2. When Is a Worker an Employee?

General definitions of ''employee'' and ''independent contractor'' are not particularly helpful in classifying workers. *Webster's Unabridged Dictionary of the English Language* defines ''employee'' as ''a person working for another person or a business firm for pay.'' It does not contain a definition of ''independent contractor.''

Black's Law Dictionary defines ''employee'' as ''a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of the work performed.'' *Black's* defines an ''independent contractor'' as ''one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.''

The regulations under the employment tax provisions contain some helpful guidance on when an employer-employee relationship exists by providing the following:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.[11]

To provide additional guidance, the IRS, in 1987, compiled a list of twenty common-law factors that have been used in case law to determine whether sufficient control is present to establish an employer-employee relationship.[12] This list became known as the 20-factor test. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The 20 factors are:

- Instructions.
- Training.
- Integration.
- Services Rendered Personally.
- Hiring, Supervising, and Paying Assistants.
- Continuing Relationship.
- Set Hours of Work.
- Full Time Required.
- Doing Work on Employer's Premises.
- Order or Sequence Set.
- Oral or Written Reports.
- Payment by Hour, Week, Month.
- Payment of Business and/or Traveling Expenses.
- Furnishing of Tools and Materials.
- Significant Investment.
- Realization of Profit or Loss.
- Working for More Than One Firm at a Time.
- Making Service Available to General Public.
- Right to Discharge (by employer).
- Right to Terminate (by employee).

While the 20-factor test remains relevant, IRS has moved to grouping the factors into three broader categories: behavioral control; financial control; and type of relationship.[13] The IRS provides a page on its website that is a good starting point for

[11] Reg. § 31.3121(d)-1(c)(2). *See also* § 31.3306(i)-1(b), § 31.3401(c)-1(b). Unless otherwise provided, all section references are to sections of the Internal Revenue Code of 1986, as amended (the ''Code'') or the Treasury regulations thereunder.

[12] Rev. Rul. 87-41, 1987-1 C.B. 296.

[13] As noted above, DOL's Wage and Hour Division, which administers the Fair Labor Standards Act (''FLSA'') broadly construes the employer-employee relationship. *See* DOL Wage and Hour Division Administrator's Interpretation 2015-1. As discussed in the Administrator's Interpretation, the FLSA defines ''employee'' as ''any individual employed by an employer,'' 29 U.S.C. § 203(e)(1), and ''employer'' as including ''any person acting directly or indirectly in the interest of an employer in relation to an employee,'' 29 U.S.C. § 203(d). The FLSA's definition of '' 'employ' includes to suffer or permit to work.'' 29 U.S.C. § 203(g). This ''suffer or permit'' concept has broad applicability and is critical to determining whether a worker is an employee and thus entitled to the FLSA's protections.

The ''suffer or permit'' standard was specifically designed to ensure as broad a scope of statutory coverage as possible. *See Rosenwasser*, 323 U.S. at 362–63 (''A broader or more comprehensive coverage of employees . . . would be difficult to frame.''); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (''employ'' is defined with ''striking breadth''). The Supreme Court ''has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' recognizing that broad coverage is essential to accomplish the [Act's] goal . . . .'' *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)) (internal citation omitted).

understanding how the IRS approaches the topic. *See* Independent Contractor (Self-Employed) or Employee?

Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done; rather, the employer must have the right to direct and control the work.

In 1996, the IRS released training materials for its agents to use in classifying workers as employees or independent contractors.[14] The training materials divided the evidence relating to behavioral control into two categories — instruction and training. The IRS has now expanded these categories into (1) type of instructions given, (2) degree of instructions, (3) evaluation system, and (4) training. *See* IRS website on Behavioral Control.

Financial control refers to facts that show whether the business has the right to control the economic aspects of the worker's job. The IRS has divided financial control into the following five factors: (1) significant investment; (2) unreimbursed expenses; (3) opportunity for profit or loss; (4) services available to the market; and (5) method of payment. *See* IRS website on Financial Control.

Type of relationship refers to facts that show how the worker and business perceive their relationship to each other. The IRS has divided type of relationship into the following four factors: (1) written contracts; (2) employee benefits; (3) permanency of relationship; and (4) services provided as key activity of the business. *See* IRS website on Type of Relationship.

Behavioral Control, Financial Control, and Type of Relationship are explored in more detail in connection with completing the Form SS-8.

[14] IRS training materials on employment tax issues are now contained in the IRS Internal Revenue Manual ("IRM") — IRM 4.23.5 — Technical Guidelines for Employment Tax Issues.