

WHO IS AN INDEPENDENT CONTRACTOR?

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I. REQUIREMENTS FOR DEFINING AN INDEPENDENT CONTRACTOR

1. Employers who improperly classify an employee as an independent contractor are subject to several areas of liability:
 - liability for payroll taxes and possible penalties;
 - liability for claims of employment discrimination or wrongful discharge;
 - liability for claims for workers compensation, or unemployment compensation;
 - liability for denial of participation in employee benefit plans, including retirement plans, profit-sharing plans, health insurance plans, and COBRA; and
 - liability for overtime claims under state or federal wage and hour laws.
2. Under Connecticut law, the “fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work.” Many factors are considered in determining whether the employer has the right of general control over the individual. Ordinarily, if the employer (a) retains the right to discharge; (b) pays the employee at an hourly or salaried rate; (c) establishes the hours to be worked; (d) furnishes the necessary equipment or materials for the job; and (e) monitors the individual’s work and retains the right to take corrective measures if performance is unsatisfactory, the individual is deemed to be an employee and not an independent contractor.
3. For purposes of unemployment compensation benefits, Connecticut has established a three-part test to determine whether an individual is an independent contractor (sometimes referred to by the courts as the “A, B, C” test). In order to establish independent contractor status, an employer must prove that:
 - a. such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and
 - b. such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
 - c. such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

4. Courts have used the “economic realities” test to determine whether an individual is an employee under the Fair Labor Standards Act (“FLSA”). The economic realities test is a totality of the circumstances test that considers: (1) the degree of the employer’s control over the worker; (2) the worker’s opportunity for profit or loss and his investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer’s business.
5. The IRS has developed a 20 factor test to determine whether an individual is an employee or an independent contractor. For the employer to be able to demonstrate that a worker is an independent contractor, most of the factors must lean towards independent contractor status. If some of the factors lean toward the employee’s side, then the employer would be required to show that other factors (or a factor which is more significant) offset them.

Factor 1. No instructions. Contractors are not required to follow, nor are they furnished with, instructions to accomplish a job. They can be provided job specifications by the hiring firm.

Factor 2. No training. Contractors typically do not receive training by the hiring firm. They use their own methods to accomplish the work.

Factor 3. Services do not have to be rendered personally. Contractors are hired to provide a result and usually have the right to hire others to do the actual work.

Factor 4. Work not essential to the hiring firm. A company’s success or continuation should not depend on the services of outside contractors. An example violating this would be a law firm that called their lawyers independent contractors.

Factor 5. Own work hours. Contractors set their own work hours.

Factor 6. Not a continuing relationship. Usually, contractors do not have a continuing relationship with a hiring company. The relationship can be frequent, but it must be at irregular intervals, on call, or whenever work is available.

Factor 7. Control their own assistants. Contractors should not hire, supervise, or pay assistants at the direction of the hiring company. If assistants are hired, it should be at the contractor’s sole discretion.

Factor 8. Time to pursue other work. Contractors should have enough time available to pursue other gainful work.

Factor 9. Job location. Contractors control where they work. If they work on the premises of the hiring company, it should not be under that company's direction or supervision.

Factor 10. Order of work set. Contractors determine the order and sequence that they will perform their work.

Factor 11. No interim reports. Contractors are hired for the final result and therefore should not be asked for progress or interim reports.

Factor 12. Payment timing. Contractors are paid by the job, not by time. Payment by the job can include periodic payments based on a percentage of job completed. Payment can be based on the number of hours needed to do the job, times a fixed hourly rate. However, this should be determined before the job commences.

Factor 13. Working for multiple firms. Contractors often work for more than one firm at a time.

Factor 14. Business expenses. Contractors are generally responsible for their incidental expenses.

Factor 15. Own tools. Usually, contractors furnish their own tools.

Factor 16. Significant investment. Contractors should be able to perform their services without relying on the company's facilities (equipment, office furniture, machinery, etc.). The contractor's investment in his trade must be real, essential, and adequate.

Factor 17. Services available to general public. Contractors make their services available to the general public by one or more of the following: having an office and assistants; having business signs; having a business license and being incorporated; listing their services in a business directory; or advertising their services.

Factor 18. Possible profit or loss. Contractors should be able to make a profit or a loss. Employees cannot suffer a loss. Five circumstances show that a profit or loss is possible: if the contractor hires, directs, and pays assistants; if the contractor has his own office, equipment, materials or facilities; if the contractor has continuing and reoccurring liabilities; if the contractor has agreed to perform specific jobs for prices agreed upon in advance; and if the contractor's services affect his own business reputation.

Factor 19. Limited right to discharge. Contractors cannot be fired so long as they produce a result which meets the contract specifications.

Factor 20. No compensation for non-completion. Contractors are responsible for the satisfactory completion of a job or they may be legally obligated to compensate the hiring firm for failure to complete.

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