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## BEST PRACTICES FOR UTILIZING INDEPENDENT CONTRACTORS

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*Disclaimer: NBAA has developed these best practices to provide an introduction to the rules and regulations governing use of contingent workers. This document is intended to provide general information and is no substitute for the advice of legal and human resource professionals addressing a specific set of facts that managers may face. Additionally, this version of the document is dated April 23, 2012, and does not incorporate any statutes, regulations or guidance released after that date.*

## Introduction

This NBAA resource is designed to provide managers with an introduction to the regulatory guidance surrounding the use of contingent workers, which includes independent contractors and temporary or part-time workers, and to offer best practices. It includes an overview of the risks involved with misclassifying workers, the tests to determine worker status, insurance considerations and common scenarios for operators.

NBAA urges managers to engage human resource professionals and employment lawyers in the review of this resource and to take steps as necessary to ensure compliance with the applicable laws and regulations related to classification of workers.

Contingent arrangements are a valuable resource for many business aircraft operators that need additional support from pilots, flight attendants and maintenance professionals, but do not require a long-term employment commitment. Contingent arrangements can provide additional resources and flexibility while saving time for operators and reducing overhead costs. The use of contingent workers is growing across the U.S. economy, with nearly four out of five companies using some type of contingent labor.

As business aircraft operators seek flexible and cost effective ways to meet their staffing needs, they are increasingly relying on a variety of arrangements using individuals commonly known as “contingent workers” or “independent contractors.” While the terms contingent worker and independent contractor will be used throughout this document, there are a myriad of other terms such as freelancer, temporary worker, contract worker, part-time worker, fill in, supplemental worker, moonlighting, casual work, day labor, consultant, seasonal, leased or borrowed help that have similar meanings.

The most important step an employer can take is to make an educated determination as to the proper classification of a contingent worker. For federal tax purposes, a worker is classified as:

- An employee of the service recipient, or
- An independent contractor to the service recipient.

This is an important issue, and has the potential to impact the tax responsibilities of both the business and the worker. If an individual is brought on as an independent contractor, but later found to be an employee, there can be significant negative consequences for the employer. This means that managers must take steps to understand the tax, insurance, and legal ramifications when determining the proper classification of contingent workers.

## Risks of Misclassifying Workers

While independent contractors can bring lawsuits related to misclassification, various state and federal agencies are also charged with reviewing the classification of workers to evaluate compliance with applicable laws and regulations.

In September 2011, the Internal Revenue Service (IRS) and the Department of Labor (DOL) agreed to share information and coordinate law enforcement with participating states in order to level the playing field for law-abiding employers, and ensure that employees receive the protections to which they are entitled under federal and state laws. Due to this stepped-up enforcement, employers should take steps to carefully review their policies and procedures in this area.

The IRS also announced the launch of a new Voluntary Classification Settlement Program (VCSP) that provides an opportunity for taxpayers to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes.

Following is a discussion of the specific areas where businesses can face risks if workers are misclassified.

## UNEMPLOYMENT TAXES

The unemployment compensation system is based on unemployment insurance (UI) contributed to by the employer based on the wages of its employees. Employers contribute to both state unemployment (SUTA) and federal unemployment (FUTA) on behalf of their employees. SUTA UI contribution rates vary from state to state and are also dependent on the employer's history of unemployment claims. Amounts paid to independent contractors are not subject to this tax nor do independent contractors contribute to UI on their own behalf.

Employees misclassified as independent contractors are often identified by regulatory authorities after a worker, previously treated as an independent contractor, files for unemployment compensation or suffers a workplace injury. If it is determined that the employer misclassified the worker as an independent contractor, the employer may be subject to substantial monetary penalties. The employer will be forced to remit the unemployment tax for that employee, in addition to penalties and interest. These amounts may stretch back several years, depending on the worker's length of service. In addition, the unemployment agency may decide to audit the employer's records to determine how workers in similar positions were classified. If the agency determines additional employees were misclassified, it may assess back taxes, interest and penalties.

## INCOME TAXES

Although an independent contractor must still pay state and federal income taxes on earned income as a contractor, the recipient of the independent contractor's services is not required to withhold and remit state and federal income taxes from payments to independent contractors. Independent contractors self-report their income and pay the tax directly to the government. It is widely accepted that there is serious underreporting of these payments. In addition, due to the ability of contractors to take deductions for business expenses and Social Security and Medicare, even if the amounts are properly reported, the tax collected on payments to independent contractors is usually less than the tax collected on the same wage paid to an employee. The IRS and state taxation departments estimate that tens of billions of dollars in tax revenue is lost every year as a result of misclassification of contingent workers.

In an attempt to recover some of this lost tax revenue, the IRS and various states have begun to aggressively audit employers, and review the classification of independent contractors. Employers that have misclassified employees as independent contractors are subject to penalties, with interest, for failure to withhold the appropriate income taxes.

## SOCIAL SECURITY AND MEDICARE: FEDERAL INSURANCE CONTRIBUTIONS ACT (FICA)

Social Security and Medicare taxes, are withheld from an employee's wages and the employer contributes the same amount or higher on behalf of its employees. However, independent contractors are responsible for both their portion of Social Security and Medicare as well as the employer portion. Employers that are found to have misclassified employees as independent contractors will be assessed back taxes, penalties and interest.

## WORKERS' COMPENSATION

Employers are mandated to provide workers' compensation for their employees. It is considered in most states as the sole recourse for medical expenses, disability payments and lost wages due to on-the-job injury or death. On the other hand, individuals working as independent contractors typically don't carry their own workers' compensation coverage. The recipient of services of an independent contractor has exposure to law suits for worker injury or death, and exposure to misclassification of the worker.

## ADMINISTRATIVE COSTS

Payments for back taxes, interest, and penalties may be substantial, but employers should also remember that administrative costs of such audits can also be significant. Attorneys' fees and accountant expenses may be considerable. In addition, company employees will have to divert their attention from their primary job responsibilities. It is not uncommon for the administrative costs of an investigation into the misclassification of employees to stretch for months or even years.

## Tests to Determine Worker Status

One of the challenges in properly classifying workers is the many tests to determine independent contractor status that exist across federal and state government. For example, while the IRS "common law rules" are used to assess an employers' tax liability, other government agencies and states often have differing tests. The DOL often uses an "economic realities test," which takes into account both the degree of control the employer exercises over the worker and also the degree to which the worker is economically dependent on the business. Finally, the individual states use what is known as the "ABC test."

The various government agencies and states have different reasons for enforcing rules regarding proper classification of independent contractors. While the IRS is primarily concerned with making sure the proper taxes are collected,

a state's ABC test is used to determine the requirement to make UI contributions for the benefit of employees. The ABC test defines whether there is sufficient absence of control by the recipient of services that the worker is an independent contractor. However, if the nature of the work is that of an employee, the recipient of the services is required to make UI contributions for the contingent worker. The DOL is concerned with making sure eligible employees receive overtime under the Fair Labor Standards Act (see NBAA's FLSA Resource at [www.nbaa.org/admin/personnel/flsa](http://www.nbaa.org/admin/personnel/flsa)).

Consequently, recipients of services need to consider both federal and state tests to make an educated determination to classify contingent workers as either an employee or an independent contractor. The IRS common law factors are discussed in detail below, but employers also need to look beyond these factors and consider things such as the specific factors their state applies when determining independent contractor status.

## IRS TESTS TO DETERMINE WORKER STATUS

Many companies believe that they can choose whether to treat any given worker as an employee or independent contractor. However, there are laws and specific tests that determine whether the worker is an employee or an independent contractor.

An employee is an individual, who performs services for you, and who is subject to your control regarding what will be done and how it will be done. This is also known as the right to direct and control. Outside of court cases, this definition found in the Treasury Regulations (26 CFR 31.3121(d)-1) is the primary definition used by the IRS to define an employee. In contrast, an independent contractor is an individual that performs services, but the entity utilizing the contractor can only control the result of the work and not the means and methods by which the work is accomplished.

Once the entity receiving service exerts, or has the right to exert control over the worker, the individual is no longer considered an independent contractor. Even in situations where the worker is given freedom of action, the fact that an employer retains the legal right to control the details of how specific services are performed means the individual in question is not an independent contractor.

When classifying workers, the IRS performs the same analysis regardless of the number of hours worked or amount earned by the worker. For example, an individual can be classified as an employee even though that person works for one hour a week or one hour a year.

When determining whether a worker is an employee or independent contractor, all of the factors listed below must be weighed. In many situations, some factors may indicate that the worker is an employee, while other factors could indicate that the individual is an independent contractor.

There are not a specific number of factors that must point in one direction or the other to classify a worker either as an independent contractor or an employee. The bottom line is that an employer must look at the entire relationship and consider the degree or extent of the right to direct and control the actions of the worker, and finally document each of the factors used in coming up with the determination.

## IRS COMMON LAW RULES

The IRS common law rules, previously known as the "twenty common law factors," are one tool that employers can use to help properly classify workers. The same rules apply to determine whether licensed professionals are employees as they do for all other workers. The three main categories of evidence that show whether a worker is an employee or an independent contractor are:

1. Behavioral Control
2. Financial Control
3. Relationship of the Parties

**Behavioral Control Factors:** These factors focus on instructions and training given to the worker. Does the company control or have the right to control what the worker does and how the worker performs his or her job? In other words, is the individual subject to instructions or training from the employer about when, where and how to do the work?

- Types of instructions include:
  - When and where to do the work
  - What tools or equipment to use
  - What worker to hire to assist with the work
  - Where to purchase supplies and services
  - What work must be performed by a specified individual
  - What order or sequence to follow when performing the work
  - The amount of instruction needed varies among different jobs. For example, even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work is achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. Courts have held that the degree of supervision necessary to demonstrate control is only "such supervision as the nature of the work requires."
- Training is defined as explaining detailed methods and procedures to be used in performing a task. If the business provides the worker with training on how to

do the job, this indicates that the business wants the job done in a particular way and is strong evidence that the worker is an employee.

- In the case of pilots, employers should carefully review how any written agreements created to satisfy FAA regulatory concerns, such as operational control requirements, impact worker status. For example, if an agreement indicates that the pilot is an “agent” of a company and that company has control over the pilot’s actions, it could present evidence that the worker should be classified as an employee of that company and not as an independent contractor.
- When looking at behavioral control, the key factor to consider is whether the business retains the right to control the worker and the details of how the services are performed, regardless of whether the business actually exercises that right.

**Financial Control Factors:** Does the business have the right to direct and control the financial aspects of the worker’s job? This includes items such as how the worker is paid, whether expenses are reimbursed, investment in facilities and equipment, and opportunity for profit or loss.

- Investment: An independent contractor often has a significant investment in the facilities or equipment he or she uses in working for someone else. An employee usually has no investment in the work other than his or her own time. However, in many occupations, such as construction, workers spend hundreds of dollars on the tools and equipment they use and are still considered to be employees. There are no precise dollar limits that must be met in order to have a significant investment. A significant investment is not necessary for independent contractor status as some types of work simply do not require large expenditures.
- Expenses: Employers are more likely to reimburse employees for their job expenses, while businesses usually do not reimburse independent contractors for expenses. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important in demonstrating that a worker is an independent contractor.
- Opportunity to make a profit or to incur a loss: If a worker has a significant investment in the tools, equipment and facilities used, and if the worker has unreimbursed expenses, the worker has a greater opportunity to lose money. In other words, the expenses can exceed the income from the work. An independent contractor can make a profit or incur a loss. Since an employer usually provides employees a workplace, tools, materials, equipment and supplies needed for the work, and generally pays the costs of doing

business, employees do not have an opportunity to make a profit or to incur a loss.

- Availability of services: Independent contactors often advertise, maintain a visible business location and are available to the relevant market to seek out business opportunities.
- Method of payment: The method of payment is helpful in determining whether the worker has the opportunity for profit or loss. A worker who is compensated on an hourly, daily, weekly or similar basis is guaranteed a return for his or her labor, and no opportunity for profit or loss exists. These payment arrangements are generally evidence of an employer-employee relationship.

**Relationship of the Parties Factors:** These factors include written contracts, any employee-type benefits provided to the contractor, the permanency of the company-worker relationship, and whether or not the work performed is a key aspect of the company’s business.

- Written contracts: While written contracts are a factor, they are normally the least important of the criteria. The key element is the nature of the underlying work relationship, not what the parties choose to call it. Even if a contract states that a worker is an independent contractor, the IRS does not have to adhere to this when making a determination. However, in close cases, the written contract is another element to be reviewed.
- Employee-type benefits: The power to grant benefits also includes the power to take them away, which is generally exercised by employers over employees. A true independent contractor will finance his or her own benefits, and procure insurance, out of the overall income of the enterprise and not be provided with specific benefits or insurance by the recipient of the services.
- Permanency of the relationship: If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, it is generally considered evidence that the intent was to create an employer-employee relationship.
- Work performed key aspect of the business: If a worker provides services that are a key aspect of the company’s regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, the regular business activity of a flight department is to transport passengers from point A to B. Assume the flight department engages a contingent pilot who is performing the same or similar service as the flight department’s employee pilot, under the same direction and

control. Both pilot's services are a key aspect of the regular business activity of the flight department and the right to direct and control the services of either pilot is evident. This would indicate an employer-employee relationship.

## IRS SUBSTANTIVE CONSISTENCY TEST

The day-to-day services that workers perform and the method by which they perform those services are relevant in determining whether workers treated as independent contractors hold substantially similar positions to workers treated as employees.

A substantially similar position exists if the job functions, duties and responsibilities are substantially similar and the control and supervision of those duties and responsibilities are substantially similar.

The business must treat all workers in similar positions the same. For example, the substantive consistency test would not be met if a flight department employing seven total pilots performing the same duties under the same direction and control treated five as employees and two as independent contractors. See **Appendix A**: IRS Determination of Worker Status: Form SS-8, and **Appendix B**: IRS Response to Request for Worker Status Determination.

## STATE TESTS TO DETERMINE WORKER STATUS

Most state laws contain strict tests to determine whether there is sufficient absence of control by an employer to classify the worker as an independent contractor rather than an employee. States use these tests to determine whether an employer is required to provide unemployment insurance coverage to an individual. More than half the states provide criteria commonly called the "ABC" test under which service for remuneration is considered employment and the worker is an employee unless each of three tests are passed:

- A. The worker is free from control or direction in the performance of the work under the contract of service; and in fact,
- B. The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and
- C. The individual is customarily engaged in an independent trade, occupation, profession or business.

Other states have variations of this ABC test. For example, in some states only the "A" and "C" tests apply. An appendix to this document contains details on the specific tests that are used by each state to determine worker status.

See **Appendix C** for additional details on the worker status tests used in each state.

## Engaging Contingent Workers Through a Third-Party Firm

To assist with the process of obtaining contingent workers, many employers engage a third-party firm with expertise in the area. These firms are commonly known as staffing firms, leasing agents, labor contractors, employment agencies or temporary help services.

No matter what the business is called or how it refers to itself, these third-party firms will either compensate workers as an employee of their firm or as an independent contractor.

According to the IRS, a firm furnishing workers to other firms is the employer of those workers for employment tax purposes. For example a third-party firm may provide the services of pilots, flight attendants or flight technicians to its clients on a temporary or per-trip basis. The third-party firm enters into contracts where the client specifies the services to be provided, and fees are paid to the third party for each individual worker. The third party hires the workers, controls the payment of their wages, provides them with unemployment insurance, workers' compensation and other benefits, and is the employer for employment tax purposes.

However, if the third-party firm misclassifies employees as independent contractors assigned to clients, the client has significant exposure. If the worker is being treated as an independent contractor rather than an employee of the third party, the entity receiving the services may be faced with obligations, such as federal withholding, Social Security and Medicare, FUTA, SUTA, workers' compensation and possible claims for other employer benefits.

Managers who choose to work with a third-party firm for contingent labor requirements are encouraged to work with a well-established firm and to ask how the firm compensates its workers as W-2 employees or as independent contractors and structure the written contract accordingly.

For more information, refer to **Appendix D**: Risk/Benefit Charts for the Aircraft Owner/Operator.

## Risks and Benefits for the Aircraft Owner/Operator

This section is designed to assist aircraft owners and operators in understanding the benefits and risks of commonly used contingent worker arrangements. Each arrangement is analyzed based on its impact to flight operations, company administration, tax liabilities and insurance coverage. When using a third-party firm, managers should take steps to determine how the firm compensates workers. Generally, the workers from a third-party firm are either independent contractors or W-2 employees of the firm.

For more information, refer to **Appendix D**.

## Scenarios

When conducting an analysis to determine the proper classification of a worker, the employer must take into account the unique facts and circumstances of their particular situation. For example, the employer should review the worker status test in the state where they are doing business, as each state has unique rules.

The following scenarios are designed to present situations where the majority of facts point towards one specific classification for the worker. Many flight departments will find that when classifying workers, certain facts will point towards independent contractor status while other facts will point towards employee status. Specifically, in the case of pilots, managers must closely review the “behavioral control” factors discussed above, as in many cases the aircraft owner or operator can exert a significant degree of control over the pilot. As these scenarios illustrate, classifying a pilot as an independent contractor requires a specific set of facts and is not without potential risks.

These scenarios should be used by employers to demonstrate the process and specific factors to consider when classifying a worker. Managers should not attempt to apply these scenarios to their specific facts and circumstances without first seeking the counsel of an employment attorney or human resources professional.

### SCENARIO 1

While a Gulfstream IV owned by Company A was undergoing extensive maintenance at an offsite maintenance facility, the company decided to sell the aircraft and continue operating its two Challenger 850s.

Due to the long period required to complete the maintenance and secure a firm aircraft purchase agreement, none of Company A’s pilots were current on the Gulfstream IV. So Company A hired two independent contractor pilots qualified in the Gulfstream IV to perform the purchaser’s demonstration and aircraft delivery flights. The agreements stated, in part, that each pilot was an independent contractor and the agreements would terminate after the aircraft delivery flight. Under the terms of the agreements, Company A was required to pay the pilots a fixed fee based on the two days the flights were scheduled to occur. The fee was inclusive of all travel and other expenses the pilots incurred as a result of the flights.

#### Scenario 1 Analysis

This scenario highlights some of the ambiguities and risks in attempting to classify workers as independent contractors or employees. Given the number of factors that can be relied upon by federal and state agencies, rarely will all the factors indicate that the worker is clearly an employee or clearly an independent contractor.

For instance, applying the factors commonly relied on by the IRS, Company A’s relationship with these pilots has many of the hallmarks of an independent contractor relationship. It is a short-term relationship to provide services that are not part of Company A’s normal business operations. The parties have a written agreement that identifies the pilots as independent contractors and provides that the pilots will be paid a set amount for the project. Furthermore, the pilots have presumably paid for their own training and provide similar services to other companies (or are at least free to do so).

On the other hand, the pilots do not have complete control over how they conduct their work for Company A. Company A (and the purchaser) has not only provided the aircraft (the equipment and “tools” to perform the job), but also when, where and how the flights will be flown. Finally, it is unclear if the pilots have any potential risk of financial loss (Company A has also agreed to pay all their expenses).

A similar conclusion is reached applying the ABC test used by many states. While the work is being performed outside the usual course of the company’s business, there is reason to consider that the services are being performed on the premises of the company; the aircraft being delivered is owned, operated and controlled by the seller of the aircraft, Company A. It is unclear if pilots are engaged in what is typically considered an independent trade, occupation, profession or business. Furthermore, the question of whether the worker is free from the control or direction of Company A is at least debatable.

Although it may appear there is enough on the “independent contractor” side of the ledger to conclude that these pilots are independent contractors, the decision is not without some risk, though given the short duration of the relationship with the pilots, that risk may be relatively small. Company A should understand the risk and consequences prior to making a decision on how to classify the workers.

### SCENARIO 2

Company A entered into an aircraft trade agreement in which it acquired two Gulfstream 550s. As the deal was approaching the closing date, Company A entered into a written agreement with Pilots for Hire, Inc. (PFH). Under the terms of the agreement, PFH supplied eight Gulfstream 550 pilots for Company A’s flight operations for four months. During that period, Company A hired and trained eight Gulfstream 550 employee pilots, who were placed on the flight line shortly before the PFH agreement terminated.

PFH charged a fixed, monthly fee for each of its pilots. PFH paid the pilots, provided them a benefits package and agreed to provide all of the unemployment and worker’s compensation coverage.

## Scenario 2 Analysis

In this scenario, the eight pilots provided by PFH are the W-2 employees of PFH. PFH has assumed responsibility for maintaining appropriate workers' compensation insurance and for making all required tax withholdings and payments. Accordingly, the risks of additional liability for Company A are rather low (although in some states an employee of a labor supply company may sue the company after a workplace injury unless the labor supply company has an alternate employer endorsement). Company A may end up paying PFH more than it would have cost to hire these pilots directly, but PFH will handle benefits and tax withholdings/payments for the pilots, saving Company A administrative time. Also, Company A will be able to begin operating the Gulfstream 550s immediately.

It should also be noted, however, that except for employment tax purposes under both state and federal law, the temporary pilots may also be employees of Company A. As "joint employers" of the pilots, it should be clearly identified which company is responsible for compliance and violations of areas of employment obligations outside of employer tax obligations. Company A's contract with PFH, therefore, should clearly provide that PFH is responsible for complying with their legal obligations, and that PFH will indemnify Company A for its failure to do so. Company A may still be legally responsible for violations of applicable employment laws (e.g., OSHA or discrimination/harassment statutes) involving these pilots.

For more information, see **Appendices A and B**.

## Insurance Best Practices

When operations dictate the use of contingent crewmembers, consider following these steps to provide insurance protection for the actions of crewmembers that are contracted with the aircraft owner or operator as independent contractors.

Operators should note that providing insurance coverage to an independent contractor is considered an employee-type benefit and may be one of the factors regulators use in determining the proper classification of the worker.

To make certain the relationship is insured, the contract for the worker should be submitted to both the aircraft and workers' compensation insurance underwriters for their review and approval prior to signing. Underwriters recommend any written agreement clearly state insurance requirements of both parties as outlined below.

Aircraft owners and operators should also remember that all insurance products contain conditions, limitations and exclusions, and are not intended to address all risks associated with the utilization of independent contractors. Consulting with insurance and legal advisors to address your specific situation is strongly recommended.

## AIRCRAFT INSURANCE

With respect to aircraft insurance, be sure the contract submitted to the underwriter names the independent contractor as an insured under the aircraft liability coverage and provides a waiver of subrogation for hull or physical damage coverage in favor of independent contractor. Also, compare the pilot's credentials to the policy's pilot warranty clause to ensure that the pilot meets or exceeds this policy provision.

## WORKERS' COMPENSATION INSURANCE

The contract for the worker should clearly establish who is legally liable for workers' compensation insurance for each party involved. Make certain to clearly state whether or not the independent contractor will be covered under his or her own policy, or the owner or operator policy. Any payments made to an independent contractor should also be submitted at the policy's audit. Payments made to individuals who are considered independent contractors should be clearly identified to avoid any ambiguity of the policy's coverage for independent contractors.

If the owner or operator and independent contractor both carry workers' compensation insurance, underwriters for both policies should be made aware of the contract. Depending upon which party is to provide this insurance, the underwriter not insuring the independent contractor should receive a waiver of subrogation.

## Best Practices for Managers Who Engage Independent Contractors

Independent contractors are a valuable business tool, but flight departments should identify the important legal considerations in this area. The decision to engage the services of a worker as either an independent contractor or an employee should only be made after a careful review. The status of independent contractors should also be periodically reviewed in collaboration with an employment attorney or human resources advisors.

When utilizing independent contractors, operators should develop an independent contractor agreement that contains the provisions listed below:

- Draft the agreement to give the contractor as much freedom as possible to complete the work.
- Require the contractor to furnish all or most of the tools, equipment and material needed to complete the job (this may not be applicable for pilot and flight attendant contractors).
- Have the contractor pay for his or her business expenses (if necessary, pay the contractor a little more, but have him or her assume responsibility for business expenses).

- Pay the contractor a flat fee rather than an hourly, daily or weekly rate.
- Do not provide employee-type benefits to the contractor.
- Clearly define the start/stop dates, scope of the assignment and duties of the respective parties.
- Specify a venue for disputes under the agreement. Both parties should ensure the scope of duties is consistent with the definitions of independent contractors used by the courts in the contracting state because states have varying views of contractors and the legal liability of those responsible for their actions.
- Allow the contractor to offer services to other businesses.
- Require the contractor to carry his or her own insurance, including workers' compensation coverage.
- Keep files containing the contractor's business card, stationery samples, ads and employer identification number.

## Conclusion

NBAA urges managers to use this resource as a starting point for ensuring that any contingent workers used in a flight operation are properly classified. As a first step, the specific job duties and employment arrangements for each contingent worker should be reviewed using the various tests outlined in the resource. Since each test has a number of factors, it is not uncommon for certain factors to point towards classification of a worker as an employee and other factors to point towards classification as an independent contractor. Federal and state regulators do not rely upon a single factor when classifying workers, meaning that the employer should weigh all of the factors together when determining if a worker is an employee or independent contractor.

After determining the appropriate classification for a worker, employers should review how the decision impacts other elements of the flight operation, such as insurance coverage. Even if a worker is properly classified as an independent contractor, neglecting to review the insurance implications of utilizing an independent contractor could open up the employer to significant liability.

Many operators may find that within their company, such as in the human resources department, there are individuals who frequently deal with issues related to independent contractors. While flight departments may not have frequent interactions with these individuals, seeking out their expertise on how to manage independent contractors can be very effective. In situations where a company does not have experience in managing independent contractors, flight departments should work with employment attorneys that can provide guidance in this area.

For managers whose entities are the recipient of services of contingent workers, further guidance on worker classification may be obtained by reviewing and considering the tools provided in the appendices to follow.

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## ABOUT NBAA

Founded in 1947 and based in Washington, DC, the National Business Aviation Association (NBAA) is the leading organization for companies that rely on general aviation aircraft to help make their businesses more efficient, productive and successful. Learn more at [www.nbaa.org](http://www.nbaa.org).

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# APPENDIX A

## IRS Determination of Worker Status: Form SS-8

Firms and workers may file IRS Form SS-8 to request a determination of the status of a worker for purposes of federal employment taxes and income tax withholding. Determinations are based on the entire relationship between the firm and the worker. The IRS does not issue a determination letter for proposed transactions or on hypothetical situations. They may, however, issue an information letter when it is considered appropriate.

Members are strongly encouraged to consult with qualified employment law counsel before utilizing IRS Form SS-8 as any determinations made by the IRS are binding.

This section contains IRS Form SS-8, which employers can utilize to request a worker status determination from the IRS. An example of a response that a company received after filing Form SS-8 can be found in Appendix D.

**Determination of Worker Status for Purposes  
of Federal Employment Taxes and  
Income Tax Withholding**

**For IRS Use Only:  
Case Number:**

**Earliest Receipt Date:**

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's fax number	Firm's website	Worker's alternate telephone number	Worker's fax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

**Note.** If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ▶ \_\_\_\_\_

**Disclosure of Information**

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* on page 6 for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

**Parts I-V.** All filers of Form SS-8 must complete all questions in Parts I-IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or workers' name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

**Part I General Information**

- This form is being completed by:  Firm  Worker; for services performed \_\_\_\_\_ to \_\_\_\_\_ .  
(beginning date) (ending date)
- Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get worker's compensation benefits, or you were audited or are being audited by the IRS). \_\_\_\_\_  
\_\_\_\_\_
- Total number of workers who performed or are performing the same or similar services: \_\_\_\_\_ .
- How did the worker obtain the job?  Application  Bid  Employment Agency  Other (specify) \_\_\_\_\_
- Attach copies of all supporting documentation (for example, contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements or IRS rulings).** In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue \$ \_\_\_\_\_ .  
If both Form W-2 and Form 1099-MISC were issued or received, explain why. \_\_\_\_\_
- Describe the firm's business. \_\_\_\_\_  
\_\_\_\_\_

**Part I** General Information (continued)

- 7 If the worker received pay from more than one entity because of an event such as the sale, merger, acquisition, or reorganization of the firm for whom the services are performed, provide the following: Name of the firm's previous owner: \_\_\_\_\_  
 Previous owner's taxpayer identification number: \_\_\_\_\_ Change was a:  Sale  Merger  Acquisition  Reorganization  
 Other (specify) \_\_\_\_\_  
 Description of above change: \_\_\_\_\_  
 \_\_\_\_\_  
 Date of change (MM/DD/YY): \_\_\_\_\_
- 8 Describe the work done by the worker and provide the worker's job title. \_\_\_\_\_  
 \_\_\_\_\_
- 9 Explain why you believe the worker is an employee or an independent contractor. \_\_\_\_\_  
 \_\_\_\_\_
- 10 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?  
 Yes  No  N/A  
 If "Yes," what were the dates of the prior service? \_\_\_\_\_  
 If "Yes," explain the differences, if any, between the current and prior service. \_\_\_\_\_  
 \_\_\_\_\_
- 11 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement. \_\_\_\_\_  
 \_\_\_\_\_

**Part II** Behavioral Control (Provide names and titles of specific individuals, if applicable.)

- 1 What specific training and/or instruction is the worker given by the firm? \_\_\_\_\_  
 \_\_\_\_\_
- 2 How does the worker receive work assignments? \_\_\_\_\_  
 \_\_\_\_\_
- 3 Who determines the methods by which the assignments are performed? \_\_\_\_\_
- 4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution? \_\_\_\_\_  
 \_\_\_\_\_
- 5 What types of reports are required from the worker? Attach examples. \_\_\_\_\_  
 \_\_\_\_\_
- 6 Describe the worker's daily routine such as his or her schedule or hours. \_\_\_\_\_  
 \_\_\_\_\_
- 7 At what location(s) does the worker perform services (for example, firm's premises, own shop or office, home, customer's location)? Indicate the appropriate percentage of time the worker spends in each location, if more than one. \_\_\_\_\_  
 \_\_\_\_\_
- 8 Describe any meetings the worker is required to attend and any penalties for not attending (for example, sales meetings, monthly meetings, staff meetings). \_\_\_\_\_
- 9 Is the worker required to provide the services personally? . . . . .  Yes  No
- 10 If substitutes or helpers are needed, who hires them? \_\_\_\_\_
- 11 If the worker hires the substitutes or helpers, is approval required? . . . . .  Yes  No  
 If "Yes," by whom? \_\_\_\_\_
- 12 Who pays the substitutes or helpers? \_\_\_\_\_
- 13 Is the worker reimbursed if the worker pays the substitutes or helpers? . . . . .  Yes  No  
 If "Yes," by whom? \_\_\_\_\_

**Part III Financial Control** (Provide names and titles of specific individuals, if applicable.)

- 1 List the supplies, equipment, materials, and property provided by each party:  
The firm: \_\_\_\_\_  
The worker: \_\_\_\_\_  
Other party: \_\_\_\_\_
- 2 Does the worker lease equipment, space, or a facility? . . . . .  **Yes**  **No**  
If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.) \_\_\_\_\_
- 3 What expenses are incurred by the worker in the performance of services for the firm? \_\_\_\_\_
- 4 Specify which, if any, expenses are reimbursed by:  
The firm: \_\_\_\_\_  
Other party: \_\_\_\_\_
- 5 Type of pay the worker receives:  Salary  Commission  Hourly Wage  Piece Work  
 Lump Sum  Other (specify) \_\_\_\_\_  
If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount. \$ \_\_\_\_\_
- 6 Is the worker allowed a drawing account for advances? . . . . .  **Yes**  **No**  
If "Yes," how often? \_\_\_\_\_  
Specify any restrictions. \_\_\_\_\_
- 7 Whom does the customer pay? . . . . .  Firm  Worker  
If worker, does the worker pay the total amount to the firm?  **Yes**  **No** If "No," explain. \_\_\_\_\_
- 8 Does the firm carry workers' compensation insurance on the worker? . . . . .  **Yes**  **No**
- 9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (for example, loss or damage of equipment, material)? \_\_\_\_\_
- 10 Does the worker establish the level of payment for the services provided or the products sold? . . . . .  **Yes**  **No**  
If "No," who does? \_\_\_\_\_

**Part IV Relationship of the Worker and Firm**

- 1 Please check the benefits available to the worker:  Paid vacations  Sick pay  Paid holidays  
 Personal days  Pensions  Insurance benefits  Bonuses  
 Other (specify) \_\_\_\_\_
- 2 Can the relationship be terminated by either party without incurring liability or penalty? . . . . .  **Yes**  **No**  
If "No," explain your answer. \_\_\_\_\_
- 3 Did the worker perform similar services for others during the time period entered in Part I, line 1? . . . . .  **Yes**  **No**  
If "Yes," is the worker required to get approval from the firm? . . . . .  **Yes**  **No**
- 4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation. \_\_\_\_\_
- 5 Is the worker a member of a union? . . . . .  **Yes**  **No**
- 6 What type of advertising, if any, does the worker do (for example, a business listing in a directory or business cards)? Provide copies, if applicable. \_\_\_\_\_
- 7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern? \_\_\_\_\_
- 8 What does the worker do with the finished product (for example, return it to the firm, provide it to another party, or sell it)? \_\_\_\_\_
- 9 How does the firm represent the worker to its customers (for example, employee, partner, representative, or contractor), and under whose business name does the worker perform these services? \_\_\_\_\_
- 10 If the worker no longer performs services for the firm, how did the relationship end (for example, worker quit or was fired, job completed, contract ended, firm or worker went out of business)? \_\_\_\_\_

**Part V For Service Providers or Salespersons.** Complete this part if the worker provided a service directly to customers or is a salesperson.

- 1 What are the worker's responsibilities in soliciting new customers? .....
- 2 Who provides the worker with leads to prospective customers? .....
- 3 Describe any reporting requirements pertaining to the leads. ....
- 4 What terms and conditions of sale, if any, are required by the firm? .....
- 5 Are orders submitted to and subject to approval by the firm? . . . . .  **Yes**  **No**
- 6 Who determines the worker's territory? .....
- 7 Did the worker pay for the privilege of serving customers on the route or in the territory? . . . . .  **Yes**  **No**  
 If "Yes," whom did the worker pay? .....
- 8 If "Yes," how much did the worker pay? . . . . . \$ .....
- 8 Where does the worker sell the product (for example, in a home, retail establishment)? .....
- 9 List the product and/or services distributed by the worker (for example, meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one. ....
- 10 Does the worker sell life insurance full time? . . . . .  **Yes**  **No**
- 11 Does the worker sell other types of insurance for the firm? . . . . .  **Yes**  **No**  
 If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance . . . . . \_\_\_\_\_ %
- 12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation . . . . . \_\_\_\_\_ %
- 13 Is the merchandise purchased by the customers for resale or use in their business operations? . . . . .  **Yes**  **No**  
 Describe the merchandise and state whether it is equipment installed on the customers' premises. ....

**Sign Here** ▶ Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

▶ \_\_\_\_\_ Title ▶ \_\_\_\_\_ Date ▶ \_\_\_\_\_  
 Type or print name below signature.

## General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

### Purpose

Firms and workers file Form SS-8 to request a determination of the status of a worker for purposes of federal employment taxes and income tax withholding.

A Form SS-8 determination may be requested only in order to resolve federal tax matters. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, a determination letter will not be issued. The statute of limitations expires 3 years from the due date of the tax return or the date filed, whichever is later.

The IRS does not issue a determination letter for proposed transactions or on hypothetical situations. We may, however, issue an information letter when it is considered appropriate.

### Definition

**Firm.** For the purposes of this form, the term "firm" means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the worker directly for these services.



*If the firm was not responsible for payment for services, be sure to enter the name, address, and employer identification number of the payer on the first page of Form SS-8, below the identifying information for the firm and the worker.*

### The Form SS-8 Determination Process

The IRS will acknowledge the receipt of your Form SS-8. Because there are usually two (or more) parties who could be affected by a determination of employment status, the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. Some or all of the information provided on this Form SS-8 may be shared with the other parties listed on page 1. The case will be assigned to a technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations.

Neither the Form SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any federal tax return. If the periods under consideration have previously been examined, the Form SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any federal tax return, the appeal rights available in connection with an examination do not apply to a Form SS-8 determination. However, if you disagree with a determination or you have additional information concerning the work relationship that you believe was not previously considered, you may request that the determining office reconsider the determination.

## Completing Form SS-8

Answer all questions as completely as possible. Attach additional sheets if you need more space. Provide information for **all** years the worker provided services for the firm. Determinations are based on the entire relationship between the firm and the worker. Also indicate if there were any significant changes in the work relationship over the service term.

Additional copies of this form may be obtained on IRS.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

### Fee

There is no fee for requesting a Form SS-8 determination letter.

### Signature

Form SS-8 must be signed and dated by the taxpayer. A stamped signature will not be accepted.

The person who signs for a corporation must be an officer of the corporation who has personal knowledge of the facts. If the corporation is a member of an affiliated group filing a consolidated return, it must be signed by an officer of the common parent of the group.

The person signing for a trust, partnership, or limited liability company must be, respectively, a trustee, general partner, or member-manager who has personal knowledge of the facts.

### Where To File

Send the completed and signed Form SS-8 to the address below for the firm's location. Faxed, photocopied, or electronic versions of Form SS-8 are not acceptable for the initial request for the Form SS-8 determination. However, only for cases involving federal agencies, send Form SS-8 to the Internal Revenue Service, Attn: CC:CORP:T:C, Ben Franklin Station, P.O. Box 7604, Washington, DC 20044. **Do not submit Form SS-8 with your tax return as that will delay processing time.**

#### Firm's location:

#### Send to:

Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming, American Samoa, Guam, Puerto Rico, U.S. Virgin Islands

Internal Revenue Service  
Form SS-8 Determinations  
P.O. Box 630  
Stop 631  
Holtsville, NY 11742-0630

Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, all other locations not listed

Internal Revenue Service  
Form SS-8 Determinations  
40 Lakemont Road  
Newport, VT 05855-1555

## Instructions for Workers

If you are requesting a determination for more than one firm, complete a separate Form SS-8 for each firm.



*Form SS-8 is not a claim for refund of social security and Medicare taxes or federal income tax withholding.*

If the IRS determines that you are an employee, you are responsible for filing an amended return for any corrections related to this decision. A determination that a worker is an employee does not necessarily reduce any current or prior tax liability. For more information, call 1-800-829-1040.

**Time for filing a claim for refund.** Generally, you must file your claim for a credit or refund within 3 years from the date your original return was filed or within 2 years from the date the tax was paid, whichever is later.

**Filing Form SS-8 does not prevent the expiration of the time in which a claim for a refund must be filed.** If you are concerned about a refund, and the statute of limitations for filing a claim for refund for the year(s) at issue has not yet expired, you should file Form 1040X, Amended U.S. Individual Income Tax Return, to protect your statute of limitations. File a separate Form 1040X for each year.

On the Form 1040X you file, do not complete lines 1 through 22 on the form. Write "Protective Claim" at the top of the form, sign and date it. In addition, enter the following statement in Part III: "Filed Form SS-8 with the Internal Revenue Service Office in (Holtsville, NY; Newport, VT; or Washington, DC; as appropriate). By filing this protective claim, I reserve the right to file a claim for any refund that may be due after a determination of my employment tax status has been completed."

**Filing Form SS-8 does not alter the requirement to timely file an income tax return.** Do not delay filing your tax return in anticipation of an answer to your Form SS-8 request. In addition, if applicable, do not delay in responding to a request for payment while waiting for a determination of your worker status.

## Instructions for Firms

If a **worker** has requested a determination of his or her status while working for you, you will receive a request from the IRS to complete a Form SS-8. In cases of this type, the IRS usually gives each party an opportunity to present a statement of the facts because any decision will affect the employment tax status of the parties. Failure to respond to this request will not prevent the IRS from issuing a determination letter based on the information he or she has made available so that the worker may fulfill his or her federal tax obligations. However, the information that you provide is extremely valuable in determining the status of the worker.

If you are requesting a determination for a particular class of worker, complete the form for one individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers. Please provide a list of names and addresses of all workers potentially affected by this determination.

If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker under section 530 of the 1978 Revenue Act. However, this relief provision cannot be considered in conjunction with a Form SS-8 determination because the determination does not constitute an examination of any tax return. For more information regarding section 530 of the 1978 Revenue Act and to determine if you qualify for relief under this section, visit [IRS.gov](http://IRS.gov).

**Privacy Act and Paperwork Reduction Act Notice.** We ask for the information on Form SS-8 to carry out the Internal Revenue laws of the United States. This information will be used to determine the employment status of the worker(s) described on the form. Subtitle C, Employment Taxes, of the Internal Revenue Code imposes employment taxes on wages, including income tax withholding. Sections 3121(d), 3306(a), and 3401(c) and (d) and the related regulations define employee and employer for purposes of employment taxes imposed under Subtitle C. Section 6001 authorizes the IRS to request information needed to determine if a worker(s) or firm is subject to these taxes. Section 6109 requires you to provide your taxpayer identification number. Neither workers nor firms are required to request a status determination, but if you choose to do so, you must provide the information requested on this form. Failure to provide the requested information may prevent us from making a status determination. If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination. Providing false or fraudulent information may subject you to penalties. Generally, tax returns and return information are confidential, as required by section 6103. However, section 6103 allows or requires the IRS to disclose or give the information shown on your tax return to others as described in the Code. Routine uses of this information include providing it to the Department of Justice for use in civil and criminal litigation, to the Social Security Administration for the administration of social security programs, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for the administration of their tax laws. We also may disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. We may provide this information to the affected worker(s), the firm, or payer as part of the status determination process.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law.

The time needed to complete and file this Form SS-8 will vary depending on individual circumstances. The estimated average time is: Recordkeeping, 23 hrs., 55 min.; Learning about the law or the form, 1 hr., 48 min.; Preparing the form, 5 hrs., 03 min.; and Sending the form to the IRS, 48 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:M:S, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the tax form to this address. Instead, see *Where To File* on page 5.

# APPENDIX B

## IRS Response to Form SS-8: Determination of Worker Status

This section contains an example of a response that a company received after filing Form SS-8 with the IRS to request a worker status determination. Members are strongly encouraged to consult with qualified employment law counsel before utilizing IRS Form SS-8 as any determinations made by the IRS are binding.

**Internal Revenue Service**

**SB/SE, Compliance**

**BIRSC, SS-8 Unit**

Index (UIL) No.: 3121.04-01

October 27, 2009

**Department of the Treasury**

**1040 Waverly Avenue-Stop 631**

**Holtsville, NY 11742**

Third Party Communication: None

**Form: SS-8**

**Person to Contact:**

**Telephone Number:**

**Fax Number:**

**Refer Reply to: Case # 66967**

Dear \_\_\_\_\_ :

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between \_\_\_\_\_, referred to as "the firm" in the rest of this letter, and \_\_\_\_\_, referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2008 and 2009.

It is our usual practice in cases of this type to solicit information from both parties involved. We requested information from the worker concerning this work relationship. Because we received no reply, we are issuing this determination based on the information available to us. Any other conditions that were not known or furnished may change this determination.

**DETERMINATION RESULT**

We hold the worker to be an employee of the firm. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

**DESCRIPTION OF WORK RELATIONSHIP**

The firm is in the business of aviation consulting, management, and pilot services. The worker is engaged as a pilot. The worker provides his services to the firm from 2008 to 2009 and in 2008 he received the Form W-2 for these services. The firm requested this

determination to obtain clarification on the worker's status as other companies treat pilot contractors/temporary pilot services as an independent contractor.

Although it is true that other firms may utilize these procedures in the treatment of their workers, it is not sufficient evidence for the SS-8 worker status determination process not to render a determination. In determining worker status the SS-8 unit is obligated to follow the guidelines set forth by the Federal Government and we do not rely on any usual industry practices. Therefore, we will be determining this case based on the Federal Government's common law practices in which the actual relationship between the parties is the controlling factor.

Information submitted by the firm indicates they provide the worker with the instructions he needs to do all the tasks the job required. The firm assigns the worker his assignments and if any problems or complaints arise, the worker is required to contact the firm's owner. The worker is required to submit written expense reports to the firm. The worker performs his services personally, adhering to a schedule set forth by the firm, flying the firm's aircraft to its assigned destination. For Federal income tax withholding and social security, Medicare, and Federal unemployment (FUTA) tax purposes, there are no differences among full-time employees, part-time employees, and employees hired for short periods. Income tax withholding may be figured the same way as for full-time workers. All of these facts indicate the firm's control over the services provided by the worker.

The firm provides all the necessary materials, supplies, and equipment the worker needs to perform his job duties. The worker supplies his labor. The worker is reimbursed by the firm for any business expenses incurred in performance of his services. The firm's customers pay the firm for the services provided by the worker. The worker receives an hourly wage for his services. The worker does not assume any financial risk in the relationship and therefore can not realize a profit or incur a loss as a result of the relationship. The above factors point towards the firm's control over the financial aspects of the relationship.

The worker's services are a necessary part of the firm's business activities. The worker does not advertise his services, nor does he maintain a shop or a business listing of his own. The worker performs his services under the firm's business name, and his work is integral to the firm's operation and not part of any kind of independent endeavor. The worker is currently employed with the firm. Both parties retain the right to terminate the relationship without incurring liability. This determination is based upon the information available to us; therefore, the firm has properly treated the worker as an employee in this work relationship for purposes of Federal employment taxes at the 2008 tax year.

## LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with

the application of law and regulations for worker classification issues, known as "common law."

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services,

the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

## ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business. This determination is based upon the information available to us; therefore, the firm had properly treated the worker as an employee in this work relationship for purposes of Federal employment taxes at the 2008 tax year.

## TAX RAMIFICATIONS

Compensation to an individual classified as an employee is subject to Federal income tax withholding, Federal Insurance Contributions Act tax (FICA), and Federal

Unemployment Tax Act (FUTA) tax as provided by sections 3101, 3301, and 3401 of the Internal Revenue Code, and it is possible you are liable for the same.

This determination is based on the application of law to the information presented to us and/or discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted. This ruling pertains to all workers performing services under the same or similar circumstances. It is binding on the taxpayer to whom it is addressed; however, Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

If you need further assistance in filing/adjusting your employment tax returns due to the classification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns. If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number (66967) when contacting us about this case.

Sincerely,



Jan Sinclair  
Operations Manager

Enclosures: Notice 441  
Sanitized Determination Letter for Public Disclosure

\* To order forms and publications, please call 1-800-TAX-FORM or visit us online at [www.irs.gov/formspubs](http://www.irs.gov/formspubs).

cc:

**Letter 3711-A (CG) (Rev. 10-2009)**  
Catalog Number 36630Q

# APPENDIX C

## Worker Status Tests Used in Each State

The following pages show a Department of Labor document outlining state tests of employer-employee relationships. For more information about these tests, contact the Department of Labor in your specific state, a human resource professional or an employment attorney.

## EMPLOYER-EMPLOYEE RELATIONSHIP

**SOURCE: US Department of Labor**

Most state laws contain strict tests to determine whether there is sufficient absence of control by an employer that the worker is not an employee but an independent contractor. More than half of the states provide criteria commonly called the “ABC” test under which service for remuneration is considered employment and the worker is an employee unless each of three tests is passed:

- The worker is free from control or direction in the performance of the work under the contract of service and in fact;
- The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and
- The individual is customarily engaged in an independent trade, occupation, profession, or business.

Other states have variations of this “ABC” test. For example, in some states only the “A” and “C” tests apply. The tests used in states are listed in the following table.

TABLE 1-4: WORKERS CONSIDERED EMPLOYEES UNLESS:									
State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests	State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests
AK	X	X	X		AL				Masterservant <sup>1</sup>
AR	X	X	X		AZ				Service performed by an employee for the entity employing him
CA	X	X	X	Contract of hire, written or oral, express or implied <sup>2</sup>	CO	X		X	
CT	X	X	X		DC				Contract of hire, written or oral, expressed or implied
DE	X	X	X		FL	X	X	X	X <sup>2</sup>
GA	X		X	SS-8 Determination from the IRS	HI	X	X	X	

State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests	State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests
IA	X			Contract of hire, written or oral, expressed or implied	ID	X		X	
IL	X	X	X		IN	X	X	X	20-factor test
KS	X	X			KY				Masterservant; by judicial interpretation
LA	X	X	X		MA	X	X	X	
MD	X	X	X		ME	X	X	X	
MI	X			Contract of hire, written or oral, express or implied	MN			X	Masterservant
MO				Common law of right to control	MS	X			Masterservant
MT				Works under approved IC exemption certificate	NC				Contract creating employee relationship
ND				20-factor test	NE	X	X	X	Contract creating employee relationship
NH	X	X	X		NJ	X	X	X	
NM	X	X	X		NV	X	X	X	
NY				Contract of hire, written or oral, expressed or implied	OH	X			Contract of hire, written or oral, expressed or implied

State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests	State	Workers Free from Control Over Performance (A)	Service Outside Regular Course or Place of Employer's Business (B)	Worker in an Independent Business (C)	Other Tests
OK	X	X	X		OR	X		X	
PA	X		X		PR	X	X	X	
RI	X	X	X		SC				Contract of hire, written or oral, expressed or implied
SD	X		X		TN	X	X	X	
TX				Common law	UT	X		X	
VA				20-factor test	VI	X	X	X	
VT	X	X	X		WA	X	X	X	
WI				Statutory factors <sup>3</sup>	WV	X	X	X	
WY	X			X <sup>4</sup>					

<sup>1</sup> In AL, KY, MN, and MS, master-servant refers generally to the employer's right of direction and control.

<sup>2</sup> In CA and FL, in addition to the A, B, and C tests, the following tests are considered: 1) in locality, work is usually done by specialist without supervision; 2) specialized skill is required in the particular occupation; 3) length of time for which person is employed suggests an independent relationship; 4) method of payment is by the job rather than by time; 5) parties do not believe they are creating a master and servant relationship; 6) principal not in business; and 7) principal does not supply the instrumentalities, tools, and the place of work for the person doing the work.

<sup>3</sup> Direction and control and independent business (i.e. AC) test used for governmental and nonprofit entities, loggers, and truckers.

<sup>4</sup> Individual must represent services to the public as being in self-employment or as an independent contractor, and individual must be able to substitute another individual to perform the services.

## EMPLOYMENT SPECIFICALLY EXCLUDED

State exclusions from employment generally follow the FUTA exclusions. However, the states often exclude other types of employment as well. This section presents a brief discussion of each of the exclusions that occur in all or nearly all of the state laws. A great many miscellaneous exclusions, which occur in only a few states and affect relatively small groups, are not included. The following table provides an overview of some of the basic exclusions from the definition of employment used by states.

**TABLE 1-5: SIGNIFICANT MISCELLANEOUS EMPLOYMENT EXCLUSIONS**

State	Insurance Agents on Commission	Real Estate Agents on Commission	Casual Labor Not in Course of Employer's Business	Part-Time Service for Nonprofit Organizations Exempt from Federal Income Tax <sup>1</sup>	State	Insurance Agents on Commission	Real Estate Agents on Commission	Casual Labor Not in Course of Employer's Business	Part-Time Service for Nonprofit Organizations Exempt from Federal Income Tax <sup>1</sup>
AL	X	X	X	X	AK	X	X	X	X <sup>1,2</sup>
AZ	X	X	X	X	AR	X	X	X	X
CA		X	X	X	CO	X	X	X	X
CT	X	X	X	X	DE	X	X		
DC	X		X	X	FL	X	X	X	X
GA	X	X	X		HI	X	X	X	X <sup>2</sup>
ID	X	X			IL	X	X		X
IN	X		X	X	IA		X		
KS	X	X	X	X	KY	X	X	X	X
LA	X	X	X	X	ME	X	X		X <sup>1</sup>
MD	X	X	X	X	MA	X	X	X	X
MI	X	X		X	MN	X <sup>3</sup>	X <sup>3</sup>	X	
MS	X	X	X	X	MO	X	X		
MT	X	X	X		NE	X	X	X	X
NV		X			NH	X	X	X	X
NJ	X	X			NM	X	X		
NY		X			NC	X	X	X	X
ND	X	X	X	X	OH	X		X	X
OK	X	X			OR	X	X	X	
PA	X	X	X		PR		X	X	
RI	X <sup>3</sup>	X	X	X	SC	X	X	X	X
SD	X			X	TN	X	X		
TX	X	X			UT	X	X	X	X
VT	X	X	X	X	VA	X	X	X	X
VI			X		WA	X	X	X	
WV	X				WI	X	X		X
WY		X	X						

<sup>1</sup> In all states, this exclusion is limited to remuneration of less than \$50 in any CQ, except in AK, (less than \$250), and ME (less than \$150).

<sup>2</sup> In AK and HI, does not exclude just part-time service.

<sup>3</sup> Does not exclude such service if performed for a corporation or by industrial and debit insurance agents; MN does not exclude such service if performed by a corporate officer

# APPENDIX D

## Risk/Benefit Charts for the Aircraft Owner/Operator

The following charts are designed to assist aircraft owners and operators in understanding the benefits and risks of commonly used contingent worker arrangements. Each arrangement is analyzed based on its impact to flight operations, company administration, tax liabilities and insurance coverage. When using a third-party firm, managers should take steps to determine how the firm compensates workers. Generally, the workers from a third-party firm are either independent contractors or W-2 employees of the firm. The risks and benefits of both scenarios are presented below.

### Contingent Worker Independent Contractor (IC)

		IC Hired Directly by Owner/Operator		IC Hired via Third-Party Firm	
		Benefits	Risks	Benefits	Risks
<b>Flight Ops</b>	Obtain Worker Quickly or As Needed	Easiest and fastest option	IC may be engaged without corporate approval	Moves quickly with contract in place	Contact approval can take time
<b>Admin</b>	Cost	Generally lowest cost	Worker could be misclassified as IC and classification challenged	Generally more expensive than hiring IC directly, but less expensive than hiring contingent W-2 employee	Worker may be misclassified as IC leading to possible challenge and exposure for third-party firm and/or owner/operator
	Accounting	Easy setup; Obtain W-9 upfront and issue 1099 at year-end	Compliance with IRS rules	Enter into contract/pay as invoiced. Avoid W-9 and 1099 requirements	Third-party firm may not comply with all IRS rules
	HR/Payroll	No benefit plan participation; no payroll tax paid	IC may bypass normal HR screening; if misclassified may be entitled to benefit plans/employee rights	No benefit plan participation; no payroll tax paid	IC may be misclassified and entitled to benefit plans/employee rights of third-party firm and/or owner/operator
<b>Tax</b>	Federal Income Tax	None withheld	Employer may be liable for IC's tax, interest and penalties	None withheld	Potential employment tax exposure for both third-party firm and owner/operator
	Unemployment Insurance (FUTA/SUTA)	None paid	IC may file claim for unemployment benefits triggering audit	None paid	IC may file claim for unemployment benefits triggering audit for third-party firm and owner/operator
	Social Security/Medicare (FICA)	None withheld None paid	Employer may be liable for both employer's/employee's tax, interest and penalties	None withheld None paid	Third-party firm and owner/operator may be liable
	State Income	None withheld	Employer exposure for unpaid tax, interest and penalties	None withheld	Third-party firm and owner/operator may be liable for unpaid tax, interest and penalties
<b>Insurance</b>	Workers' Comp	Fewer covered employees = lower premiums; owner/operator can require IC to provide own coverage	Employer may violate state law by not covering IC and may still be responsible for coverage; IC can sue employer for damages from workplace injuries	Third-party firm may have coverage or require IC to obtain own coverage	Third-party firm may not have coverage and may not require certificate of insurance from IC evidencing coverage creating exposure to both third-party firm and owner/operator for workplace injuries
	Liability	N/A	Employer may be liable for actions of IC and IC may not have coverage or adequate coverage/assets to cover damages	If coverage available through third-party firm also obtain third-party liability coverage for contractor's actions	Third-party firm may not have coverage or adequate coverage and lack assets to cover damages = exposure for owner/operator due to IC actions

## Contingent Worker W-2 Employee

		W-2 Employee Hired Directly by Owner/Operator		W-2 Employee Hired via Third-Party Firm	
		<i>Benefits</i>	<i>Risks</i>	<i>Benefits</i>	<i>Risks</i>
<b>Flight Ops</b>	Obtain Worker Quickly or As Needed	Hiring fully approved per corporate guidelines although process may be slower	Hiring process can move slowly	Moves quickly with contract in place	Contact approval can take time
<b>Admin</b>	Cost	Often most expensive initially, but future penalties and enforcement costs are minimized	Generally most expensive in terms of cost, administrative burden, and benefits	Generally less expensive than W-2 direct hire due to lower overhead and no participation in owner/operator benefits, future penalties and enforcement costs minimized	Owner/operator benefit plan must be structured to accurately reflect workers who qualify/do not qualify for benefit plans
	Accounting	Employer processes W-2 payroll, FICA, FUTA, SUTA, workers' compensation and benefits	N/A	Third-party firm processes W-2 payroll, FICA, FUTA, SUTA, workers' compensation and benefits	N/A
	HR/Payroll	Employees go through normal screening process	N/A	Hiring process administered by third-party firm	N/A
<b>Tax</b>	Federal Income Tax	Withheld by employer	N/A	Withheld by third-party firm	N/A
	Unemployment Insurance (FUTA/SUTA)	Contributions paid by employer	Employer's contribution rate can increase with higher level of unemployment; claims managed by employer	Contributions paid by and claims managed by third-party firm. Rate increases for higher unemployment benefits responsibility of third-party firm	N/A
	Social Security/Medicare (FICA)	Employer pays their portion and withholds employee's portion	N/A	Third-party firm pays their portion and withholds employee's portion	N/A
	State Income	Withheld by employer. Some states have none	N/A	Withheld per applicable taxing jurisdiction	N/A
<b>Insurance</b>	Workers' Comp	Policy paid by employer based on W-2 payroll; employer policy handles claims/absorbs losses; employees generally prohibited from suing employer for damages from workplace injuries	Premium costs increase with hiring of additional employees	Policy paid by third-party firm based on W-2 payroll; policy handles claims/absorbs losses; employees generally prohibited from suing third-party firm or owner/operator for damages from workplace injuries	Alternate employer endorsement to include owner/operator should be provided
	Liability	Employer's policies cover exposures created by employee	Employer policies handle claims/absorbs losses	Third-party firm policies may cover all or some claims/loss burden created by third-party firm employee depending on type of exposure	Third-party firm may not have coverage or adequate coverage or assets relative to exposure. With third-party firm coverage, owner/operator may absorb some loss created by or contributed to third-party firm employee