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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-1@ Employee Defined, Rules Generally Applicable to Determinations of Employment

4304-1 Employee Defined, Rules Generally Applicable to Determinations of Employment

Whether an individual is an employee for the purposes of Sections 621(b) and 13020 of the code will be determined by the usual commonlaw rules applicable in determining an employer-employee relationship. Under those rules, to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists. Strong evidence of that right to control is the principal's right to discharge at will, without cause.

(a)

If it cannot be determined whether the principal has the right to control the manner and means of accomplishing a desired result, the following factors will be taken into consideration: (1) Whether or not the one performing the services is engaged in a separately established occupation or business. (2) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision. (3) The skill required in performing the services and accomplishing the desired result. (4) Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work. (5) The length of time for

which the services are performed to determine whether the performance is an isolated event or continuous in nature. (6) The method of payment, whether by the time, a piece rate, or by the job. (7) Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal. (8) Whether or not the parties believe they are creating the relationship of employer and employee. (9) The extent of actual control exercised by the principal over the manner and means of performing the services. (10) Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

(1)

Whether or not the one performing the services is engaged in a separately established occupation or business.

(2)

The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.

(3)

The skill required in performing the services and accomplishing the desired result.

(4)

Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.

(5)

The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.

(6)

The method of payment, whether by the time, a piece rate, or by the job.

(7)

Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.

(8)

Whether or not the parties believe they are creating the relationship of employer and employee.

(9)

The extent of actual control exercised by the principal over the manner and means of performing the services.

(10)

Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

(b)

The factors enumerated in (a) above are indicia of the right to control. Where there is independent evidence that the principal has the right to control the manner and means of performing the service in question it is not necessary to consider the above enumerated factors. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed. For personal income tax withholding purposes only, whether an individual provides equipment in the performance of services for remuneration shall not be considered in a determination of whether that individual is an employee. (1) Instrumentalities and facilities. Whether the principal or worker provides the instrumentalities or facilities necessary to accomplish the work would have little relevance if those instrumentalities are not significant in nature.

Examples are hand tools commonly provided by workers or an automobile for personal transportation. On the other hand, if they were of substantial value and supplied by the principal it would indicate that the principal had the right to control the manner and means of their use and that the worker would follow a principal's direction in the use of such valuable instrumentalities if the principal chose to give such directions. Similarly, if the facilities are of an intangible nature or unavailable except through the principal, such as a trade name, office facilities, advertising, merchandise, inventory, or communications, the worker would also be presumed to use such facilities in a way specified by the principal if the principal so chose to specify so that the worker can insure their continued use and availability. (2) Effect of custom. Unskilled labor is usually supervised and persons performing services, which require little or no skill or experience are customarily regarded as employees. Even where skill is required, such as an artisan, and the services are an incident of the business of the principal, the principal would usually be considered to have the right to control the manner and means of performing the service incident to its business, and the worker would be considered an employee. On the other hand, if the service of the artisan, such as a plumber, were engaged to repair the plumbing for an insurance company in the company's office facilities, the manner and means of performing services would not normally be controlled by persons in the insurance company's offices. (3) The period of employment and method of payment. If the time in which the service is performed is short, the worker is less apt to subject himself to control as to details of performing the service. This is especially true if the payment is to be made by the job and not by the hour, commission, or piece rate. On the other hand, if the work is not skilled, and the principal supplies the instrumentalities necessary to perform the work, and it is an integral part of the principal's business activity, the worker would be an

employee even though the time period was short and the payment was by the job. If the services are performed on a continuing basis it would be evidence of employment, especially if the services are a regular part of the principal's business. The time of performing the service and the method of payment may result in strong evidence of employment if the performance and payment occur during regular intervals at regular times and payment is in regular amounts. (4) Control of the premises. If the services are performed upon the premises of the principal who is in business and the worker uses the facilities of the principal in performing the services in compliance with policies or regulations for the conduct of workers on the premises, the worker would be an employee. On the other hand, if the rules are made only for the general safety, or security of the premises, and do not relate to the manner and means of performing the actual service in question, adherence to such rules would not raise the inference that the worker is an employee and the relationship would depend on other factors. Similarly, if the worker has only agreed to accomplish a desired result, rules or policies for the handling of the result upon completion, such as distribution, storage, transportation, or display, will not raise the inference that the worker is an employee. (5) Belief of the parties. The terminology used in an agreement between a principal and a worker is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried

out. If the factual relationship between the parties is different than that provided by the agreement, an inference will arise that the agreement does not express the intention of the parties and an employer-employee relationship does in fact exist. If an agreement between a worker and a principal specifically denies an employment relationship, but contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the provision that an employment relationship does not exist does not express the intent of the parties that their relationship is one of independent contractors. (6)

Services performed as a part of the regular business of the principal. Since for the purposes of these regulations, employment is only significant where remuneration (wages) is paid for services performed, employment will generally occur where the principal is in business. In some situations, employment may occur where there is no business activity of the principal, but it is presumed that those occasions will be rare. If the principal is in business and the services performed are a regular part of the business of the principal, it is evidence that the services are performed in employment. It is presumed that if the principal is in business, he has the right to control the manner and means by which services in that business are performed as an incident to the principal's right to protect his business interests. There must be a strong showing that the principal has abandoned that right to overcome the evidence of employment under those circumstances. For example, if the principal is in the business of selling insurance, and an individual performs services for remuneration selling insurance, it is evidence that those insurance sales services are in employment. On the other hand, if the principal is in the business of selling insurance and the services are performed by a plumber fixing the pipes in the insurance company's office facilities, it is not evidence that the services of the plumber are performed in the employ of the insurance sales company. (7)

Separately established occupation or business. If the person performing services for the principal is not in a separately established occupation or business it will be evidence that the services are performed in employment. If the individual performing the services does not have an independently established occupation or business, and the services are a regular part of the business of the principal, it will be presumed that the services are performed in employment. Evidence that an occupation or business is separately established is that the individual holds himself or herself out to the general public or a significant segment of the business community, in some readily identifiable way, as ready to perform services similar to those performed for the principal at or about the same time as they are being performed for the principal in the normal course of the independently established occupation or business. A readily identifiable way to hold oneself out as in an independently established occupation or business would include the name of the person or the person's business name in media advertising, commercial telephone listing, signs or displays on vehicles or premises, or brochure.

(1)

Instrumentalities and facilities. Whether the principal or worker provides the instrumentalities or facilities necessary to accomplish the work would have little relevance if those instrumentalities are not significant in nature. Examples are hand tools commonly provided by workers or an automobile for personal transportation. On the other hand, if they were of substantial value and supplied by the principal it would indicate that the principal had the right to control the manner and means of their use and that the worker would follow a principal's direction in the use of such valuable instrumentalities if the principal chose to give such directions. Similarly, if the facilities are of an intangible nature or unavailable except through the principal, such as a trade name, office facilities, advertising, merchandise, inventory, or communications, the

worker would also be presumed to use such facilities in a way specified by the principal if the principal so chose to specify so that the worker can insure their continued use and availability.

(2)

Effect of custom. Unskilled labor is usually supervised and persons performing services, which require little or no skill or experience are customarily regarded as employees. Even where skill is required, such as an artisan, and the services are an incident of the business of the principal, the principal would usually be considered to have the right to control the manner and means of performing the service incident to its business, and the worker would be considered an employee. On the other hand, if the service of the artisan, such as a plumber, were engaged to repair the plumbing for an insurance company in the company's office facilities, the manner and means of performing services would not normally be controlled by persons in the insurance company's offices.

(3)

The period of employment and method of payment. If the time in which the service is performed is short, the worker is less apt to subject himself to control as to details of performing the service. This is especially true if the payment is to be made by the job and not by the hour, commission, or piece rate. On the other hand, if the work is not skilled, and the principal supplies the instrumentalities necessary to perform the work, and it is an integral part of the principal's business activity, the worker would be an employee even though the time period was short and the payment was by the job. If the services are performed on a continuing basis it would be evidence of employment, especially if the services are a regular part of the principal's business. The time of performing the service and the method of payment may result in strong evidence of employment if the performance and payment occur during regular intervals at regular

times and payment is in regular amounts.

(4)

Control of the premises. If the services are performed upon the premises of the principal who is in business and the worker uses the facilities of the principal in performing the services in compliance with policies or regulations for the conduct of workers on the premises, the worker would be an employee. On the other hand, if the rules are made only for the general safety, or security of the premises, and do not relate to the manner and means of performing the actual service in question, adherence to such rules would not raise the inference that the worker is an employee and the relationship would depend on other factors. Similarly, if the worker has only agreed to accomplish a desired result, rules or policies for the handling of the result upon completion, such as distribution, storage, transportation, or display, will not raise the inference that the worker is an employee.

(5)

Belief of the parties. The terminology used in an agreement between a principal and a worker is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement, an inference will arise that the agreement does not express the intention of the parties and an employer-employee relationship does in fact exist. If an agreement between a worker and a principal

specifically denies an employment relationship, but contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the provision that an employment relationship does not exist does not express the intent of the parties that their relationship is one of independent contractors.

(6)

Services performed as a part of the regular business of the principal. Since for the purposes of these regulations, employment is only significant where remuneration (wages) is paid for services performed, employment will generally occur where the principal is in business. In some situations, employment may occur where there is no business activity of the principal, but it is presumed that those occasions will be rare. If the principal is in business and the services performed are a regular part of the business of the principal, it is evidence that the services are performed in employment. It is presumed that if the principal is in business, he has the right to control the manner and means by which services in that business are performed as an incident to the principal's right to protect his business interests. There must be a strong showing that the principal has abandoned that right to overcome the evidence of employment under those circumstances. For example, if the principal is in the business of selling insurance, and an individual performs services for remuneration selling insurance, it is evidence that those insurance sales services are in employment. On the other hand, if the principal is in the business of selling insurance and the services are performed by a plumber fixing the pipes in the insurance company's office facilities, it is not evidence that the services of the plumber are performed in the employ of the insurance sales company.

(7)

Separately established occupation or business. If the person performing services for the principal is not in a separately established occupation or business it will be evidence that the services are performed in employment. If the individual performing the services

does not have an independently established occupation or business, and the services are a regular part of the business of the principal, it will be presumed that the services are performed in employment. Evidence that an occupation or business is separately established is that the individual holds himself or herself out to the general public or a significant segment of the business community, in some readily identifiable way, as ready to perform services similar to those performed for the principal at or about the same time as they are being performed for the principal in the normal course of the independently established occupation or business. A readily identifiable way to hold oneself out as in an independently established occupation or business would include the name of the person or the person's business name in media advertising, commercial telephone listing, signs or displays on vehicles or premises, or brochure.