

EDD Factors Used to Determine Whether a Worker is an Employee or an Independent Contractor

We recently published an article on our website entitled [The Famous IRS "20 Factors" Used to Determine Whether a Worker is an Independent Contractor - Revenue Rule 87-41](#). Now it's time to look at the factors used by the EDD. They are not necessarily the same. In fact, the EDD has a few more factors than the IRS. What makes things even more complicated is that the EDD will use the IRS factors when it suits their purpose. This means things can get confusing and there is no certainty of tests when it comes to dealing with the EDD. In other words, the IRS does not use the EDD factors, but the EDD uses IRS factors when it serves its purposes.

The EDD refers to its factors as the common law tests. According to the EDD's audit manual, "Common law has its basis in the old English common law principals of master/servant. These original relationships have continued to evolve in our modern society and are continually expanded and redefined through administrative and judicial interpretations. Through a systematic application of the employer and worker is that of common law employment or if, in fact, the work being performed is that of an independent contractor."

Direction and Control – That's What It's All About

By far the most important factor that the EDD relies upon to determine whether a worker is an employee or independent contractor is whether or not the employer has the right to control that worker. Whether or not that control is actually exercised may not be that important. It's the "right to control" that makes all the difference in the world to the EDD. Here's what the EDD's audit manual has to say about the right to control:

“While the principal may not exercise the direction and control, the key factor is whether the right of control exists. Strong evidence of control is the principal's right to discharge at will, without cause.”

Very Important Court Cases

Every EDD Auditor and every Administrative Law Judge hearing employee/independent contractor cases will rely upon the following "BIG 4" California cases in reaching a decision on the treatment of workers:

Empire Star Mines v California Employment Commission (1946) 28 Cal.2d 33

Isenberg v California Employment Stabilization Commission (1947) 30 Cal.2d 34

Tieberg v California Unemployment Insurance Appeals Board (1970) 2 Cal.3d 943

S.G. Borello & Sons v Department of Industrial Relations (1989) 48 Cal.3d 341

Comparison Charts of “Employment” and “Independent Contractor” Factors Used by the EDD

Rather than remake the wheel, I am presenting the EDD factors to you exactly as they are presented to EDD auditors in their Audit Manual. There are a total of 23 factors as follows:

The following comparison chart of ‘Employment’ and ‘Independent Contractor’ factors will assist the auditor in making this determination:

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
1. Instructions	A worker who is required to comply with instructions about when, where, and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished. Some employees may work without receiving instructions because they are highly proficient and conscientious workers. Even if no instructions are given, the control factor is present if the employer has the <u>right</u> to give instructions.	An independent contractor decides how to do the job, establishes his or her own procedures, and is not supervised. The entity engaging his or her services is only interested in the end result.
2. Training	Training of a worker by an experienced employee working with him or her, by correspondence; by	An independent contractor ordinarily uses his or her own methods and receives no training

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
2. Training (cont.)	required attendance at meetings or by other methods, is a factor of control indicating that the employer wants the services performed in a particular manner. This is especially true if the training is given periodically or at frequent intervals.	from the purchaser of the services. He or she is not required to attend meetings.
3. Integration	If the individual's services are so integrated into an employer's operations that the success or continuation of the business depends on the performance of the services, it generally indicates employment.	If the individual's performance of service and those of his/her assistants establish, or affect his or her own business reputation and not the business reputation of those who purchase his services, it is an indication of an independent contractor relationship.
4. Services Rendered Personally	If the services must be rendered personally, it indicates the employer is interested in the methods, as well as the results.	An individual's right to substitute another's services without the employer's knowledge suggests the existence of an independent relationship.
5. Hiring Assistants	An employee works for an employer who hires, supervises, and pays	An independent contractor hires, supervises, and pays

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
5. Hiring Assistants (cont.)	assistants. If an employee hires and supervises assistants at the direction of the employer, he or she is acting as an employee in the capacity of a foreman or representative of the employer.	assistants under a contract that requires him or her to provide materials and labor.
6. Continuing Relationship	The existence of a continuing relationship between an individual and the person for whom he or she performs services indicates an employer-employee relationship. If the arrangement consists of continuing or recurring work, the relationship is considered permanent, even if the services are rendered on a part-time basis, are seasonal in nature, or if the person actually works for only a short time.	The relationship between an independent contractor and his or her client ends when the job is finished.
7. Set Hours of Work	The establishment of set hours of work by the employer is a factor of control. If the nature of the occupation makes fixed hours impractical, a requirement that the worker work at certain times is an element of control.	An independent contractor is the master of his or her own time.

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
8. Full-Time Work	<p>Full-time work for the business is indicative of control by the employer since it restricts the worker from doing other gainful work. Full-time does not necessarily mean an eight hour day or a five day week. Its meaning may vary with the intent of the parties, the nature of the occupation, and the customs in the locality. These conditions should be considered in defining full-time. Full-time services may be required even though not specified orally or in writing.</p>	<p>An independent contractor is free to work when he or she chooses and to set his or her daily or weekly schedule. An independent contractor would normally perform services less than full-time for one principal.</p>
9. Work Done on Premises	<p>Doing the work on the employer's premises, or on a route, or at a location designated by an employer implies employer control, especially where the work is of such a nature that it could be done elsewhere. The use of desk space and of telephone and stenographic services provided by an employer places the worker within the employer's direction</p>	<p>Doing work away from the employer's premises when it could be done on the employer's premises indicates a lack of control, especially when the work is free from supervision.</p>

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
9. Work Done on Premises (cont.)	and supervision unless the worker has the option as to whether he or she wants to use these facilities. However, the fact that work is done off the premises does not indicate freedom from control since some occupations, e.g., employees of construction contractors, are necessarily performed away from the employers premises.	
10. Order or Sequence Set	If a person must perform services in the order or sequence set by the employer, it shows that the worker is not free to follow an independent pattern of work, but must follow the established routines and schedules of the employer. Often, because of the nature of the occupation, the employer either does not set the order of the services or sets them infrequently. Control is sufficiently shown, however, if the employer retains the right to do so.	If the person engaging the services is not interested in the order or sequence by which the individual completes the work, there is an indication that there is a lack of control over the manner and means by which the work is performed.

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11. Reports	The submission of regular oral or written reports indicates control since the worker must account for his or her actions.	An independent contractor is not required to file reports which constitutes a review of his work. (However, reports related only to an end result are not an indication of employment or independence.)
12. Payments	<p>Payment by the hour, week, or month, represents an employer-employee relationship.</p> <p>The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings, tends to indicate the existence of an employer-employee relationship.</p>	Payment on a commission or job basis is customary where the worker is an independent contractor. Payment by the job includes a lump sum computed by the number of hours required to do the job at a fixed rate per hour.
13. Expenses	Payment of the worker's business and travel expenses by the employer indicates control over the worker.	A person who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Since the person is accountable to no other person for the expenses, the

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
13. Expenses (cont.)		the person is free to work according to his or her own methods and means
14. Tools and Materials	The furnishing of tools, materials, etc., by the employer indicates control over the worker. In some occupations and industries it is customary for individuals to provide their own tools, which are usually small hand tools; in that case, workers may also be considered to be employees.	When a worker furnishes tools and materials, especially when a substantial sum is involved there is an indication of independence.
15. Investment	The furnishing of all necessary facilities by the employer tends to indicate an employment relationship. Facilities include generally, equipment or premises necessary for the work but not tools, instruments, clothing, etc., which are commonly provided by employees in their particular trade.	A significant investment by the worker in facilities used by him in performing services for another tends to show an independent status.
16. Profit and Loss	When workers are insulated from loss or are restricted in the amount of profit they can gain, they usually are employees. The opportunity for higher earnings, such as from	The possibility of a profit or loss for the worker as a result of his/her services generally shows independent contractor status. Profit or loss implies

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
16. Profit and Loss (cont.)	pay on a piece work basis or the possibility of gain or loss from a commission arrangement, is not considered profit or loss.	the use of capital by the individual in an independent business. Profit or loss generally depends on his/her own decisions. Factors include: whether he/she hires, directs, and pays assistants; has his/her own office, equipment, materials or other facilities for doing the work; has continuing/recurring liabilities/obligations and pays his/her own expenses.
17. Workers for More Than One Person or Firm	It is possible that a person may work for a number of people or firms and still be an employee of one or all of them because he/she works under the control of each firm.	Work for a number of persons or firms at the same time usually indicates an independent contractor status because the worker is usually free, in such cases, to accept or reject assignments.
18. Offers Services to General Public	If a worker performs service for only one person, does not advertise his or her services to the general public, does not hold licenses, or hire assistants, and performs services on a continuing	The availability of services to the general public usually indicates independent contractor status. This may be evidenced by the worker having his or her own office and

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
18. Offers Services to General Public (cont.)	basis, it is an indication of employment relationship.	assistants, hanging out a “shingle” in front of his or her home or office, holding business licenses, maintaining business listings in telephone directories, or advertising in newspapers, trade journals, magazines, etc.
19. Right to Fire	If an employer has the right to discharge an individual at will without liability, that worker is considered an employee. The employer exercises the control through the ever-present threat of dismissal, which causes the worker to obey instructions. A restriction on the employer’s right to discharge in a labor union contract does not detract from the existence of an employment relationship.	An independent contractor cannot be discharged as long as he produces a result that measures up to his contract specifications. However, the relationship can be terminated with liability.
20. Right to Quit	The <u>right to quit</u> at any time without incurring liability indicates an employer-employee relationship.	An independent contractor usually agrees to complete a specific job and he or she is responsible for its satisfactory completion or is legally obligated to make good faith to complete the job. If

ELEMENTS	EMPLOYMENT	INDEPENDENT CONTRACTORS
20. Right to Quit (cont.)		the principal terminates an independent contractor on a contract job without cause, the principal is still liable to the independent contractor for the job.
21. Custom in Industry and Location	If the work is traditionally performed by employees under the direction of a supervisor, it is an indication of employment.	If the work is usually performed by independent contractors, it is an indication of independence.
22. Required Level of Skill	A low level of technical skill is strong evidence of employment, since as the skill level declines there is less room to exercise the discretion necessary for independence.	A high level of technical skill is important when combined with other factors such as owning a separate and distinct business.
23. Belief of Parties	<p>It is an indication of employment if:</p> <ul style="list-style-type: none"> • Both the worker and the State believe the relationship is employment. • If either party believe that the relationship is employment. 	If all parties agree that the relationship is one of independence, it may be. However, consideration should be given to the fact that many individuals do not know how an employee determination is made, and believe they are an independent contractor because they were told they are.

Robert Schriebman has written the only 2 books ever published dealing with how California Employment Development Department (EDD) operates. See “California Tax Collection Practice and Procedures” and “California Taxation Practice and Procedure”, both published by Commerce Clearing House.