

120. Employee vs. Independent Contractor

Due to the changing nature of work, in January 2021, the Department of Labor (DOL) issued new rules to clarify employee vs. independent contractor determinations. These rules are primarily based on an economic realities test and two core factors, as described below.

- An “economic reality” test is used to determine whether an individual is in business for him or herself (independent contractor) or is economically dependent on a potential employer for work (employee).
- Two “core factors” that best describe whether a worker is economically dependent on someone else’s business or is in business for him or herself:
 - The nature and degree of control over the work.
 - The worker’s opportunity for profit or loss based on initiative and/or investment.

If the determination is not clear based on the economic reality test or the two core factors, the DOL rules also provide three “guideposts” which can be examined for further clarification.

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production.

Source: <https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor>

The IRS has also provided guidance for determining whether an employment or contractor arrangement exists based on two primary factors, control and relationship, as described below.

1. **Control.** The relationship between a worker and a business is important. If the business controls what work is accomplished and directs how it is done, it exerts behavioral control. If the business directs or controls financial and certain relevant aspects of a worker’s job, it exercises financial control. This includes:
 - The extent of the worker's investment in the facilities or tools used in performing services
 - The extent to which the worker makes his or her services available to the relevant market
 - How the business pays the worker, and
 - The extent to which the worker can realize a profit or incur a loss
2. **Relationship.** How the employer and worker perceive their relationship is also important for determining worker status. Key topics to think about include:
 - Written contracts describing the relationship the parties intended to create
 - Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation or sick pay

- The permanency of the relationship, and
- The extent to which services performed by the worker are a key aspect of the regular business of the company
- The extent to which the worker has unreimbursed business expenses

Source: <https://www.irs.gov/newsroom/employee-or-independent-contractor-know-the-rules>

Specific to higher education, the IRS has scrutinized several common types of payments to individuals, including part-time instructors, including continuing education instructors, contract payments to coaches, and graduate assistants and fellows.

The Human Resources Office has primary responsibility for employee vs. independent contractor determinations and should be consulted on any questionable or unclear relationships.