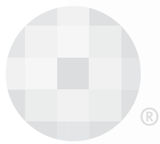
Practice

By Charles P. Rettig

IRS Voluntary Worker Classification Settlement Program

The IRS recently launched a new program designed to enable many employers to resolve past worker classification issues and achieve certainty by voluntarily reclassifying their workers on a prospective basis. The Voluntary Classification Settlement Program (VCSP)[1] is designed to allow eligible employers to obtain substantial relief from federal payroll taxes they may have owed for the past, if they agree to prospectively treat their workers as employees. It is available to many businesses, tax-exempt organizations and government entities that might be erroneously treating their workers or a class or group of workers as nonemployees or independent contractors, and now want to treat these workers as employees. The VCSP allows employers the opportunity to get into compliance by making a relatively minimal payment covering past payroll tax obligations rather than waiting for an IRS examination and an uncertain financial liability associated with a worker status reclassification.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Definition of Employee

Before an employer can know how to treat payments made to workers for services, they must first know the business relationship that exists between the employer and the person performing the services. The worker may be: (a) a common-law employee, (b) a statutory employee, (c) a statutory nonemployee, or (d) an independent contractor. The determination of whether a worker is an employee or an independent contractor is generally made under a facts and circumstances test that seeks to determine whether the worker is subject to the control of the service recipient, not only as to the nature of the work performed, but the circumstances under which it is performed.

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Employee (Common-Law Employee)

Under common-law rules, anyone who performs services is an employee if the employer can control what will be done and how it will be done. The most significant issue is the right to control the details of how the services are performed. In Rev. Rul. 87-41,[2] the IRS developed a list of 20 factors (*see* Appendix A.) that may be examined in determining whether an employer-employee relationship exists. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The 20 factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the 20 factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee).

The IRS has also identified three categories of evidence that may be relevant in determining whether the requisite control exists under the common-law test and has grouped illustrative factors under these three categories: (1) behavioral control (whether the business has the right to control how the worker does the contemplated task); (2) financial control (whether the business has the right to control the business aspects of the contemplated task); and (3) relationship of the parties (such as whether there are contracts describing the relationship, permanency of the relationship, the extent to which the services performed are a key aspect of the regular activities of the business and whether the business provides the worker with employee-type benefits such as insurance, a pension plan, etc.).[3]

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Businesses must consider all relevant factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another. The entire relationship must be examined including the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Statutory Employees

For purposes of FICA,[4] the term "employee" means: (1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Under the Regulations, an employer-employee relationship generally exists if the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished.[5] That is, an employee is subject to the will and control of the employer, not only as to what is to be done, but also as to how it is to be done. It is not necessary that the employer actually control the manner in which the services are performed, rather it is sufficient that the employer have a right to control. Whether the requisite control exists is determined on the basis of all the relevant facts and circumstances.

Accordingly, workers will be deemed a statutory employee if they are an officer of a corporation or are deemed an employee under the foregoing common law rules.[6] Additionally, even if workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees) for certain employment tax purposes if they fall within any one of the following four categories (1–4) and meet the three conditions described under Social Security and Medicare taxes (5):[7]

- A driver who (i) operates their own trucks or the trucks of the persons for whom they perform services, (ii) serve customers designated by their principals and customers they solicit on their own initiative, (iii) make wholesale or retail sales, and (iv) are paid commissions on their sales or earn the difference between what they charge their customers and what they pay their principals for the products or services they sell. Such drivers are "statutory employees" if they distribute beverages (other than milk), meat, vegetables, fruit or bakery products, or if they pick up and deliver laundry or dry cleaning.
- A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
- An individual who works at home on materials or goods supplied by the employer and that must be returned to the employer or to a person they

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name, if the employer also furnishes specifications for the work to be done.

- A full-time traveling or city salesperson who works on behalf of the employer and turns in orders to the employer from wholesalers, retailers, contractors, or operators of hotels, restaurants or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for the employer must be the salesperson's principal business activity.
- Social Security and Medicare Taxes—Social Security and Medicare taxes must be withheld from the wages of statutory employees if all three of the following conditions apply: (i) the service contract states or implies that substantially all the services are to be performed personally by them, (ii) they do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities), and (iii) the services are performed on a continuing basis for the same payer.

Statutory Nonemployees

There are generally two categories of statutory nonemployees: direct sellers and licensed real estate agents. They are treated as self-employed for all federal tax purposes, including income and employment taxes, if: (a) substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked; and (b) their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.[8]

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Independent Contractor

Lawyers, contractors, subcontractors and auctioneers who follow an independent trade, business or profession, in which they offer their services to the public, are generally not employees. However, whether such people are employees or independent contractors depends on the facts in each case. The general rule is that an individual is an independent contractor if the person for whom the services are performed has the right to control or direct only the result of the work and not the means and methods of accomplishing the result.

Act Sec. 530 of the Revenue Act of 1978[9] generally allows an employer to treat a worker as not being an employee for employment tax purposes (but not income tax purposes), regardless of the worker's actual status under the common-law test, unless the employer has no reasonable basis for such treatment or fails to meet certain requirements. Sec. 530(a) generally provides, for purposes of the employment taxes under Subtitle C of the Code, that to qualify for relief, the business must meet three requirements:

- Reporting Consistency—All Federal tax returns (including information returns) required to be filed by the taxpayer with respect to the individual for the period must have been filed by the business on a basis consistent with the business' treatment of the individual as not being an employee. This test must be applied to each worker separately, since the taxpayer may have filed a Form 1099-MISC for one worker in a class, but not for another worker in the same class. If this is the case, such workers will be treated as separate classes.
- Substantive Consistency—The business must have consistently treated similarly situated workers as independent contractors. That is, if the business (or a predecessor) treated a similarly situated worker as an employee, there is no Sec. 530 relief. This test must be applied to the class of workers having substantially similar job responsibilities and working under substantially similar conditions (*i.e.*, supervisors vs. workers being supervised).
- Reasonable Basis—The business must have had some reasonable basis for not treating the worker as an employee. This may consist of reasonable reliance on: a judicial precedent, a published ruling, a private letter ruling or technical advice memorandum issued to the taxpayer; the results of a past audit of the taxpayer; or a long-standing recognized practice of a significant segment of the industry. Any other reasonable basis could also suffice.

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under Sec. 530(a) generally requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual

is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions. The determination is often based on an analysis of Sec. 530 as applied to the particular factual situation involved.

Employment Taxes

In general, employment taxes consist of the taxes under the Federal Insurance Contributions Act (FICA), the tax under the Federal Unemployment Tax Act (FUTA), and income taxes required to be withheld by employers from wages paid to employees (income tax withholding).[10] FICA tax consists of two parts: (1) old age, survivor and disability insurance (OASDI), which correlates to the Social Security program that provides monthly benefits after retirement, disability or death; and (2) Medicare hospital insurance (HI). Unlike the OASDI tax, the HI tax is not limited to a specific amount of wages, but applies to all wages. Under FUTA, employers must pay a tax of 6.2 percent of wages up to the FUTA wage base of $7,000.

An employer may take a credit against its FUTA tax liability for its contributions to a State unemployment fund and, in certain cases, an additional credit for contributions that would have been required if the employer had been subject to a higher contribution rate under State law. For purposes of the credit, contributions means payments required by State law to be made by an employer into an unemployment fund, to the extent the payments are made by the employer without being deducted or deductible from employees' remuneration. Employers generally are required to withhold income taxes from wages paid to employees. Withholding rates vary depending on the amount of wages paid, the length of the payroll period, and the number of withholding allowances claimed by the employee. Wages paid to employees, and FICA and income taxes withheld from the wages, are required to be reported on employment tax returns (Forms 940 and 941) and on Form W-2.[11]

The "tax gap"—the difference between what taxpayers should have paid and what they actually paid on a timely basis—based information developed through the National Research Program (NRP) for tax year 2001 is estimated to be $345 billion for tax year 2001. IRS enforcement activities, coupled with other late payments, recover about $55 billion of the tax gap, leaving a net tax gap of $290 billion for Tax Year 2001. Of that amount, approximately $15 billion is believed to be represented by FICA and FUTA underreporting.

Employers must file information reports on all wages paid to employees. Even when Forms 1099 are issued, compliance is somewhat less than when workers are classified as employees and withholding is required. Employers often fail to file requisite Forms 1099 for payments made to independent contractors, and independent contractors often fail to report the unreported payments as income. The NRP for tax year 2001 determined that when substantial information reporting and withholding was required, there was approximately 98.80 percent reporting accuracy; when substantial information reporting was required, there was approximately 95.50 percent reporting accuracy; when some information reporting was required, there was approximately 91.45 percent reporting accuracy; and when little or no information reporting was required, there was approximately 46.10 percent reporting accuracy.

Responsibility for Employment Tax Compliance/Worker Classification

An employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. In addition, other tax issues, including the provision of certain employee benefits, depend upon the proper classification of workers. Employment tax responsibility generally rests with the person who is the employer of an employee under a common-law test that has been incorporated into Treasury Regulations.[12] The test of whether an employer-employee relationship exists is relevant in determining whether a worker is an employee or an independent contractor. However, the same test applies in determining whether a worker is an employee of one person or of another.

No definitive test exists to distinguish whether a worker is an employee or an independent contractor. The tests used to determine whether a worker is an independent contractor or an employee are complex and subjectively applied. When employees are classified as independent contractors, they may be excluded from coverage under key laws designed to protect workers and may not have access to employer-provided health insurance coverage and

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pension plans. Moreover, classification of employees can affect the administration of many federal and state programs, such as payment of taxes and payments into state workers' compensation and unemployment insurance programs.

Significant tax consequences result from the classification of a worker as an employee or independent contractor. These consequences relate to withholding and employment tax requirements, as well as the ability to exclude certain types of compensation from income or take tax deductions for certain expenses. Some consequences favor employee status, while others favor independent contractor status. For example, an employee may exclude from gross income employer-provided benefits such as pension, health and group-term life insurance benefits. On the other hand, an independent contractor can establish his or her own pension plan and deduct contributions to the plan. An independent contractor also has greater ability to deduct work-related expenses.

Employers have economic incentives to classify employees as independent contractors. Employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages or including independent contractors in employee benefit plans.

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Significant tax consequences also result if a worker was misclassified and is subsequently reclassified, *e.g.*, as a result of an audit. For the employer, such consequences may include liability for withholding taxes for an undefined number of years, interest and penalties, and potential disqualification of employee benefit plans. For the worker, such consequences may include liability for self-employment taxes and denial of certain business-related deductions.

IRS Worker Classification Settlement Program (CSP)

Under the CSP,[13] the IRS allows examiners and employers to resolve worker classification cases as early in the enforcement process as possible.[14] CSP is applied separately to each class of worker for each period. In an employment tax examination, the examiner must first determine whether the employer is entitled to Sec. 530 relief. If so, there is no assessment and the employer can continue to treat the workers in question as independent contractors. If the employer desires to begin treating the workers as employees, it can agree to do so in the future (no later than the beginning of the next year after the examination) without giving up its claim to Sec. 530 relief for earlier periods.

If the examiner finds that the employer is erroneously treating employees as independent contractors, a series of two graduated CSP settlement offers can occur. It is mandatory for the examiner to offer CSP to businesses with an open employment tax case in either SB/SE, TE/GE, LMSB or Appeals, even if Form 940 or Form 941 have not been filed (which would be consistent with a belief that the worker is not an employee) or of Forms 1099 are not required to be filed (such as for household workers).[15] If the employer has met the reporting consistency requirement of Sec. 530, but clearly has no reasonable basis for its treatment of the workers as independent contractors or has been inconsistent in its treatment of the workers, the offer would be a full employment tax assessment under Code Sec. 3509 for one taxable year, with the employer agreeing to reclassify the workers as employees on a prospective basis, ensuring future compliance. If the employer has met the reporting consistency requirement and can reasonably argue that it met the reasonable basis and consistency of treatment tests, the offer will be an assessment of 25 percent of the employment tax liability for the audit year under Code Sec. 3509, with the employer agreeing to reclassify the workers as employees on a prospective basis, ensuring future compliance.

In the event of a recharacterization of workers as employees from independent contractors under CSP or otherwise, if the employer agrees to the recharacterization with either the Examination Division or the Appellate Division of the IRS (following a timely Protest), and the additional FICA tax is paid in full before the date the current Form 941 would be due for the quarter within which there is an agreement with the IRS as to the recharacterization, no interest will be due on the additional liability arising as a result of the recharacterization.[16] Code Sec. 6205 allows employers to make adjustments to returns without interest until the last day for filing the return for the quarter in which the error was ascertained. Rev. Rul. 75-464[17] clarifies that employers can still make interest-free adjustments where the underpayment is discovered during an audit or examination—the employment taxes can be paid free of interest if paid when the employer signs Form 2504, *Agreement to Adjustment and Collection of Additional Tax*.

Voluntary Classification Settlement Program (VCSP)

The VCSP is available for taxpayers who want to voluntarily change the prospective classification of their workers. The program applies to taxpayers who are currently treating their workers (or a class or group of workers) as independent contractors or other nonemployees and want to prospectively treat the workers as employees.

Eligibility

A taxpayer must have consistently treated the workers as nonemployees, and must have filed all required Forms 1099 for the workers to be reclassified under the VCSP for the previous three years to participate in VCSP. Additionally, the taxpayer cannot currently be under audit by the IRS and the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency.

If the IRS or the Department of Labor has previously audited a taxpayer concerning the classification of the workers, the taxpayer will be eligible only if the taxpayer has complied with the results of that audit. Exempt organizations and Government entities may participate in VCSP if they meet all of the eligibility requirements. An exempt organization that is currently under a Form 990 series examination is considered to be "under audit by the IRS" and is not eligible to participate in the VCSP.[18]

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VCSP Agreement

A taxpayer participating in the VCSP must agree to prospectively treat the class or classes of workers as employees for future tax periods. In exchange, the taxpayer will pay 10 percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year, determined under the reduced rates of Code Sec. 3509(a),[19] will not be liable for any interest and penalties on the amount and will not be subject to an employment tax audit with respect to the worker classification of the workers being reclassified under the VCSP for prior years. In addition, as part of the VCSP program, the taxpayer will agree to extend the period of limitations on assessment of employment taxes for three years for the first, second and third calendar years beginning after the date on which the taxpayer has agreed under the VCSP closing agreement to begin treating the workers as employees.

Applying for VCSP

To participate in the VCSP, a taxpayer must apply using Form 8952, *Application for Voluntary Classification Settlement Program*. The IRS will review the application and verify the taxpayers eligibility. Once the IRS accepts the taxpayer into VCSP, the IRS will contact the taxpayer (or the taxpayers authorized representative if an executed Power of Attorney is included with the application) to enter into the VCSP closing agreement with the IRS. The application should be filed at least 60 days from the date the taxpayer wants to begin treating its workers as employees. Taxpayers who want to begin treating a class or classes of workers as employees for the fourth quarter of 2011 should file Form 8952 as soon as possible. Along with the application, the taxpayer should provide the name of a contact or an authorized representative with a valid Power of Attorney (Form 2848). The IRS will contact the taxpayer or authorized representative to complete the process after reviewing the application and verifying the taxpayer's eligibility. Eligible taxpayers accepted into the VCSP will enter into a closing agreement with the IRS to finalize the terms of the VCSP, and will simultaneously make full and complete payment of any amount due under the closing agreement.

Prospective Reclassification of Workers

The VCSP permits taxpayers to reclassify some or all of their workers. However, once a taxpayer chooses to reclassify certain of its workers as employees, all workers in the same class must be treated as employees for employment tax purposes. The VSCP Frequently Asked Questions (FAQs) provide the following example: ABC Company is a construction firm that currently contracts with its drywall installers, electricians and plumbers to perform services at housing construction sites. ABC Company determines it wants to voluntarily reclassify its drywall installers as employees. ABC Company submits an application, is accepted into the VCSP and enters into a closing agreement with the IRS. Once the VCSP closing agreement is executed, ABC Company must treat all drywall installers as employees for employment tax purposes.[20]

VSCP Amount

Payment need not be submitted with Form 8952, but will be required when the VSCP signed closing agreement is returned to the IRS.[21] Payment under

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the VCSP is 10 percent of the amount of employment taxes calculated under the reduced rates of Code Sec. 3509(a) of the Code for the compensation paid for the most recent tax year to the workers being reclassified under the VCSP. Under Code Sec. 3509(a), the effective tax rate for compensation up to the Social Security wage base is 10.68 percent in 2010 or 10.28 percent in 2011, and 3.24 percent for compensation above the Social Security wage base.

The amount due under the VCSP is calculated based on compensation paid in the most recently closed tax year, determined at the time the VCSP application is being filed. Accordingly, the 10.68 percent effective rate applies under the VCSP in 2011, since the most recently closed tax year is 2010. The 10.28 percent effective rate applies under the VCSP in 2012, since the most recently closed tax year is 2011. The rate of 3.24 percent applies to compensation above the Social Security wage base in both situations. These effective rates constitute the sum of the rates as calculated under Code Sec. 3509(a).

The VSCP FAQs provide the following payment examples:[22]

Example. In 2010 you paid $1.5 million to workers that are the subject of the VCSP. All of the workers that are the subject of the VCSP were compensated at or below the Social Security wage base (*e.g.*, under $106,800 for 2010). You submit the VCSP application on October 1, 2011 and you want the beginning date of the quarter for which you want to treat the class or classes of workers as employees to be January 1, 2012. You look to amounts paid to the workers in 2010 for purposes of calculating the VCSP amount, since 2010 is the most recently completed tax year at the time the application is being filed. Under Code Sec. 3509(a), the employment taxes applicable to $1.5 million would be $160,200 (10.68 percent of $1.5 million). Under the VCSP, your payment would be 10 percent of $160,200, or $16,020.

Example. The facts are the same as in the example above, except that some of the workers that are the subject of the VCSP were compensated above the Social Security wage base in the amount of $250,000. Under Code Sec. 3509(a), the employment taxes applicable to $1.25 million would be $133,500 (10.68 percent of $1.25 million) and the employment taxes applicable to the other $250,000 would be $8,100 (3.24 percent of $250,000). Under the VCSP, your payment would be 10 percent of $141,600 ($133,500 plus $8,100), or $14,160.

Summary

In our recessionary economy, the IRS is to be commended for launching the VSCP! Questionable treatment of workers as independent contractors can, following an IRS examination reclassifying the workers as employees, render many businesses insolvent. The VSCP will save many businesses by getting the past cleared up (without interest) in exchange for treating such workers as employees going forward. Any business utilizing independent contractors should strongly consider participating on the VSCP.

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Endnotes

[1] IR-2011-95, September 21, 2011 and Announcement 2011-64, IRB 2011-41, 503.

[2] Rev. Rul. 87-41, 1987-1 CB 296.

[3] *See* Department of the Treasury, Internal Revenue Service, Independent Contractor or Employee? Training Materials, Training 3320-102 (10-96) TPDS 84238I, at 2-7, which is publicly available online at *irs.gov*.

[4] Code Sec. 3121(d).

[5] Reg. §31.3121(d)-1(c)(2).

[6] Code Secs. 3121(d)(1) and (2).

[7] Code Sec. 3121(d)(3).

[8] Code Sec. 3508.

[9] Act Sec. 530(a) of the Revenue Act of 1978 (P.L. 95-600), as amended by Code Sec. 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (P.L. 97-248), 1982-2 C.E. 462, 536. *See* also Internal Revenue Manual (IRM) 4.23.5.2.

[10] Code Secs. 3101-3128 (FICA), 3201-3241 (the Railroad Retirement Tax Act), 3301-3311 (FUTA), and 3401-3404 (income tax withholding). Code Secs. 3501-3510 provide additional rules.

[11] Code Secs. 6011 and 6051.

[12] Reg. § 31.3121(d)-1(c)(1), § 31.3306(i)-1(a), and § 31.3401(c)-1.

[13] IRM 4.23.6 (10-30-2009).

[14] Code Sec. 7436 provides the Tax Court with jurisdiction to review determinations by the IRS that workers are employees for purposes of subtitle C of the Code, or that the organization for which services are performed is not entitled to relief from employment taxes under Sec. 530—the determination must involve an actual controversy and be made as part of an examination.

[15] IRM 4.23.6.1 (10-30-2009).

[16] See Rev. Rul. 75-464, 1975-2 CB 474 and Code Sec. 6205.

[17] Rev. Rul. 75-464, 1975-2 CB 474.

[18] *See* CSP FAQ 7 available online at *irs.gov*.

[19] *See* CSP FAQ 16 available online at *irs.gov*, for information on how payment under the VCSP is calculated. Also *see* Instructions to Form 8952.

[20] *See* CSP FAQ 2 available online at *irs.gov*.

[21] *See* CSP FAQs 12 and 16 available online at *irs.gov*.

[22] *See* CSP FAQ 16 available online at *irs.gov*.

Appendix A. 20 Employment Status Factors
Rev. Rul. 87-41, 1987-1 CB 296

Providing Guidance with Respect to Act Sec. 530 of the Revenue Act of 1978

Over the years courts have identified on a case-by-case basis various facts or factors that are relevant in determining whether an employer-employee relationship exists. In Rev. Rul. 87-41,1 the IRS developed a list of 20 factors that may be examined in determining whether an employer-employee relationship exists. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed; factors other than the listed 20 factors may also be relevant. The 20 factors identified by the IRS in Rev. Rul. 87-41 are as follows:

1. **Instructions.** A worker who is required to comply with other persons' instructions about when, where and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.[2]
2. **Training.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.[3]
3. **Integration.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.[4]
4. **Services Rendered Personally.** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.[5]
5. **Hiring, Supervising and Paying Assistants.** If the person or persons for whom the services are performed hire, supervise and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.[6]
6. **Continuing Relationship.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.[7]
7. **Set Hours of Work.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.[8]
8. **Full Time Required.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.[9]
9. **Doing Work on Employer's Premises.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.[10] Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is

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not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time or to work at specific places as required.[11]

10. **Order or Sequence Set.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work, but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.[12]
11. **Oral or Written Reports.** A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.[13]
12. **Payment by Hour, Week, Month.** Payment by the hour, week or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.[14]
13. **Payment of Business and/or Traveling Expenses.** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.[15]
14. **Furnishing of Tools and Materials.** The fact that the person or persons for whom the services are performed furnish significant tools, materials and other equipment tends to show the existence of an employer-employee relationship.[16]
15. **Significant Investment.** If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.[17] Special scrutiny is required with respect to certain types of facilities, such as home offices.
16. **Realization of Profit or Loss.** A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.[18] For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
17. **Working for More Than One Firm at a Time.** If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor.[19] However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.
18. **Making Service Available to General Public.** The fact that a worker makes his or her services available to the general public on

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a regular and consistent basis indicates an independent contractor relationship.[20]

19. **Right to Discharge.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.[21]
20. **Right to Terminate.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.[22]

Endnotes

1 Rev. Rul. 87-41, 1987-1 CB 296.
2 *See*, for example, Rev. Rul. 68-598, 1968-2 CB 464 and Rev. Rul. 66-381, 1966-2 CB 449.
3 *See* Rev. Rul. 70-630, 1970-2 CB 229.
4 *See Silk*, 331 US 704, 67 SCt 1463, 1947-2 CB 167 (1947), 1947-2 CB 167.
5 *See* Rev. Rul. 55-695, 1955-2 CB 410.
6 Compare Rev. Rul. 63-115, 1963-1 CB 178, with Rev. Rul. 55-593, 1955-2 CB 610.
7 *See Silk, supra* note iv.
8 *See* Rev. Rul. 73-591, 1973-2 CB 337.
9 *See* Rev. Rul. 56-694, 1956-2 CB 694.
10 Rev. Rul. 56-660, 1956-2 CB 693.
11 *See* Rev. Rul. 56-694, 1956-2 CB 694.
12 *Id.*
13 *See* Rev. Rul. 70-309, 1970-1 CB 199 and Rev. Rul. 68-248, 1968-1 CB 431.
14 *See* Rev. Rul. 74-389, 1974-2 CB 330.
15 *See* Rev. Rul. 55-144, 1955-1 CB 483.
16 *See* Rev. Rul. 71-524, 1971-2 CB 346.
17 *Id.*
18 *See* Rev. Rul. 70-309, 1970-1 CB 199.
19 *See* Rev. Rul. 70-572, 1970-2 CB 221.
20 *Supra* note 32.
21 Rev. Rul. 75-41, 1975-1 CB 323.
22 *Supra* note 40.

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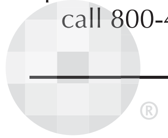

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