

# Am I an employee or independent contractor? ...and why does that matter?



Information for workers in Texas

*These rights apply to all workers, regardless of immigration status.*

## **My employer gave me a 1099, doesn't deduct payroll taxes from my check, and says I'm an independent contractor. Does that mean I'm an independent contractor?**

No, not necessarily. The law says that you can be an employee even if your employer calls you an independent contractor (or gives you a 1099) and even if you sign something agreeing that you are an independent contractor.

Even if your employer says you're an independent contractor, that doesn't mean you are one. What's important are your relationship with the employer and the facts of your work, not how the employer labels you.

## **Why does it matter if I'm an independent contractor or an employee?**

In general, you have many more rights as an employee. If you are truly an independent contractor, you do not automatically have the right to the minimum wage, overtime pay, workers' compensation, unemployment compensation, and most other workplace protections (like protections against discrimination). Independent contractors have to pay more in taxes, too.

Many employers treat their employees as independent contractors to avoid responsibilities under the above laws. Even if you were treated as an independent contractor, you can still enforce your rights as an employee if the facts show that you were really an employee, not an independent contractor.

## **So how can I tell if I'm an independent contractor or an employee?**

There's not a simple test, and you have to look at all the facts of the work, but:

- You're more likely to be an **independent contractor** if you usually do work without supervision, your work is outside the regular work of the business that pays you (for example, if a school hires an AC repairperson), you do your own advertising or hold yourself out as an independent business, you negotiate your price, you control your profits, and you invest in your own tools or equipment.
- You're more likely to be an **employee** if your work is supervised, your work is part of the regular work of the business that pays you (for example, if you're a teacher working for a school), you do not hold yourself out as an independent business or set your own pay, and your employer provides you with most tools/equipment you need for the work.

*These types of workers are often misclassified as independent contractors, but may really be employees: temporary workers, workers paid in cash, construction workers, workers who work off-site, and domestic workers.*

### **If I was misclassified as an independent contractor, what claims could I have?**

Many workers who are misclassified as independent contractors (but are really employees) may have claims for minimum wage or overtime against their employers. Most employees in Texas have the right to a minimum wage of \$7.25 per hour for the first 40 hours of work, plus overtime (1.5 times the hourly rate, or \$10.88 per hour, whichever is higher) for hours worked beyond 40 in a workweek. For more information on wage rights, go [here](#).

Employees can also have the right to workers' compensation (for workplace injuries), unemployment compensation (if you are fired or quit with good cause), and rights under discrimination and family leave laws (if the employee and employer are covered). For more information, contact an attorney.

### **If I really am an independent contractor, do I have rights?**

Yes. If you really are an independent contractor and are owed pay for your work, you probably have the right to sue for breach of contract. If you are owed \$20,000 or less, you can file a lawsuit in Justice of the Peace Court. For more information on how to file a claim in Justice of the Peace Court, go [here](#). If you are a construction worker and not paid for your work, you could also have the right to get a mechanic's lien to help you get paid for your work. For more information on mechanic's liens, go [here](#). If you are injured at work as an independent contractor, you could have the right to personal injury damages in some cases.

Other rights could apply. Contact an attorney for advice on your situation.

### **If I got a 1099 but I'm really an employee, how do I file my taxes?**

*Before you file your taxes, you should contact an attorney or tax professional for assistance with your taxes. See below for options. Below is general information that may help you. Seek specific advice on your situation.*

If your employer gives you a 1099 and does not make payroll deductions for federal income tax withholding and Social Security and Medicare taxes, there are some steps you can take to correct this issue when you file your taxes.

**Filing a substitute W-2:** Even if your employer did not give you a W-2, you can still file your taxes using a substitute W-2. If you don't receive a W-2 by the time you file your taxes, you can look at your records to determine how much you earned from your employer for the year for which you are filing your taxes. You can report this amount with your taxes on Form 4852, Substitute W-2 and also on Form 8919, which you will attach to your tax return. You can also file Form SS-8 with the IRS to explain why your employer should have treated you as an employee. The IRS will contact your employer to ask for the company's response to what you say in form SS-8. It can take up to six months for the IRS to make this determination. You should check for the

most updated versions of these forms when you are filing your taxes. You can find them on the IRS website: <https://apps.irs.gov/app/picklist/list/formsPublications.html>

**Asking the IRS to help you get a W-2 from your employer:** You have the option to ask the IRS to help you get a W-2 from the employer. If you want to ask the IRS to help you contact the employer, you can contact the IRS at 800-829-1040 to ask to make a Form W-2 Complaint. The IRS will send your employer a letter requesting that they provide you a corrected Form W-2 within ten days, and the IRS will also send you a letter with instructions on what to do if you do not get your W-2 in time to file your taxes. For more information on getting help from the IRS, see: <https://www.irs.gov/faqs/irs-procedures/w-2-additional-incorrect-lost-non-receipt-omitted/w-2-additional-incorrect-lost-non-receipt-omitted>

**Reporting your employer to the IRS:** You may also want to submit a Form 4939-A "Information Referral" to the Internal Revenue Service to report your employer for failing to pay required federal tax. You can get a copy of this form here: <https://www.irs.gov/pub/irs-pdf/f3949a.pdf>

**Help with filing your taxes:** If you would like assistance with your taxes, you can contact the Volunteer Income Tax Assistance (VITA) program run by the IRS. The VITA program offers free tax help to lower- and middle-income people (see this website for the current income levels: <https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers>), persons with disabilities, and limited English speaking taxpayers who need assistance in preparing their own tax returns. IRS-certified volunteers provide free basic income tax return preparation with electronic filing to qualified individuals. VITA and Tax Counseling for the Elderly (TCE) sites are generally located at community and neighborhood centers, libraries, schools, shopping malls and other convenient locations across the country. To locate the nearest VITA or TCE site near you, use the VITA Locator Tool (see: <https://www.irs.gov/individuals/find-a-location-for-free-tax-prep>) or call 800-906-9887. You can also contact a paid tax preparer.

**Reporting the Employer to the Texas Workforce Commission's Tax Department:** Employers are required to report/forward taxes to the Texas Workforce Commission's (TWC's) tax department. In addition to reporting your employer to the IRS, you can contact the TWC's tax department. To report the employer anonymously, you can call the TWC's Field Tax Operations Department at 512-463-2700.

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*Note: this information is not legal advice. For free, confidential advice and information, contact Texas RioGrande Legal Aid at 888-988-9996.*