

## Employee (W-2) or Independent Contractor (1099) Can I choose?

**How do you know the difference** between an employee and an independent contractor? For many employers, and in many situations, the answer to this question may seem obvious. However, in other cases, the determination of employment status may not be quite as clear.

*As a general rule, if the Employer has the right to control or direct only the result of the work, and not what will be done and how it will be done, the worker/employee is an Independent Contractor. Conversely, a company, who in addition to specifying the expected work outcome, is directly involved in defining specific tasks to be performed, is providing the “work tools” to be used in accomplishing those tasks, and is determining the working conditions, such as work location and hours of work for the worker/ employee, then the company may be an Employer and not just a “client”.*

**Why is this so important?** State and federal agencies are cracking down on the practice of **misclassifying workers as contractors when in reality the worker performs the same duties as full-time employees.** The IRS has the misclassification issue in its crosshairs, not only because contractors are denied employment benefits such as unemployment compensation, but also because no payroll tax is levied on those workers. Just ask Microsoft. In 1989 the IRS audited Microsoft’s employment practices. The IRS determined that Microsoft had misclassified thousands of workers as independent contractors, and, after protracted and costly legal wrangling, Microsoft eventually settled the case for \$97 million. In this case, a lot of unemployed IT workers who had been classified as independent contractors didn’t realize that they were not entitled to unemployment benefits. When they applied for those benefits Microsoft got an unpleasant phone call from the tax collector.

If you make it a practice to retain the services of Independent Contractors, consider the following questions. Although not all-encompassing, this will give you a flavor of the types of analysis you may want to perform when deciding how to classify a worker.

- Are the worker’s services an integral part of your business operations?
- Do you hire, supervise and pay others to perform the same, or similar, job as the worker?
- Does the worker perform continuing services for your company?
- Is the worker required to devote his or her full time to your business?
- Is the worker paid by the hour, week or month?
- Do you reimburse the worker for job-related expenses?

If the answer to any of these questions is “Yes”, then the worker may be more properly classified as an employee and not as an Independent Contractor.

However, if the answer to the next set of questions below is “Yes”, then you are more than likely safe in classifying the worker as an Independent Contractor.

- Can the worker subcontract part or all of the required labor or services to another party?
- Does the worker hire, supervise and pay others on the job under a contract to furnish labor and materials?
- Has the worker invested in the equipment or facilities used in performing services?
- Does the worker have a right to realize a profit or have a significant risk of loss?
- Does the worker perform the same type of services for several persons or firms?
- Has the worker attained business registrations, professional occupational licenses or certificates required by law to perform contracted services?
- Does the worker maintain a separate set of books or records, reflecting all items of business income and expenses of an independent business?
- Has the worker assumed financial responsibility for any defective workmanship or for services not provided?

Like so many other areas of business operations, decisions on the classification of workers as employees or independent contractors are not always clear. There will always be situations or variables to make these decisions a little more interesting and complex.

If you have workers on staff and are uncertain as to their employment status, a more thorough analysis may be in order. If so, STREAMLINE CXO has developed an **Independent Contractor Questionnaire** to assist you in making this determination.

**STREAMLINE CXO** is responsible for providing the essential support our clients need to ensure their compliance with IRS and DOL laws and regulations.

Our goal is to deliver a preventive approach to employment situations and ensure these approaches are managed appropriately. If you have questions about our services, or **HOW TO DETERMINE IF A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR**, please contact us.