

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. Proper classification is often complicated because there is no single test for determining whether a worker is or is not an employee. For example, the United States Department of Labor (“US DOL”) and the Internal Revenue Service (“IRS”) use different, although similar, analytical frameworks to determine when a worker should be classified as an employee rather than as an independent contractor.
3. The multiplicity of tests defining independent contractor status applied across federal and state laws, makes it possible for a worker to be classified as an independent contractor under one law, but as an employee under another.
4. To minimize legal risk, organizations are well-advised to ensure that classification as an independent contractor would satisfy *every* test that may be applicable where they do business (i.e., the classification must pass muster under all applicable tests, in all applicable states).
5. For purposes of wage and hour laws, the US DOL (and the Second Circuit Court of Appeals which covers employers in Connecticut) has adopted the “totality of the circumstances” test in addressing whether, as a matter of economic reality, the worker depends upon someone else's business for the opportunity to render service, or is in business for themselves. In applying this test, the Second Court has emphasized “it is not what [the workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.” This test is based on six factors, each of which is examined and analyzed in relation to one another, and no single factor is determinative:

- (a) the extent to which the work performed is an integral part of the service recipient's business;
 - (b) the extent of the worker's investment in his own business vs. the service recipient's business;
 - (c) the opportunity for profit and loss available to the worker;
 - (d) the degree of control that the service recipient exercises or retains over the worker;
 - (e) the permanence or duration of the working relationship; and
 - (f) the level of special skills and independent initiative needed to perform the job.
6. For tax reporting and withholding purposes, the IRS relies upon 11 factors (rather than the previous 20 factors) within three areas to determine contractor status, as follows:

- (a) Behavioral control: Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:
 - 1. *Instructions the business gives the worker*. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
 - i. When and where to do the work;
 - ii. What tools or equipment to use;
 - iii. What workers to hire or to assist with the work;
 - iv. Where to purchase supplies and services;
 - v. What work must be performed by a specified individual; and
 - vi. What order or sequence to follow

NOTE: The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

2. *Training the business gives the worker.* An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

(b) Financial Control: Facts that show whether the business has a right to control the business aspects of the worker's job include:

1. *The extent to which the worker has unreimbursed business expenses.* Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.
2. *The extent of the worker's investment.* An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.
3. *The extent to which the worker makes services available to the relevant market.* An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
4. *How the business pays the worker.* An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
5. *The extent to which the worker can realize a profit or 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 loss. An independent contractor can make a profit or loss.

(c) Type of relationship: Facts that show the parties' type of relationship include:

1. *Written contracts describing the relationship the parties intended to create.* This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.
2. *Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.* The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.
3. *The 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, this is generally considered evidence that the intent was to create an employer-employee relationship.
4. *The extent to which services performed by the worker are a key aspect of the regular business of the company.* 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, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

7. The “right to control” test (generally utilized in employee benefits and discrimination cases) is dependent on when the organization can tell the worker what to do and how, when and where to do it, and is based on factors including:

- (a) the extent of control exercised by the service recipient over the details of the work;
- (b) whether the worker is engaged in a distinct business or occupation;
- (c) the kind of occupation and whether, in the locality, the work is usually done under the direction of the service recipient or by a specialist without supervision;

- (d) the skill required in the particular occupation;
 - (e) whether the service recipient or the worker supplies the instrumentalities, tools and workplace;
 - (f) the length of time for which the person works;
 - (g) the method of payment, whether by time worked or by the job;
 - (h) whether or not the work is part of the regular business of the service recipient;
 - (i) whether or not the parties believe they are creating an employer-employee relationship; and
 - (j) whether or not the worker does business with others.
8. For unemployment purposes, Connecticut law expressly limits benefits to “employees” and delineates the “ABC” test for determining employment status. Under the “ABC” test, any service rendered by a person to an employer is considered “employment,” unless and until the employer proves that:
- (a) the person has been and will continue to be free from control and direction in connection with the performance of work;
 - (b) the work is performed either outside the usual course of the business or is performed outside of all the places of business; and
 - (c) the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In Standard Oil v. Administrator, Unemployment Compensation, 320 Conn. 611 (2016), the Connecticut Supreme Court reversed an unemployment decision that workers used by a business to visit and service customer sites were employees and not independent contractors.

- (a) On part A of ABC test, the Court found that the workers owned their own tools and vehicles, were independently licensed and certified and unsupervised at their worksites by representatives of Standard Oil. Further, installers/technicians were free to accept or reject any assignment offered to them without adverse consequences.

- (b) On part B of ABC test, the Court found that “place of business” should not be extended to homes in which installers/technicians worked, unaccompanied by the hiring entity’s employees and without supervision.

In Southwest Appraisal Group v. Administrator, Unemployment Compensation, 324 Conn. 822 (2017), the Connecticut Supreme Court ruled that an individual who works only with one company can be an independent contractor for unemployment purposes. The Court focused on whether the worker was “customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed” and stated that the Administrator must look at the “totality of the circumstances” including:

- (a) the existence of state licensure or specialized skills;
- (b) whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices or advertising;
- (c) the existence of a place of business separate from that of the putative employer;
- (d) the putative employee’s capital investment in the independent business, such as vehicles and equipment;
- (e) whether the putative employee manages risk by handling his or her own liability insurance;
- (f) whether services are performed under the individual’s own name as opposed to the putative employer;
- (g) whether the putative employee employs or subcontracts others;
- (h) whether the putative employee has a saleable business or going concern with the existence of an established clientele;
- (i) whether the individual performs services for more than one entity;
- (j) and whether the performance of services affects the goodwill of the putative employee rather than the employer.

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