

**SUBJECT:
WORKERCLASSIFICATION/INDEPENDENTCONTRACTOR/STATUTORY
EMPLOYEE**

DATE: 2.11.10

The question of whether a worker is an independent contractor or employee for federal income and employment tax purposes is a complex one. It is intensely factual, and the stakes can be very high. As I'm sure you know, if a worker is an employee the company must withhold federal income and payroll taxes, pay the employer's share of FICA taxes on the wages plus FUTA tax, and often provide the worker with fringe benefits it makes available to other employees. These obligations don't apply for a worker who is an independent contractor. The business sends the independent contractor a Form 1099-MISC for the year showing what he or she was paid (if it amounts to \$600 or more), and that's it.

Under the common-law rules (so-called because they originate from court cases rather than from the tax code), an individual generally is an employee if the enterprise he works for has the right to control and direct him regarding the job he is to do and how he is to do it. If this is the case there most likely the worker is not an independent contractor.

Don't Forget the State

There are state tax obligations as well. We are seeing more states reviewing worker classification. Many times the state laws are more stringent than the federal laws. Who is an "employee?" There is no uniform definition of the term:

Section 530

Some employers that have misclassified workers as independent contractors are relieved from federal employment tax liabilities under Section 530 of the '78 Revenue Act (not the Internal Revenue Code). In brief, Section 530 protection applies only if the employer:

- filed all federal returns consistent with its treatment of a worker as an independent contractor;
- treated all similarly situated workers as independent contractors; **and**
- had a "reasonable basis" for not treating the worker as an employee. For example, a "reasonable basis" exists if a significant segment of the employer's industry has traditionally treated similar workers as independent contractors. Section 530 doesn't apply to certain types of technical services workers.

Note that Section 530 may give you relief for federal law but the states have their own regulations and do not recognize Section 530 as relief for state purposes.

Statutory Employees

Individuals who are "statutory employees," (that is, specifically identified by the tax code as being employees) are treated as employees for social security tax purposes even if they aren't subject to an employer's direction and control (that is, even if the individuals wouldn't be treated as employees under the common-law rules). These individuals are agent drivers and commission drivers, life insurance salespeople, home workers, and full-time traveling or city salespeople who meet a number of tests. Statutory employees may or may not be employees for non-FICA purposes. Corporate officers are statutory employees for all purposes.

Statutory Independent Contractors

Individuals who are statutory independent contractors (that is, specifically identified by the tax code as being non-employees) aren't employees for purposes of wage withholding, FICA or FUTA, and the income tax rules in general. These individuals are qualified real estate agents and certain direct sellers.

Summary

There is an IRS form (Form SS-8) that you or the worker can complete which is a method of asking the IRS to rule on whether a worker is an independent contractor or employee. The questions on this form provide a very good summary of what the IRS would be looking for if they were examining your worker classification.

If you'd like to discuss these complex rules with me and see how they apply to your business in order to make sure that none of your workers are misclassified, please call my office to arrange for an appointment.