



Contractor or Employee?

The distinction is more nuanced than you think.



National Labor Relations Board:

	Contractor	Employee
1. Does the company control the details of the work?		✓
2. Is the work performed by a distinct occupation or business?	✓	
3. Is the work being performed typically done under the supervision of an employer?		✓
4. Does the work require a highly specialized skill?	✓	
5. Does the company supply the tools or equipment?		✓
6. Is the length of the engagement long-term?		✓
7. Is compensation based on time spent (as opposed to compensation being project-based)?		✓
8. Is the employer in the same business that the work is performed?		✓
9. Do the parties believe they have created an independent contractor relationship?	✓	
10. Does the worker in question run their own business?	✓	

Internal Revenue Service (SS-8):

	Contractor	Employee
1. Does the company control or have the right to control what the worker does and how the worker does his or her job?		✓
2. Are the business aspects of the worker's job controlled by the payer? (these include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)		✓
3. Are there employee-type benefits provided (i.e. pension plan, insurance, vacation pay, etc.)?		✓
4. Will the relationship continue and is the work performed a key aspect of the business?		✓

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FLSA - Fair Labor Standards Act:

Contractor | **Employee**

- | | Contractor | Employee |
|---|------------|----------|
| 1. <u>Opportunity for Profit or Loss</u>
Can the worker can set or negotiate their own pay, accept or decline jobs, choose the time of performance, hire others, or otherwise invest in their business? | ✓ | |
| 2. <u>Investments by the Worker and the Employer</u>
Does the worker make investments that are “capital or entrepreneurial” in nature, such as those increasing the worker’s ability to do different types or more work, reducing costs or extending market reach? | ✓ | |
| 3. <u>Degree of Permanence of the Work Relationship</u>
Is the work definite in duration, nonexclusive, project-based, or sporadic “based on” the worker providing services to other businesses? | ✓ | |
| 4. <u>Nature and Degree of Control</u>
Does the employer exercise control to ensure compliance with legal obligations, safety standards, or contractual or customer service standards? | | ✓ |
| 5. <u>Work Performed as Integral to the Employer’s Business</u>
Is the work performed critical, necessary, or central to the employer’s PRINCIPAL business? | | ✓ |
| 6. <u>Skill and Initiative</u>
Does the worker uses specialized skills in performing the work, and do those skills contribute to business-like initiative? | ✓ | |
| 7. <u>In General</u>
Do the factors in some way indicate that the worker is in business for themselves, as opposed to being economically dependent on the employer for work? | ✓ | |

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Common Myths:

1. A 1099 tax form is issued by the business owner, so this makes the worker an independent contractor.
2. Having a worker sign an independent contractor agreement makes the worker an independent contractor.
3. If the worker is not on payroll, they are not an employee.
4. The business owner wants the worker to be an independent contractor, so that means the worker cannot be an employee.
5. The worker is an independent contractor because it is an established practice in the industry to classify this type of worker as an independent contractor.
6. The worker has been an independent contractor for years; this means the person will continue to be an independent contractor.
7. If my worker is an independent contractor under one law, the worker is an independent contractor under other laws.
8. If the worker works offsite consistently, then they are an independent contractor.
9. The worker has their own professional license, so they are an independent contractor.
10. The worker never went through the new hire process, so they are an independent contractor.

Anecdotal advice:

If this worker fits all of these criteria, they may be an independent contractor. Let's double-check first, though, to be safe.

- They choose what hours they're going to work.
- They are not monitored or supervised.
- They do not receive performance evaluations.
- They are permitted to work for other businesses.
- They are not bound by a non-compete agreement.

Reach out today to talk about new ways to tackle your human capital challenges.