



Employee or Independent Contractor?

by David B. Gregory, Financial Officer

Many churches like to classify workers as independent contractors in order to save taxes and to save the effort to prepare all the required payroll tax forms. Both the IRS and California provide Publications to assist you in determining if a worker is an employee or independent contractor. If you make the wrong decision, you could pay dearly.

The IRS and the California Franchise Tax Board have both produced Publications to assist employers to determine if a worker is an employee or independent contractor. [IRS Publication 1779](#) and [Publication 15](#) provide guidelines to make a determination. California has also provided guidelines in determining if a worker is an employee or independent contractor with their article titled "[Independent Contactor or Employee](#)" and [California Publication DE 44](#).

The IRS guidelines fall under three categories: behavioral control, financial control, and relationship of the parties. It is important to look at all three categories, as no single guideline provides the answer.

Behavioral Control shows how much direct control the church has over the worker. The more direct control, the greater the likelihood the worker is an employee. The more independent the worker is, the greater the likelihood he is an independent contractor.

Financial Control shows how much financial control the church has over the worker. The more financial investment the worker has made, including setting up the business, paying expenses, and risk of making a profit or loss, the greater likelihood the worker is an independent contractor. The more financial investment the church has made increases the probability the worker is an employee.

Relationship of the Parties shows how the worker and church perceive their relationship, including the expectation of benefits. Any "employee type" benefits increase the probability the workers is an employee. A written contract at the beginning of the employment is very helpful in making the exact nature of the relationship clear.

In addition to the three IRS categories, California gives us a main test and secondary factors. The Main Test is: Does the church have the right to direct and control the manner and means in which the worker carries out the job? A yes answer indicates the worker is an employee.

I have summarized the secondary factors as follows. The more yes answers there are, the greater the indication the worker is an independent contractor:

- Does the worker make his services available to the general public?
- Does the worker do similar work for other clients?
- Does the worker hire, supervise and pay assistants?

- Does the worker work without direct supervision?
- Does the worker work without direct instructions regarding how to do the work?
- Is the worker highly skilled and specialized?
- Does the worker pay for his own training?
- Does the worker provide his own tools/office equipment and supplies?
- Does the worker primarily do his work away from the church?
- Is the work sporadic and short term in duration?
- Is the worker paid based on completion of a project verses paid based on time worked?
- Does the worker believe they have not created an employee/employer relationship?
- Can the worker be held financially responsible if he terminates the work?
- Does the worker decide when he will work and the number of hours he will work?

If you are not sure if a worker is an employee or independent contractor, you can ask the IRS or EDD for assistance.

One church recently asked the IRS if a person who plays worship music at church is an employee. This worship leader plays at two services every Sunday and rehearses 2 hours during the week. The worker provided his personal instrument, while the church provided most of the other supplies and materials. The worker did not assume any financial risk, there was no written contract, nor did the worker perform this function for other churches. Most churches would be surprised with the IRS response. You can read the [complete IRS letter dated October 26, 2009](#). In it, the IRS stated that they consider the worker an employee.

The employer could be liable for several years of the employer FICA Taxes, a portion of the employee FICA Taxes, FIT withholding, penalties and interest. The employer may be liable for IRC Section 3509(a) taxes of 10.68% and IRS Section 3509(b) taxes of 13.71%. Keep in mind that this is after the worker already paid these taxes in full.

I suggest you read this letter to determine if this IRS case may be applicable to you.