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## **EMPLOYMENT LAW FOR BUSINESS OWNERS**

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### **EMPLOYEE OR INDEPENDENT CONTRACTOR?<sup>1</sup>**

Misclassification of workers can lead to payment of back wages, liquidated (double) damages, trouble with the U.S. Department of Labor, IRS, other government agencies, and lawsuits. On January 10, 2024, the U.S. Department of Labor published a final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, revising the Department's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds an earlier rule published January 7, 2021. The new rule takes effect on March 11, 2024.

The following is a summary of points to keep in mind for FLSA compliance.<sup>2</sup>

#### **TO WHOM DOES THE FLSA APPLY?**

The FLSA is a federal law that establishes minimum wage, overtime pay, recordkeeping and child labor standards affecting full-time and part-time employees in the private sector and in federal, state and local governments.

The FLSA's protections do not apply to independent contractors. Under the FLSA, the central question for determining whether a worker is an independent contractor is whether, as a matter of economic reality, the worker is economically dependent upon the employer for work (and is thus an employee) or is the worker in business for themselves (and is thus an independent contractor)?

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<sup>1</sup> This document is not intended as legal advice for any specific set of facts. For legal advice, contact an attorney who practices employment law.

<sup>2</sup> The Small Entity Compliance Guide can be found at the U.S. Department of Labor Wage and Hour Division web site.

## **WHAT DETERMINES WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR UNDER THE FLSA?**

There is no single rule for determining whether an individual is an independent contractor or employee. The “economic reality” test looks to the facts of the situation rather than assuming that a written label, contractual arrangement, or form of business determines if a worker is economically dependent on an employer. Courts have historically considered multiple factors. The final rule uses six factors that businesses and workers should consider when analyzing the economic realities of the relationship.

The factors in the economic reality test of the final rule are:

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the potential employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control;
5. Extent to which the work performed is an integral part of the potential employer’s business; and
6. Skill and initiative.

No one factor or subset of factors carries more weight than others. Additional factors may be relevant.

The U.S. Department of Labor’s guidance sets out a detailed analysis for each of the six factors of the test. For example, for the first factor, opportunity for profit or loss depending on managerial skill, the query may be whether the worker can meaningfully negotiate the charge or pay for the work provided, or whether the worker makes decisions to hire others, purchase materials and equipment or rent space. If the worker has no opportunity for a profit or loss, then this factor suggests the worker is an employee.

## COMMON QUESTIONS<sup>3</sup>

Question: Can an individual waive their rights under the FLSA by signing an independent contractor agreement?

Answer: **No.** If a worker is an employee under the FLSA, then FLSA-protected rights, such as minimum wage and overtime pay, cannot be waived by agreement.

Question: Can an individual be an employee for FLSA purposes even if they are an independent contractor for tax purposes?

Answer: **Yes.** To make matters even more confusing, the Internal Revenue Service (IRS) applies its own test to determine if a worker is an employee or an independent contractor for tax purposes. The IRS utilizes the “common law control” test. The courts consider the Department of Labor’s economic reality test for the FLSA to be broader than the IRS’s test. This means that some workers who may be classified as independent contractors for tax purposes may be employees for FLSA purposes.

Question: If an individual is an employee, are they entitled to minimum wage and/or overtime pay?

Answer: **Yes**, unless an exemption applies. Most employees will be paid at least the federal minimum wage (\$7.25 per hour) for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 in a workweek. However, the FLSA includes numerous exemptions to the Act’s minimum wage and/or overtime pay requirements. For example, section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, or professional employees, as well as computer employees and outside sales employees. For this FLSA exemption to apply, an employee’s specific job duties and earnings must meet all the requirements of the Department’s regulations. See Fact Sheet #17A for more information on the US DOL White Collar Exemptions. (Attached)

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<sup>3</sup> See US DOL Fact Sheet #13, Employee or Independent Contractor Classification Under the FLSA, attached.

Question: What is an employer's liability under the FLSA for misclassifying an employee as an independent contractor?

Answer: If an employee is incorrectly classified as an independent contractor, the employer will be responsible for paying any unpaid wages owed to the employee under the FLSA. Additionally, the employer may have to pay liquidated damages in an amount equal to back wages, as well as civil money penalties. Employers may also be ordered to pay attorneys' fees associated with litigation.



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## **EMPLOYMENT LAW FOR BUSINESS OWNERS**

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### **WHICH FORM DO I USE? W-2 OR 1099?**

Submitting a W-2 or 1099 form with the IRS is not a matter of personal choice. An otherwise successful business can suffer severe financial consequences by making the mistake of misclassifying employees as 1099 contractors. Misclassification can lead to lawsuits, penalties by government agencies, and even jail time. It is important to learn the difference between employees and independent contractors both according to the U.S. Department of Labor's "economic reality test" and the IRS's "common law control" test. Once the determination is correctly made, the appropriate form can be completed and filed.

The following is a brief overview of the difference between independent contractors and employees, and the use of W-2 and 1099 forms.<sup>1</sup>

Independent contractors or "freelancers" are given a 1099 form by the employer at the end of the year to file with the IRS. Independent contractors control when and how they perform their work, and normally use their own equipment and supplies. They provide services to several other clients/customers/patients who pay them directly for their work. They are self-employed and employers are not required to provide benefits or add them to the payroll. Employers do not withhold taxes or Social Security from an independent contractor's wages. Independent contractors are responsible for paying federal and state taxes themselves. Typically, independent contractors are engaged to work for a short period of time to assist with a specific task or project.

Employees are given a W-2 form by the employer at the end of the year to file with the IRS. An employee is a worker who usually is provided office space and supplies by the employer to complete tasks. The employer may offer benefits such as

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<sup>1</sup> This document is not intended as legal advice for any specific set of facts. For legal advice, contact an attorney who practices employment law.

insurance, retirement plans, or vacation days. The employer controls the details of how the work is done, and when and how the employees perform their work. The employer deducts Social Security tax, income tax, Medicare tax, and state income taxes from an employee's wages.

Penalties for misclassifying employees can be imposed by government agencies, including the IRS and the U.S. Department of Labor. If an agency determines that the error was intentional (or that the employer with due diligence should have known better), severe penalties can be imposed, including payment of double the amount of any unpaid back wages owed, and additional fines and penalties such as paying 100% of both the employer and employee's share of FICA taxes. The IRS also can bring criminal charges that carry penalties up to \$1,000.00 per misclassified worker and impose one year in prison.

Even if it is determined that the error was an honest mistake, the employer may face a fine for each W-2 it failed to file correctly, 1.5% of wages, 40% of FICA taxes that were not withheld from the employees, 100% of the FICA taxes the employer should have paid, and 0.5% of the unpaid tax liability for each month up to 25%.

If uncertain about how an employee should be classified, an employer can file a Form SS-8 with the IRS and it will review the relationship between the employer and the worker to make a determination. This process may be time-consuming; for a more timely solution, contact a tax advisor or employment lawyer.

Additional information from the Internal Revenue Service is attached.



**WAGE AND HOUR DIVISION**  
UNITED STATES DEPARTMENT OF LABOR

# Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)

Revised January 2024

This fact sheet provides general information on how to determine if a worker is an employee or independent contractor under the FLSA. Misclassification occurs when a worker is an employee under the FLSA but is instead treated as an independent contractor by the employer. Misclassification may deny workers minimum wage, overtime pay, and other protections. Also, employers that comply with the law are placed at a competitive disadvantage compared to other businesses that misclassify employees. It is an employer's responsibility to determine if a worker is an employee or independent contractor under the FLSA.

## Is a Worker an Employee or an Independent Contractor?

The Department has issued regulations addressing how to analyze whether a worker is an employee or an independent contractor under the FLSA (29 CFR part 795), [effective March 11, 2024](#). Employees receive the protections of the FLSA. Independent contractors are in business for themselves and therefore are not covered by the FLSA.

For a worker to be protected by the minimum wage and overtime pay requirements of the FLSA, the worker must be an "employee" of the employer, meaning that there is an employment relationship between the worker and employer. Independent contractors do not have these protections. Whether a worker is an employee or an independent contractor under the FLSA is determined by looking at the economic realities of the worker's relationship with the employer. If the economic realities show that the worker is economically dependent on the employer for work, then the worker is an employee. If the economic realities show that the worker is in business for themselves, then the worker is an independent contractor. The economic realities of the entire working relationship are looked at to decide whether a worker is an employee or an independent contractor. Employment under the FLSA is not determined by technical concepts or common law standards of control; it is broader than the common law standard often applied to determine employment status under other Federal laws.

## What Is the Economic Reality Test?

The economic reality test uses multiple factors to see if an employment relationship exists under the FLSA (29 CFR 795.110). The goal of the test is to decide if the worker is economically dependent on the employer for work or is instead in business for themselves. All factors should be considered. No single factor determines a worker's status, and no one factor or combination of factors are more important than the other factors. Instead, the totality of the circumstances of the working relationship should be considered.

The following factors, discussed more below, should guide the assessment of whether a worker is an employee under the FLSA or an independent contractor in business for themselves:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the employer,
3. Permanence of the work relationship,
4. Nature and degree of control,
5. Whether the work performed is integral to the employer's business, and
6. Skill and initiative.

Additional factors may be considered as well if they are relevant to whether the worker is in business for themselves or is economically dependent on the employer for work. There are certain facts, however, that are not relevant to whether an employment relationship exists. What the worker is called is not relevant—a worker may be an employee under the FLSA regardless of the title or label they are given. A worker who is paid off the books or receives a 1099 is not necessarily an independent contractor, and agreeing verbally or in writing to be classified as an independent contractor—including by signing an independent contractor agreement—does not make a worker an independent contractor under the FLSA. Additionally, such facts as the place where work is performed, whether a worker is licensed by State/local government, and the time or mode of pay do not determine whether a worker is an employee or an independent contractor under the FLSA.

## Economic Reality Test Factors

- 1. Opportunity for profit or loss depending on managerial skill.** This factor primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making. Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising. Taking such actions, or having a real opportunity to take such actions but making a business decision not to (for example, because the potential profit to be gained may not justify the expense that would be incurred), indicates that the worker is an independent contractor. Not taking such actions, or having only a theoretical opportunity to take such actions (for example, the worker must get approval from the employer), indicates that the worker is an employee. A worker who decides to work more hours or take on more jobs when paid a fixed rate per hour, day, or job is generally not exercising managerial skill like an independent contractor even if those decisions may lead to more earnings.

*Examples: Opportunity for Profit or Loss Depending on Managerial Skill*

- A worker for a landscaping company performs assignments only as decided by the company for its corporate clients. The worker does not independently choose assignments, ask for additional work from other clients, advertise the landscaping services, or try to reduce costs. The worker regularly agrees to work additional hours to earn more money. In this example, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may change based on the work available and their willingness to work more. Because of this lack of managerial skill affecting their opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.
  - In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. These facts indicate independent contractor status under the opportunity for profit or loss factor.
- 2. Investments by the worker and the employer.** This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor status. A lack of such capital or entrepreneurial investments weighs in favor of employee status. Costs to a worker of tools for a specific job and costs that the employer imposes on the worker are not capital or entrepreneurial investments that indicate independent contractor status. In addition to considering the nature of any investments by the worker, the worker's investments should be compared to the employer's investments in its overall business. The worker's investments do not need to be equal to the employer's and should not be compared only in dollar amounts or size. The focus should be on whether the worker makes similar types of investments as the employer (even if on a smaller scale) or investments of the type that would allow the worker to operate independently in the worker's industry or field. Such investments by the worker in comparison to the employer weigh in favor of independent contractor status, while a lack of investments that support an independent business indicate employee status.

*Examples: Investments by the Worker and the Employer*

- A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. These facts indicate employee status under the investment factor.



- A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents their own space. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (e.g., they allow the worker to do more work and find new clients). These facts indicate independent contractor status under the investment factor.

**3. Degree of permanence of the work relationship.** This factor primarily looks at the nature and length of the work relationship. Work that is sporadic or project-based with a fixed ending date (or regularly-occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs indicates independent contractor status. Work that is continuous, does not have a fixed ending date, or may be the worker's only work relationship indicates employee status. The lack of a long working relationship does not necessarily suggest that the worker is an independent contractor unless it is because of the worker's business decision. Short-term jobs for multiple employers may be due to the seasonal or temporary nature of the work or industry, and not the worker's business decision to market their services to multiple entities, and therefore may indicate employee status.

*Examples: Degree of Permanence of the Work Relationship*

- A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as decided by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity as the cook does not cook for other venues. These facts indicate employee status under the permanence factor.
- A cook has prepared specialty meals occasionally for an entertainment venue over the past three years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work from the entertainment venue for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.

**4. Nature and degree of control.** This factor primarily looks at the level of control the potential employer has over the performance of the work and the economic aspects of the working relationship. Relevant facts include whether the potential employer: controls hiring, firing, scheduling, prices, or pay rates; supervises the performance of the work (including via technological means); has the right to supervise or discipline workers; and takes actions that limit the worker's ability to work for others. Where the potential employer maintains more control over these aspects of the work relationship, this factor weighs in favor of employee status, and where the potential employer maintains less control over these aspects of the work relationship, this factor weighs in favor of independent contractor status. Control that is for the sole purpose of complying with a specific, applicable federal, state, tribal, or local regulation, rather than the employer's own internal policies or customer standards, does not weigh in favor of an employment relationship.

*Examples: Nature and Degree of Control*

- A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines the staff assignments. Alpha House's policies prohibit nurses from working for other nursing homes while employed with Alpha House to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.
- Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse provides therapy sessions to residents at Beta House as well as other nursing homes in the community at the same time. These facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status under the control factor.

**5. Extent to which the work performed is an integral part of the employer's business.** This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which indicates employee status. Where the work performed by the worker is not critical, necessary, or central to the potential employer's principal business, this indicates independent contractor status. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the work they perform is an integral part of the business.

*Examples: Extent to Which the Work Performed is an Integral Part of the Employer's Business*

- A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because a necessary part of a tomato farm is picking the tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.
- Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

**6. Skill and initiative.** This factor primarily looks at whether the worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business. The fact that a worker does not use specialized skills (for example, the worker relies on the employer to provide training for the job) indicates that the worker is an employee. Additionally, both employees and independent contractors can be skilled, so the fact that a worker is skilled does not indicate one status or the other. The focus should be on whether the worker uses their skills in connection with business initiative. If the worker does, that indicates independent contractor status; if the worker does not, that indicates employee status.

*Examples: Skill and Initiative*

- A highly skilled welder provides welding services for a construction firm. The welder does not make any independent decisions at the job site beyond what it takes to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding for the next job, or use their welding skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.
- A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.

Additional factors may be considered if they assist in assessing whether the worker is in business for themselves or is economically dependent on the employer for work.

## Requirements

When an employer-employee relationship exists and the employee is performing work that is covered under the FLSA, the employee must be paid not less than the federal minimum wage (\$7.25 per hour) and overtime pay that is not less than one and one-half the regular rate of pay for all hours worked over 40 per week unless a relevant exemption applies. The FLSA also has recordkeeping requirements, retaliation protections, and child labor provisions which regulate the employment of minors under the age of eighteen.

### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.dol.gov/agencies/whd> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.





**WAGE AND HOUR DIVISION**  
UNITED STATES DEPARTMENT OF LABOR

# Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

Revised September 2019

NOTICE: On August 30, 2023, the Department of Labor (Department) announced issuance of a [Notice of Proposed Rulemaking \(NPRM\)](#), *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*. The NPRM proposes to update and revise the regulations issued under section 13(a)(1) of the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, and professional employees. Proposed revisions include increasing the standard salary level and the highly compensated employee total annual compensation threshold, as well as providing an automatic updating mechanism that would allow for the timely and efficient updating of all the thresholds to reflect current earnings data.

**\*Note:** The Department of Labor revised the regulations located at 29 C.F.R. part 541 with an effective date of January 1, 2020. WHD will continue to enforce the 2004 part 541 regulations through December 31, 2019, including the \$455 per week standard salary level and \$100,000 annual compensation level for Highly Compensated Employees. The final rule is available at: <https://www.federalregister.gov/documents/2019/09/27/2019-20353/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees>.

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the FLSA as defined by Regulations, [29 C.F.R. Part 541](#).

The FLSA requires that most employees in the United States be paid at least the [federal minimum wage](#) for all hours worked and [overtime pay](#) at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both [minimum wage](#) and [overtime pay](#) for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$684\* per week. Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for [executive](#), [administrative](#), [professional](#), [computer](#) and [outside sales](#) employees, and for more information on the [salary basis](#) requirement.

## Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

## Administrative Exemptions

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

## Professional Exemption

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

## Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

## **Outside Sales Exemption**

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

## **Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$107,432 or more (which must include at least \$684\* per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

## **Blue-Collar Workers**

The exemptions provided by FLSA Section 13(a)(1) apply only to "white-collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

## **Police, Fire Fighters, Paramedics & Other First Responders**

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

## **Other Laws & Collective Bargaining Agreements**

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

### **Where to Obtain Additional Information**

**For additional information, visit our Wage and Hour Division Website:**

**<http://www.dol.gov/agencies/whd> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.



The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.



# Independent Contractor (Self-Employed) or Employee?

It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold and deposit income taxes, social security taxes and Medicare taxes from the wages paid to an employee. Additionally, you must also pay the matching employer portion of social security and Medicare taxes as well as pay unemployment tax on wages paid to an employee. Generally, you do not have to withhold or pay any taxes on payments to independent contractors.

## Select the Scenario that Applies to You:

- **I am an independent contractor or in business for myself**

If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax obligations if you are self-employed (an independent contractor), see our [Self-Employed Individuals Tax Center](#).

- **I hire or contract with individuals to provide services to my business**

If you are a business owner hiring or contracting with other individuals to provide services, then you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.

## Determining Whether the Individuals Providing Services are Employees or Independent Contractors

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be:

### Related Topics

- [Businesses with Employees](#)
- [Hiring Employees](#)
- [Know Who You're Hiring Independent Contractor \(Self-employed\) vs Employee](#)
- [Voluntary Classification Settlement Program \(VCSP\) Frequently Asked Questions](#)
- [Topic No. 762, Independent Contractor vs. Employee](#)

### Forms & Instructions

- [About Form SS-8, Determination of Worker Status for](#)

- An independent contractor
- An employee (common-law employee)
- A statutory employee
- A statutory nonemployee
- A government worker

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

## Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

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

Businesses must weigh all these 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 keys are to look at the entire relationship and consider the extent of the right to direct and control the worker. Finally, document each of the factors used in coming up with the determination.

## Form SS-8

If it is still unclear whether a worker is an employee or an independent contractor after reviewing the three categories of evidence, then Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax

Purposes of Federal Employment Taxes and Income Tax Withholding

- Completing Form SS-8

## Publications

- About Publication 15, (Circular E), Employer's Tax Guide
- About Publication 15-A, Employer's Supplemental Tax Guide, (Supplement to Pub. 15, Employer's Tax Guide)
- About Publication 15-B, Employer's Tax Guide to Fringe Benefits
- Publication 1779, Independent Contractor or Employee (PDF)
- Publication 5067, Voluntary Classified Settlement Program (VCSP) "At a Glance" (PDF)
- Publication 5520, How Businesses Determine if a Worker is an Employee or



Withholding [PDF](#), can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status.

Be aware that it can take at least six months to get a determination. A business that continually hires the same types of workers to perform particular services may want to consider filing the Form SS-8 [PDF](#).

## Employment Tax Obligations

Once a determination is made (whether by the business or by the IRS), the next step is filing the appropriate forms and paying the associated taxes.

- Forms and associated taxes for independent contractors
- Forms and associated taxes for employees

## Misclassification of Employees

### Consequences of Treating an Employee as an Independent Contractor

If you classify an employee as an independent contractor and you have no reasonable basis for doing so, then you may be held liable for employment taxes for that worker (the relief provisions, discussed below, will not apply). See Internal Revenue Code section 3509 for more information.

### Relief Provisions

If you have a reasonable basis for not treating a worker as an employee, then you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977. See Publication 1976, Section 530 Employment Tax Relief Requirements [PDF](#), for more information.

### Misclassified Workers Can File Social Security Tax Form

Workers who believe they have been improperly classified as independent contractors by an employer can use Form 8919, Uncollected Social Security and Medicare Tax on Wages, to figure and report the employee's share of uncollected Social Security and Medicare taxes due on their compensation.

Independent  
Contractor (PDF)

## Videos

- IRS Video Portal [↗](#)
- Proper Worker Classification Audio [↗](#)
- Small Business Taxes: The Virtual Workshop - Worker Classification [↗](#)

## **Voluntary Classification Settlement Program**

The Voluntary Classification Settlement Program (VCSP) is an optional program that provides taxpayers with an opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat their workers (or a class or group of workers) as employees. To participate in this voluntary program, the taxpayer must meet certain eligibility requirements. Apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, in order to enter into a closing agreement with the IRS.

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# Forms and Associated Taxes for Independent Contractors

## Form W-9

If you've made the determination that the person you're paying is an independent contractor, the first step is to have the contractor complete Form W-9, Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and Taxpayer Identification Number, or TIN, of the payee. The W-9 should be kept in your files for four years for future reference in case of any questions from the worker or the IRS.

## Form 1099-NEC

Beginning with Tax Year 2020, you must use Form 1099-NEC, Nonemployee Compensation, to report payments of nonemployee compensation (NEC) previously reported in box 7 on Form 1099-MISC. The separate instructions for filers/issuers for Form 1099-NEC are available in the Instructions for Forms 1099-MISC and 1099-NEC [PDF](#).

Payers use Form 1099-NEC to report payments made in the course of a trade or business to others for services.

If you paid someone who is not your employee, such as a subcontractor, attorney or accountant \$600 or more for services provided during the year, a Form 1099-NEC needs to be completed, and a copy of Form 1099-NEC must be provided to the independent contractor by January 31 of the year following payment. You must also send a copy of this form to the IRS by January 31.

Also note that independent contractors may have their own employees or may hire other independent contractors (subcontractors). In either case, they should be aware of their tax responsibilities, including filing and reporting requirements, for

## Related Topics

- Independent Contractor (Self-Employed) or Employee?
- Reporting Payments to Independent Contractors
- Am I Required to File a Form 1099 or Other Information Return?
- Online Ordering for Information Returns and Employer Returns
- Backup Withholding "B" Program
- Information Reporting for Form 1042-S
- Penalties

these workers.

There are certain situations where a Form 1099-NEC is not required. These exceptions are listed in the Instructions for Forms 1099-MISC and 1099-NEC [PDF](#).

## Backup Withholding and Nonresident Alien Withholding

Withholding may be required on nonemployee compensation. There are two withholding types for non-wage withholding:

- Non-wage withholding pursuant to Internal Revenue Code (IRC) 3406 (Backup Withholding) and 3402.
- Withholding of tax on nonresident aliens pursuant to IRC 1441.

You must withhold 24% (backup withholding rate) from reportable payments of nonemployee compensation to U.S. persons (individuals or entities) if the U.S. person has not provided their taxpayer identification number (TIN) in the manner required, or the IRS notifies you that the TIN furnished by the payee is incorrect and the payee does not certify their TIN as required in the notice. Form 945, Annual Return of Withheld Federal Income Tax, must be filed if the payer is required to deduct backup withholding. For more information on Form 945, see Topic No. 307, Backup Withholding and Publication 15, (Circular E), Employer's Tax Guide.

Independent personal services (a term commonly used in tax treaties) are personal services performed by an independent nonresident alien contractor as contrasted with those performed by an employee. Payments made to these individuals may be subject to 30% withholding (nonresident alien withholding rate) unless a lower rate is provided by tax treaty or the law. If you cannot determine whether the payee is a foreign person or a U.S. person, the presumption rules require you to treat the payee as a non-exempt U.S. person and deduct backup withholding. Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, must be filed if the payer is required to file Form 1042-S. A Form 1042-S is required even if the tax was not actually withheld. For more information on withholding on payments to nonresident aliens, see NRA Withholding, Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, and Publication 901, U.S. Tax Treaties.

## Publications

- Publication 1779, Independent Contractor or Employee [PDF](#)

## E-File Forms 1099 With IRIS

The Information Returns Intake System (IRIS) Taxpayer Portal is a system that provides a no cost online method for you to electronically file Forms 1099. This free electronic filing service is secure, accurate and requires no special software. This may be especially helpful to any small business that currently sends their 1099 forms on paper to the IRS. Through the Taxpayer Portal, you can submit automatic extensions, make corrections and reduce expenses related to paper filing. The Taxpayer Portal allows you to enter data to create Forms 1099 by either keying in the information or uploading a .csv file. For more information see Publication 5717, IRS Portal User Guide [PDF](#). You may continue to use the Filing Information Returns Electronically (FIRE) system to file your information returns.

## Filing Electronically With FIRE

The Filing Information Returns Electronically (FIRE) system is set up for financial institutions and others to file Information Return Forms 1042-S, 1098, 1099, 5498, 8027 or W-2G. Information Returns can be filed electronically, however, you must have software that can produce the file in the proper format as required by Publication 1220. FIRE does not provide an electronic fill-in form option.

## E-Filing Requirements Will Change Beginning in 2024

The Department of the Treasury and the Internal Revenue Service issued final regulations [↗](#) amending the rules for filing returns and other documents electronically (e-file). These regulations affect filers of many types of returns including information returns (for example, Forms 1099) and withholding tax returns (for example, Forms 945 and 1042).

For information returns (for example, Form 1099 series) required to be filed on or after January 1, 2024, the final regulations

- reduce the 250-return threshold enacted in prior regulations to generally require electronic filing by filers of 10 or more returns in a calendar year.
- require filers to aggregate almost all information return types covered by the regulation to determine whether a filer meets the 10-return threshold and is required to e-file their information returns.

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# Employment Taxes

If you are self-employed, visit the [Self-Employed Individuals Tax Center](#) page for information about your tax obligations.

## Understanding Employment Taxes

Understand the various types of taxes you need to deposit and report such as, federal income tax, social security and Medicare taxes and Federal Unemployment (FUTA) Tax.

## Depositing and Reporting Employment Taxes

You must deposit federal income tax and Additional Medicare Tax withheld and both the employer and employee social security and Medicare taxes. You also must report on the taxes you deposit, as well as report wages, tips and other compensation paid to an employee.

## Employment Tax Due Dates

You must deposit and report your employment taxes on time.

## Correcting Employment Taxes

"X" forms are used to report adjustments to employment taxes and to claim refunds of overpaid employment taxes.

## E-file Employment Tax Forms

Learn how to electronically file your employment tax forms.

## Related Topics

- [Online Tax Calendar](#)

## Forms & Instructions

- [Employment Tax Forms](#)
- [Forms and Associated Taxes for Independent Contractors](#)
- [Reporting Payments to Independent Contractors](#)
- [Online Ordering for Information Returns and Employer Returns](#)

## Publications

- [Employment Tax Publications](#)



# When would I provide a Form W-2 and a Form 1099 to the same person?

A worker's role determines which information return an entity would provide. Entities provide a Form 1099-Misc to independent contractors and Form W-2 to employees [↗](#). See this [article on worker classification for more information](#). However, there may be instances where a worker [↗](#) may be serving as an independent contractor and an employee for the same entity.

## Example

Joe is a custodian who works for a county public school. The county views him as an employee and issues him a Form W-2 for these services. He also has a business that he owns and operates that provides snow plowing services on nights and weekends. Any snow plowing services he performs for the county are separate and distinct from his services as a custodian. Therefore the county should treat him as an independent contractor for his snow plowing business. The county reports this income on a Form 1099-Misc in Box 7, Nonemployee Compensation.

**NOTE:** You should never report taxable fringe benefits on Form 1099-MISC (Box 7 – Nonemployee Compensation). Report them on Form W-2.

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