



Employment Law Roundtable: Who is an Independent Contractor? Part 2

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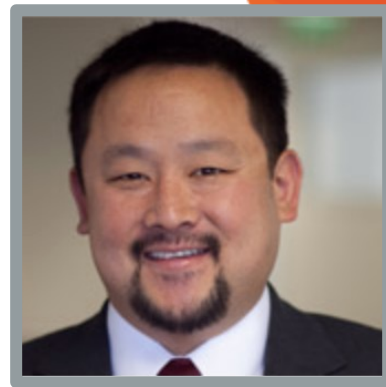
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General Considerations

- ❑ Type of test to use depends on employment matter at issue
 - Example:
 - Alaska uses “ABC” test for unemployment insurance coverage, Economic Realities test for wage-hour claims, and statutory test for workers' compensation coverage

New DOL Independent Contractor Test

☐ Six factors to consider:

- Opportunity for profit or loss based on managerial skill
- Investments in tools by the worker and employer
- Permanence of the work relationship
- Nature and degree of control
- Whether work performed is integral to the business
- Skill and initiative

☐ Written agreement, licensing, and 1099 payment not relevant

New DOL Independent Contractor Test

- ❑ *Warren v. U.S. Dept. of Labor*, Case No. 2:24-CV-007-RWS (N.D. Ga. January 16, 2024)
 - Suit brought by freelance workers wishing to remain independent contractors
 - Alleges Rule violates Administrative Procedure Act and U.S. Constitution

IRS 20-Factor Test

☐ 20 Factors:

- Does worker have to comply with specific instructions about the time, place, and manner of work?
- Does the company provide training or apprenticeship?
- Does the service fit into overall business operation?
- Must the worker perform the service personally?
- Who hires, supervises, and pays assistants of worker?
- Is there a continuing relationship?

IRS 20-Factor Test (cont'd.)

- Are there set hours of work?
- Does the work require full-time service to the business?
- Does the worker perform work on company premises?
- Is there a sequence of work set by the company?
- Does the company require oral or written reports?
- Does the worker receive regular periodic paychecks based on time spent on work?
- Who pays business and/or travel expenses of worker?

IRS 20-Factor Test (cont'd.)

- Who furnishes tools, machinery, and materials for work?
- Does the worker make significant investment in facilities used to perform services?
- Does the worker provide same services to others?
- Does the worker have an opportunity for profit or loss?
- Does the worker advertise or make services available to the general public?
- Does the company have the right to hire or fire?

IRS 20-Factor Test (cont'd.)

- Does the worker have the ability to terminate the relationship at any time without liability?
- ❑ IRS doesn't even follow test anymore
- ❑ However, certain states have codified the test for independent contractor purposes (Alabama, Arkansas)

State Common Law “Right to Control” Test

- ❑ Company has right of control establishing employment relationship based on:
 - Direct evidence demonstrating a right or an exercise of control
 - Method of payment for services
 - Company furnishes equipment for services
 - Whether either party has right to terminate relationship

State Common Law “Economic Realities” Test

- ❑ Independent contractor relationship determined by:
 - Degree of company’s right to control manner in which work is performed
 - Worker’s opportunity to earn profit or loss depending upon their own managerial skill
 - Amount of special skill required to render service
 - Degree of permanence of the working relationship
 - The integral nature of the service to the business

State “ABC” Test

- ❑ Worker considered an employee and not an independent contractor UNLESS:
 - Worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract and in fact;
 - Worker performs services outside the usual course of the hiring entity's business; and
 - Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

“ABC” Test

- ❑ Certain states using the “ABC” test only require two of the three elements
 - Colorado, Idaho, Montana, Pennsylvania, Wisconsin, and Wyoming only require first and third elements
 - Oklahoma and Virginia require first and third or first and second elements