expenses.

(17) **Working for more than one firm at a time.** If a worker performs services for a multiple of unrelated firms at the same time, the worker may be an independent contractor.

(18) **Making services available to the general public.** If a worker makes his or her services available to the general public on a regular and consistent basis, the worker may be an independent contractor.

(19) **Right to discharge.** The employer's right to discharge a worker is a factor indicating that the worker is an employee.

(20) **Right to terminate.** If the worker can quit work at any time without incurring liability, the worker is generally an employee.

Payments Subject to Withholding

Virginia law conforms to the federal definition of income subject to withholding. Virginia withholding is generally required on any payment for which federal withholding is required. This includes most wages, pensions and annuities, gambling winnings, vacation pay, bonuses, and certain expense reimbursements.

Payments Exempt From Withholding

Payments that are exempt from federal withholding are also exempt from Virginia withholding. In addition, the following payments are exempt from Virginia withholding:

- Payments made for acting in or serving as a crew member for movies, television series, commercials, or promotional films that are filmed totally or partially in Virginia by an employer that conducts business in Virginia for less than 90 days and that edits, processes and markets the completed project outside Virginia
- Payments made from an IRA or SEP
- Payments made to nonresident employees of rail carriers, motor carriers, and water carriers
- Payments made to resident and nonresident merchant seamen