



Am I an employee or a contractor?

This should be an easy question to answer, however many small businesses pay their employees as independent contractors to avoid paying minimum wage or avoid paying the employer taxes associated with employees. I will define the four type of relationships, and the criteria for evaluating each.

Independent Contractor – The employer has the right to control or direct the result of the work, not the means or method of accomplishing the work. This means that if you are required to keep business hours, or work a specific number of hours, you are probably not a contractor. If you are being paid on a 1099, but the employer controls how, where and when the work is done, the employer is improperly reporting your status to the IRS. If you have not received a 1099, but the employer does not withhold taxes, the employer is still improperly treating you as a contractor.

Employee – The employer is subject to wage and hour laws, and withholds taxes. The employer has the right to determine how, where and when the work will be performed. At year end the employer provides a W-2 for wages paid. If wages are paid which are below minimum wage, the services must be in food service or the employer must have an approved waiver.

Statutory Employee – A statutory employee is a special class of employee that is a contractor, but may be treated as an employee for Social Security, and sometimes FUTA. This is a very limited class of employee. The description follows.

- A driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.
- A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
- An individual who works at home on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work to be done.
- A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for you must be the salesperson's principal business activity.

Statutory Nonemployee – There are two categories of statutory nonemployees: **direct sellers** and **licensed real estate agents**. They are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked and
- Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.