A BUILDER'S RESOURCE GUIDE TO STATE LAWS ON MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

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A Builder's Resource Guide to State Laws on Misclassification of Employees as Independent Contractors

The law permits the use of Independent Contractors, provided such workers are not "employees" under existing tax, employee benefit, and labor and employment laws.

If an employee is classified as an independent contractor, the "employer" is not required to pay and/or withhold a variety of payroll-related taxes, fees and benefits (e.g., social security and medicare taxes, local, state and federal income taxes, unemployment insurance, workers compensation, pension and health benefits, etc.). Not only are these costs shifted to the individual worker, the "independent contractor" is also not fully protected by various employment laws (minimum wage and overtime requirements, workers compensation protection, etc.).

Responding to mounting evidence that many employers nationwide have classified some of their employees as independent contractors as a cost-savings measure – there has been increased focus at both the federal and state levels on whether workers are properly designated as independent contractors or if they instead should be considered company employees. Some states have focused their efforts on specific industries, most notably the construction industry.

The tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law. For example, at the federal level, the National Labor Relations Act, The Civil Rights Act, Fair Labor Standards Act, and Employee Retirement Income Security Act (ERISA) each use a different definition of an employee and various tests, or criteria to distinguish independent contractors from employees. Similarly, at the state level, often there is no single test to determine employment classifications. Thus, a worker may be an independent contractor under a test used by one agency, and an employee under the test used by another agency, creating confusion for businesses.

This state-by-state Guide discuss the laws that determine whether a worker is an independent contractor or employee, with an emphasis on the tests commonly used to determine worker status for purposes of unemployment insurance, workers' compensation, and revenue (taxation).

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ALABAMA

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Alabama, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Workers' Compensation and Unemployment Compensation

Alabama courts apply a "right of control" test to determine employee or independent contractor status. For one to be an employee, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished or, in other words, not only what shall be done, but how it shall be done.

If the right of control extends no further than directing what is to be ultimately accomplished, an employer-employee relationship is not established; however, if an individual retains the right to direct the manner in which the task is to be done or if that individual does in fact dictate the manner of operation, then an employer-employee relationship is established. The factors to be considered in determining whether an individual or an entity has retained the right of control include:
(1) Direct evidence demonstrating a right or an exercise of control;
(2) The method of payment for services;
(3) Whether equipment is furnished; and
(4) Whether the other party has the right to terminate the employment.

Susan Schein Chrysler Dodge, Inc. v. Rushing, 77 So.3d 1203, 1208 (Ala. Civ. App. 2011)

Effective October 1, 2012, the Alabama Department of Industrial Relations merged with the Alabama Department of Labor (ADOL). The merged agency is known as the ADOL with jurisdiction over workers' compensation and unemployment compensation. The ADOL does not post an employee/independent contractor test on its website.

Income Taxes

The Alabama Department of Revenue (ADR) has jurisdiction over payroll taxes and withholding. The ADR does not post an employee/independent contractor test on its website, but does state that… "an employer is any person or other entity for which an individual performs or performed a service, of any nature, as an employee of such person or entity. For more information on whether a worker is considered contract labor or an employee requiring income tax withholding, file Form SS-8 with the IRS for a determination."

Wage and Hour

Alabama does not have any state laws governing wage and hour issues. For wage and hour purposes, Alabama applies the employee status determination test used by the U.S. Department of Labor, Wage and Hour Division (WHD) under the Fair Labor Standards Act (FSLA).

(1) The extent to which the work performed is an integral part of the employer's business.

(2) Whether the worker's managerial skills affect his or her opportunity for profit and loss.

(3) The relative investments in facilities and equipment by the worker and the employer.

(4) The worker's skill and initiative.

(5) The permanency of the worker's relationship with the employer.

(6) The nature and degree of control by the employer.

Memorandum of Understanding

On October 2, 2014, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Alabama Department of Labor (ADOL) entered into a Memorandum of Understanding (MOU) agreement for a period of three years pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law.

Additional Resources:

Memorandum of Understanding
MOU press release
IRS Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)

In Atchison v. Boone Newspapers, Inc. 981 So.2d 427 (Ala. Civ. App. 2007) the court held that… "(f)or one to be an employee for purposes of workers' compensation benefits, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished or, in other words, not only what shall be done, but how it shall be done".

Income Tax - Ala. Code 1975 § 40-18-1 to 40-18-344

Workers' Compensation - Ala. Code 1975 § 25-5-1 to 25-5-318
Unemployment Insurance Taxes - Ala. Code 1975 § 25-4-1 to 25-4-152

ALASKA

Misclassification occurs when a worker is improperly classified as an independent contractor when the worker is actually an employee of the employer. In Alaska, no one test is determinative as agencies use different tests to establish employment status with respect to separate areas of the law. For example, the Alaska Employment Security Act uses a different test from the Workers' Compensation statutes to determine an employee's classification for coverage purposes.

Unemployment Compensation

Alaska follows the ABC test for workers to qualify as an independent contractor: "(a) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact; (b) the service is performed either outside the usual course of 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) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed." Alaska Stat. § 23.20.525(a)(8)(A)-(C).

In addition, Alaska requires that a worker performing services outside of the usual course of business must be covered for Unemployment Insurance purposes if: (1) remuneration paid is $50 or more in a calendar quarter, and (2) the service performed is done by a worker who is regularly employed to do this work. Alaska Stat. § 23.20.526(a)(3).

Workers' Compensation

In the context of Workers' Compensation coverage, Alaska applies a "relative nature of the work" test to distinguish employees from independent contractors. Alaska Stat. § 23.30.055. This test uses a multi-prong approach which considers: (1) the character of the worker's work or business, and (2) the correlation between the worker's work or business and the purported employer's business. Odsather v. Richardson, 96 P.3d 521, 523 (Alaska 2004) (citing Brenner v. Wichman, 874 P.2d 949, 952 (Alaska 1994). The court in Odsather stated,

> The inquiry into the character of the claimant's business can further be broken into three factors: (1) the degree of skill involved, (2) whether the claimant holds himself out to the public as a separate business, and (3) whether the claimant bears the accident burden. The inquiry into the relationship between the claimant's work and the work of the purported employer can also be broken into three factors: (1) extent to which claimant's work is a regular part of the employer's regular work, (2) whether claimant's work is continuous or intermittent, and (3) whether the duration of the work is such that it amounts to hiring of continuing services rather than a contract for a specific job.

Id. at 953.

Under Alaska common law, the primary question in determining a worker's status as an employee or independent contractor is based on whether there is a right to direct and control the means and details of the work. Alaska will also look at additional factors including behavioral control, financial control, and the relationship of the parties. *See, Independent Contractor or Employee?* (Alaska Dept. of Labor 2005).

Revenue

With respect to the wage and hour laws, Alaska uses the "Jeffcoat test" to determine whether a worker qualifies as an independent contractor. The six factors to consider include:

1. the degree of the alleged employer's right to control the manner in which the work is to be performed;
2. the alleged employee's opportunity for profit or loss depending upon his managerial skill;
3. the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
4. whether the service rendered requires a special skill;
5. the degree of permanence of the working relationship;
6. whether the service rendered is an integral part of the alleged employer's business.

Jeffcoat v. State, Dept. of Labor, 732 P.2d 1073, 1075-76 (Alaska 1987).

Alaska does not have a state income tax and there is no specific case law or statute with respect to the test used for tax purposes.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with Alaska.

Additional Resources:
Alaska Department of Labor
Alaska Employment Security Act – § 23.20.525(a)(8)(A)-(C)
Alaska Stat. § 23.30.045 – Employer's Liability for Contributions
Alaska Stat. § 23.30.055 – Exclusiveness of Liability under Workers' Compensation
Alaska Department of Revenue
Article – *Independent Contractor or Employee?* (Alaska Dept. of Labor, 2005).

ARIZONA

Misclassification occurs when an employee is improperly classified as an independent contractor. In Arizona, the state examines a totality of circumstances when evaluating whether a worker is an employee or an independent contractor. In addition, for purposes of Workers' Compensation requirements, Arizona applies the "right to control" test.

Unemployment Compensation

The Arizona Department of Economic Security examines several factors including whether the employer: (1) has authority over the worker's assistants; (2) requires compliance with its instructions; (3) requires workers to submit oral or written reports; (4) designates the place of work; (5) evaluates personal performance; (6) establishes the sequence of work; (7) has the right to fire; (8) controls the work hours and amount of time spent working; (9) provides training and tools and materials; and (10) reimburses expenses. Ariz. Admin. Code § 6-3-1723(D)(2).

Under the common law, Arizona applies the "right to control" test, which considers the extent of control the employer may exercise over the details of the work. Munoz v. Industrial Comm'n, No. 2 CA-IC 2013-001 (Ariz. Ct. App. Feb. 10, 2014) (citing Cent. Mgmt. Co. v. Indus. Comm'n, 162 Ariz. 187, 189, 781 P.2d 1374, 1376 (1989)). To determine who has the right to control, courts consider "various indicia of control" to resolve whether a claimant is an independent contractor or employee. Home Ins. Co. v. Indus. Comm'n, 123 Ariz. 348, 350, 599 P.2d 801, 803 (1979). Such indicia include, inter alia, the duration of employment, the method of remuneration, who furnishes equipment, who has the right to hire and fire, who bears responsibility for workmen's compensation insurance, and the extent of the employer's control over the details of the work. Id. No one factor is determinative, as courts must look to the totality of the facts and circumstances. El Dorado Ins. Co. v. Indus. Comm'n, 545 P.2d 465, 467 (Ariz. Ct. App. 1976).

Workers' Compensation

With respect to Workers' Compensation coverage, Arizona's statutes provide that a written agreement that is signed and dated by, and between, a business and an independent contractor that discloses the contractor is not entitled to workers' compensation benefits and contains certain criteria will create a rebuttable presumption that there is an independent contractor relationship between the parties. *See,* Ariz. Rev. Stat. § 23-902.

This presumption may be found null and void if the consent of either party to the written agreement is (1) obtained through misrepresentation, false statements, fraud or intimidation, or (2) obtained through coercion or duress. *Id.* The actual agreement should reflect the actual working relationship between the parties.

Revenue

For federal tax purposes, Arizona uses the Internal Revenue Service standard for classification.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a MOU with Arizona.

Additional Resources:

Arizona Department of Labor

Arizona Unemployment Insurance – Ariz. Rev. Stat. §§ 23-601 – 23-799

Industrial Commission of Arizona
Ariz. Rev. Stat. § 23-362 – Employer and employee defined
Ariz. Rev. Stat. § 23-902 – Exceptions to definition of employer
Ariz. Rev. Stat. § 23-613.01 – Employee defined in context of extended benefits

ARKANSAS

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Arkansas, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Unemployment Insurance Taxes

Arkansas statutory law, A.C.A. § 11-10-210(e)(1)(2)(3), provides the test, commonly referred to as the "1, 2, 3 test," for classification of a worker for unemployment insurance (UI) tax purposes. Under the statute, the presumption is that a worker is an employee unless the business entity that pays the worker can establish to the satisfaction of the Arkansas Department of Workforce Services all three test provisions, as follows:

1. The 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
2. The service is performed either outside the usual course of the business for which the service is performed or is performed outside all the places of business of enterprise for which the service is performed, and
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

If the employer cannot establish that the worker meets all three parts of the test, the worker must be classified as an employee and UI taxes reported and paid.

Workers' Compensation

The Arkansas Workers' Compensation Commission does not post an employee/independent contractor test on its website.

In Woodmancy v. Framco, Inc. 2011 Ark. App. 785, 387 S.W.3d 286 (2011) the court held that the factors to be considered in determining whether a workers' compensation claimant is an employee or independent contractor, with the principal factor being the right to control, are:

(1) The extent of control which, by the agreement, the master may exercise over the details of the work;

(2) Whether or not the one employed is engaged in a distinct occupation or business;

(3) The kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(4) The skill required in the particular occupation;

(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) The length of time for which the person is employed;

(7) The method of payment, whether by the time or by the job;

(8) Whether or not the work is a part of the regular business of the employer;

(9) Whether or not the parties believe they are creating the relation of master and servant; and

(10) Whether the principal is or is not in business.

Income Taxes

The Arkansas Department of Finance and Administration does not post an employee/independent contractor test on its website. Reference is made to the IRS 20 factor test for the determination of employee/independent contractor status for withholding tax purposes.

Wage and Hour – The Arkansas Department of Labor (ADL)

The ADL does not does not post an employee/independent contractor test on its website. For wage and hour purposes, Arkansas will apply the employee status determination test used by the U.S. Department of Labor, Wage and Hour Division (WHD) under the Fair Labor Standards Act (FSLA).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Arkansas has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

The ADWS publishes a chart to assist employers in the classification of their workers for unemployment insurance tax purposes: http://dws.arkansas.gov/Employers/ComparativeClassification.htm

The IRS's 20 factor test

Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)

Income Tax: A.C.A. § 26–51-101 to § 26–51-2509
Overtime Pay and Minimum Wage: A.C.A. § 11-4-201 to 11-4-219
Workers' Compensation: A.C.A. § 11-9-102 to 11-9-1001
Unemployment Insurance Taxes: A.C.A. § 11-10-101 to 11-10-902.

CALIFORNIA

Misclassification occurs when a worker is improperly classified as an independent contractor when the worker is actually an employee of the employer. As with other states, California applies various tests depending on which agency is examining the worker's classification.

Unemployment Compensation

California applies the common law "right to control" test in determining whether an employment relationship exists. This test examines whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. Although the right to control test is "clearly the most significant test of the employment relationship," California courts also consider the factors derived from the Restatement (Second) of Agency. See Santa Cruz Transp. v. Unemployment Ins. Appeals Bd., 235 Cal. App. 3d 1363, 1370 (1991).

Workers' Compensation

California's Workers' Compensation Act incorporates the common law test and agrees that "right of control" is a significant factor, but also adopts additional factors which include:

(1) whether there is a right to fire at will without cause;
(2) whether the one performing services is engaged in a distinct occupation or business;
(3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
(4) the skill required in the particular occupation;
(5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(6) the length of time for which the services are to be performed;
(7) the method of payment, whether by the time or by the job;
(8) whether or not the work is a part of the regular business of the principal;
(9) whether or not the parties believe they are creating an employer-employee relationship;
(10) whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status;
(11) the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license;
(12) whether the hiree has employees;
(13) the hiree's opportunity for profit or loss depending on his or her managerial skill; and
(14) whether the service rendered is an integral part of the alleged employer's business.

JKH Enterprises, Inc. v. Dep't of Indus. Relations, 48 Cal. Rptr.3d 563 (Cal. App. 6th Dist. 2006) (citing S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399 (Cal. 1989)). In JKH Enterprises, the California Department of Industrial Relations was successful in challenging a claim by the employer that drivers hired by the company as couriers were independent contractors. The California Court of Appeals upheld that rejection.

California's Workers' Compensation statute defines an "independent contractor" as meaning any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished. Cal. Labor Code § 3353.

In 2012, California amended its statute making it unlawful for any person or employer to willfully misclassify an individual as an independent contractor. Cal. Labor Code § 226.8.

Revenue

Under the wage and hour laws, California uses the standard set out in the Workers' Compensation statutes to determine whether a worker is an independent contractor. This test includes the common law right to control test as well as the other factors set out above in the Workers' Compensation section.

With respect to taxes and revenue, California follows the Internal Revenue Service factors when classifying workers.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On December 21, 2011, the DOL's Wage and Hour Division entered into a Memorandum of Understanding with the California Labor and Workforce Development Agency. That agreement expired on 12/21/14, with no indication on the DOL website that it has been renewed yet.

Grant

In 2014 California was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Memorandum of Understanding
California Department of Labor/Industrial Relations
History of California Minimum Wage
Workers' Compensation
California Dept. of Labor Press Release: Misclassification of workers as "independent contractors" rebuffed by the CA Court of Appeal
Cal. Labor Code § 226.8 – making it unlawful to willfully misclassify an individual
Overview of California Unemployment Insurance
Cal. Labor Code § 3351 – Employee defined
Cal. Labor Code § 3353 – Independent Contractor defined

COLORADO

Misclassification occurs when an employer improperly classifies a worker as an independent contractor when the worker should properly be classified as an employee. In May 2014, the Colorado Supreme Court issued two decisions that clarified the test that should be used for worker classification in unemployment insurance coverage cases, holding there is no dispositive single factor or set of factors to determine whether a worker is engaged in an independent trade or business under Colorado's Employment Security Act. Thus, Colorado uses a "totality of the circumstances" test to evaluate the particular set of circumstances of the relationship between the worker and the company engaging the worker's services.

Unemployment Compensation

In May 2014, the Colorado Supreme Court issued two decisions clarifying the test used with respect to unemployment insurance coverage. The court held that "whether an individual is customarily engaged in an independent business is a question that can only be resolved by applying a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer." Industrial Claim Appeals Office v. Softrock Geological Services, Inc., 325 P.3d 560, 565 (Colo. May 12, 2014) (*en banc*); Western Logistics, Inc. v. Industrial Claim Appeals Office, 325 P.3d 55 (Colo. 2014) (finding under section 8-70-115(1)(b), "an individual may be classified as an independent contractor if the employer can prove that the individual is "free from control and direction in the performance of the service, . . . and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.").

Colorado amended the Colorado Employment Security Act in 2010 to allow investigations for employee misclassification. *See, e.g.,* Colo. Rev. Stat. § 8-72-114. The Colorado Employment Security Act applies when determining coverage for unemployment insurance. Under the act, "misclassifying" an employee means, "erroneously classifying a person as an independent contractor, free from control and direction of the employer in the performance of service for the employer, when the employer cannot show an exception … to the general rule that service being performed for the employer is presumed to be employment for purposes of the act." Colo. Rev. Stat. § 8-72-114(b)(f).

Workers' Compensation

The common law test used in Colorado is the "right to control" test, which means that a worker is "free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." Colo. Rev. Stat. § 8-40-202(2)(b)(I). The statute also allows parties to prove independence through the following 9 factors:

(1) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
(2) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
(3) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
(4) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
(5) Provide more than minimal training for the individual;
(6) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(7) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
(8) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
(9) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

Colo. Rev. Stat. § 8-40-202(2)(b)(II)(A)-(I). Alternatively, the parties can also use a written document to establish the worker is an independent contractor. Colo. Rev. Stat. § 8-40-202(2)(b)(III).

Revenue

Colorado uses the IRS common-law definition for worker classification that includes: (1) whether the company controls or has the right to control what the worker does and how the worker does the job; (2) whether the company controls the business aspects of the worker's job; and (3) the type of relationship between the worker and the company paying for the work.

For federal tax purposes, Colorado uses the Internal Revenue Service standard for classifying workers.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The U.S. Department of Labor's Wage and Hour Division and Colorado entered into a Memorandum of Understanding which was signed on December 5, 2011. The parties renewed the MOU on December 5, 2014, and it now expires December 5, 2017.

Additional Resources:

Memorandum of Understanding
Colorado Employment Security Act (CESA) – Colo. Rev. Stat. §§ 8-70-101 *et seq.*
- Colo. Rev. Stat. § 8-70-103 – Definitions
- Colo. Rev. Stat. § 8-70-113 – Employer defined
- Colo. Rev. Stat. §§ 8-70-115 – 125 – Employment defined
- Colo. Rev. Stat. §§ 8-70-126 – 140.7 – Exclusions from employment

Department of Labor & Employment
Workers' Compensation
- Article: What is an Employer, Independent Contractor, etc.

Colo. Rev. Stat. § 8-40-202(2) – Classifying Independent Contractors
Colo. Rev. Stat. § 39-22-604

CONNECTICUT

Misclassification occurs when an employer incorrectly defines a worker as an "independent contractor" rather than an employee.

Connecticut agencies and courts use different rules and tests to determine employment status as different agencies are responsible for separate aspects of law.

For example, the Connecticut Department of Labor's Unemployment Compensation Division uses the "ABC" test and, for determining a covered claim, the Workers' Compensation Commission considers other factors, and the Connecticut Department of Revenue Services refers to "common law rules."

Unemployment Compensation

The ABC Test applies three factors (A, B, and C) for determining a worker's employment status. To be considered an "independent contractor," an individual must meet all three of the following factors:

A. The individual must be free from direction and control (work independently) in connection with the performance of the service, both under his or her contract of hire and in fact;

B. The individual's service must be performed either outside the usual course of business of the employer or outside all the employer's places of business; and

C. The individual must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service performed.

Workers' Compensation

Connecticut utilizes the "right to control" test to determine whether the claimant is an employee or an independent contractor for workers' compensation purposes.

"One is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained.... The controlling consideration in the determination whether the relationship of master and servant exists or that of independent contractor exists is: Has the employer the general authority to direct what shall be done and when and how it shall be done — the right of general control of the work?" See Kaliszewski v. Weathermaster Alsco Corp., 173 A.2d 497 (Conn. 1961); Hanson v. Transp. Gen., 696 A.2d 1026, 1028 (Conn. App. Ct. 1997).

Revenue

Under the common law rules, an employer-employee relationship exists when the business for which the services are performed has the right to direct and control the worker who performs the services. This control refers not only to the result to be accomplished by the work, but also the means and details by which that result is accomplished. Three major categories should be considered when determining the correct classification of a worker. These are:

Behavioral control (The right to direct and control the details and means by which the worker performs the required services)

Financial control (Economic aspects of the relationship between the parties are analyzed in determining worker classification)

The relationship of the parties (It reflects the parties' intent concerning control).

Memorandum of Understanding

On September 19, 2011, the Department of Labor's Wage and Hour Division (WHD), Occupational Safety and Health Administration (OSHA), and Employee Benefits Security Administration (EBSA) entered into a Memorandum of Understanding (MOU) agreement for a period of 3 years with the State of Connecticut's Department of Labor with the specific and mutual goals of providing clear, accurate, and easy-to-access compliance information to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by, as appropriate, conducting coordinated enforcement actions and sharing information consistent with applicable law.

Additional Resources:

http://www.ctdol.state.ct.us/wgwkstnd/JEC/JEC.htm
Joint Enforcement Commission on Employee Misclassification
Conn. Gen. Stat. §31-222(a)(1)(A) and (B) - The Unemployment Compensation Act
Memorandum of Understanding

Latimer v. Administrator, Unemployment Compensation Act, 579 A.2d 497 (Conn. 1990) (Court found an employer-employee relationship even in the face of a signed agreement stating that the health care registry workers were independent contractors);

Rodriguez v. E.D. Construction, Inc., 12 A.3d 603 (Conn. App. 2011) (Evidence was sufficient to support finding that injured worker seeking benefits under the Workers' Compensation Act was an independent contractor).

DELAWARE

There is no single definition of “Independent contractor” under Delaware law.

Workplace Fraud Act

Pursuant to Del. Code tit. 19, § 3501 - 3515 of the Workplace Fraud Act, which applies only to the *construction services industry,* an employer shall not improperly classify an individual who performs work for remuneration provided by an employer as an independent contractor. There is a presumption in favor of employee status when work is performed by an individual for remuneration paid by an employer, unless to the satisfaction of the Department the employer demonstrates that the individual is an exempt person or independent contractor.

"Construction services" includes, without limitation, all building or work on buildings, structures, and improvements of all types.

“Exempt person” means any individual who:

a. Performs services in a personal capacity and who employs no individuals other than a spouse, child, or immediate family member of the individual;

b. Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;

c. Furnishes the tools and equipment necessary to provide the services; and

d. Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities, in which the individual:

1. Owns all of the assets and profits of the business; and

2. Has sole, unlimited, personal liability for all of the debts and liabilities of the business; or alternatively, if the business is organized as a single-person corporate entity, to which sole, unlimited personal liability does not apply, the individual must be the sole member of said single-person corporate entity; and

3. For which the individual does not pay taxes for the business separately but reports business income on the individual’s personal income tax return; and

e. Exercises complete control over the management and operations of the business.

Unemployment Compensation

The “ABC Test,” used to determine the nature of the relationship between an employer and individual, is the statutory definition of employee under the Delaware Unemployment Compensation Act. Individuals who perform services for others for wages are presumed to be employees, unless the recipient of the services satisfies the statutory exclusion. That test provides that wages are to be assessed by an employer unless and until it has been shown to the satisfaction of the Department of Labor that:

(i) Such individual has been or will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and

(ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside all of the places of business of the enterprise for which the service is performed; and

(iii) 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.

This test is conjunctive; failure to satisfy any one of the prongs will render the enterprise subject to the act. Del. Code tit. 19 § 3302 (10)(K).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. Delaware has not entered into any MOU with DOL.

Grant

In 2014 Delaware was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://delcode.delaware.gov/title19/c033/sc01/index.shtml
http://delcode.delaware.gov/title19/c035/index.shtml
http://dia.delawareworks.com/labor-
http://ui.delawareworks.com/employer-faqs.php
Spar Mktg. Servs,. Inc. v. Unemployment Ins. Appeal Bd., No. K11A-03-003 (Del. Super. Ct. July 9, 2013), *aff'd* 74 A.3d 655 (Del. 2013) (table) - http://courts.delaware.gov/opinions/download.aspx?ID=191960

FLORIDA

There is no single definition of "Independent contractor" under Florida law.

Employers must determine whether a worker is an employee or an independent contractor, so they can correctly include all employees on their *Employer's Quarterly Report* (Form RT-6). Misclassification of workers is not just a tax reporting issue; it also affects claims for reemployment assistance benefits. If a person files a claim for benefits and the employer has not been including the person on the quarterly report, this can cause a delay in benefit payments. The intentional misclassification of a worker is a felony.

Unemployment Compensation

Fla. Stat. Ch. 443, governs whether services performed constitute employment subject to the Florida Reemployment Assistance Program Law. This law provides that employment includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship. The common law rules look primarily at 10 factors of the working relationship to determine if the worker is an employee or an independent contractor. The State of Florida's common law criteria are similar to, but independent of, the Internal Revenue Service's criteria for determining independent contractor status

Workers' Compensation

Fla. Stat. Ch. 440, establishes workers' compensation coverage requirements for employers.

Construction Industry: An employer in the construction industry who employs one or more part-or full-time employees must obtain workers' compensation coverage. Sole proprietors, partners, and corporate officers are considered employees. Members of a limited liability company are considered corporate officers. Corporate officers may elect to exempt themselves from the coverage requirements of Chapter 440.

A construction industry contractor, who sub-contracts all or part of their work, must obtain proof of workers' compensation coverage or a Certificate of Election to be Exempt from all subcontractors, prior to work being done. If the sub-contractor is not covered or exempt, for purposes of workers' compensation coverage, the sub-contractor's employees shall become the statutory employees of the contractor. The contractor will be responsible to pay any workers' compensation benefits to the sub-contractor and its employees.

Pursuant to Rule 69L-6.018 Misclassification of Employees as Independent Contractor, of the Florida Administratice Code and the Florida Administrative Register**,** an employer who fails to secure compensation as required by Sections 440.10(1) and 440.38(1) for each employee classified by the employer as an independent contractor but who does not meet the criteria of an independent contractor specified in Section 440.02, shall be assessed a penalty.

Misclassifying employees to lower premiums or treating employees as subcontractors when they are not in order to hide or conceal payroll is a criminal violation of 440.105 and constitutes a felony of the first, second or third degree depending on the monetary value of the fraud as provided in s. 775.082, s. 775.083, or s. 775.084,

Memorandum of Understanding

The Department of Labor's Wage and Hour Division entered into a Memorandum of Understanding (MOU) with the Florida Department of Revenue, General Tax Administration with the specific and mutual goals of providing clear, accurate, and easy-to-access compliance information to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information. The MOU was signed on January 13, 2015 and it expires on January 13, 2018.

Grant

In 2014 Florida was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://dor.myflorida.com/dor/taxes/rt_employee.html
http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0440/Sections/0440.02.html
http://www.myfloridacfo.com/division/wc/pdf/wc-system-guide.pdf
https://www.flrules.org/gateway/ruleno.asp?id=69L-6.018

Memorandum of Understanding

Cantor v. Cochran, 184 So.2d 173 (Fla. 1966) (In this workers' compensation case the Florida Supreme Court set out the ten factors, as formulated by the Restatement (Second) of Agency § 220, to be considered in determining whether one is an employee or an independent contractor).

T & T Communications, Inc. v. State Dept. of Labor and Employment Sec., 460 So.2d 996 (Fla.App. 2 Dist.,1984) (Although the case law in Florida requires that a number of factors be considered in making a determination of employee or independent contractor status, the most important factor is the extent of control exercised by the employer).

C. Hyland and L. Quigley, *Determination of Employee Status Right To Control v. Economic Reality – Is There A Difference*?, 61 Florida Bar Journal 43 (January 1987).

GEORGIA

There is no single definition of “Independent contractor” under Georgia law.

General Rule:
In determining whether the relationship of parties under a contract for performance of labor is that of employer and servant or that of employer and independent contractor, the chief test lies in whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract. Where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control. On the other hand, where the contract specifies that the employee's status shall be that of independent contractor but at the same time provides that he shall be subject to any rules or policies of the employer which may be adopted in the future, no such presumption arises.

Unemployment Insurance
Services performed by an individual for wages shall be deemed to be employment under employment security law unless and until it is shown that:

(1) (A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and
(B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or

(2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.

Ga. Code § 34-8-35 – Employment. See also Rules of Georgia Department of Labor Employment Security Law Chapter 300-2-7-.13 Independent Contractors.

Workers’ Compensation
Under Georgia law, to be eligible for workers' compensation benefits a person must be an employee or a statutory employee. For purposes of the Workers’ Compensation law, "employee" means every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer. If the alleged employer has the right to control the time, the manner, the methods, and the means of execution of the work to be completed under the contract, the worker is considered an employee rather than an Independent Contractor. Ga. Code § 34-9-1.

(e) A person or entity shall otherwise qualify as an independent contractor and not an employee if such person or entity meets all of the following criteria:

(1) Is a party to a contract, written or implied, which intends to create an independent contractor relationship;

(2) Has the right to exercise control over the time, manner, and method of the work to be performed; and

(3) Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.

A person who does not meet all of the above listed criteria shall be considered an employee unless otherwise determined by an administrative law judge to be an independent contractor. Ga. Code § 34-9-2(a)(2)(e).

Revenue and Taxation

Employers are required to withhold income tax on behalf of their employees. Employers are defined as any entity for which a person preforms a service as an employee. An employee is a person who performs services for an employer under the direction and control of the employer. Ga. Code Ann. § 48-7-100.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Georgia has not entered into any MOU with DOL.

Additional Resources:

http://www.dol.state.ga.us/ui_rules.htm
Cotton States Mutual Insurance Co. v. Kinzalow, 634 S.E.2d 172 (Ga. App 2006)

HAWAII

Misclassification occurs when a worker is improperly classified as an independent contractor when the worker is actually an employee of the employer. In Hawaii, there are several tests used depending on which state agency is involved.

Unemployment Compensation

For example, the Hawaii Employment Security Act uses the "ABC" test, which provides that: (1) the individual is free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and (2) the service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and (3) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service. Haw. Rev. Stat. § 383-6(1)-(3).

Workers' Compensation

Alternatively, the state workers' compensation statutes use the "control" and "relative nature of the work" tests. *See, e.g.,* Locations, Inc. v. Hawai`i Dept. of Labor & Indus. Relations, 900 P.2d 784, 788-89 (Hawaii 1995) (citing Yoshino v. Saga Food Serv., 577 P.2d 787, 790 (Hawaii 1978)); *see also* Suzuki v. Castle & Cooke Resorts, 239 P.3d 1380 (Hawaii 2010). The control test provides that "an employment relationship is established when the person in whose behalf the work is done has the power, express or implied, to dictate the means and methods by which the work is to be accomplished." Locations, Inc., 900 P.2d at 787.

Revenue

For tax purposes, Hawaii uses the Internal Revenue Service standard for classifying workers.

Pending Legislation:

Proposed bill HB1213 was introduced in the Hawaii House of Representatives that would allow the state Department of Labor and Industrial Relations (DLIR) to set out the criteria when an individual will be considered an independent contractor and when independent contractor status is presumed. On March 2, 2015, an amendment was introduced and the committee with jurisdiction recommended the measure be deferred.

A similar bill was introduced in the Senate, SB1219, and passed with amendments on March 27, 2015. The bill would clarify Hawaii's employment security law for independent contractors and includes twenty factors to be used as guidelines when determining whether a worker is an independent contractor.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On July 20, 2011, the DOL's Wage and Hour Division entered into a Memorandum of Understanding with the Hawaii Department of Labor and Industrial Relations. The MOU expired on July 20, 2014; nothing on the DOL website indicates the agreement has been renewed yet.

Grant:

In 2014 Hawaii was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:
Memorandum of Understanding
Hawaii Department of Labor
Haw. Rev. Stat. § 383-1 – Definition of employment
Haw. Rev. Stat. § 383-6 – Master and servant relation not required (ABC Test)

IDAHO

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. In Idaho, agencies use the same test to determine employment status for purposes of unemployment insurance and workers' compensation.

Unemployment Compensation

In Idaho, the "right to control" test is used to determine whether a worker is an independent contractor or an employee. A worker is an independent contractor if the worker has and will continue to be free from control or direction in the performance of his work, both under contract of service and in fact, and the worker is engaged in an independently established trade, occupation, profession, or business. *See, e.g.,* Idaho Code § § 72-1316(4)(a)-(b).

Workers' Compensation

For purposes of workers' compensation, the Idaho Code states that an "[i]ndependent contractor means any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Idaho Code § 72-102(17). The four factors courts use to determine whether a worker is an employee or independent contractor are: (1) direct evidence of the right to control; (2) method of payment; (3) who furnishes the major items of equipment (the worker or the employer); and (4) the right to terminate the relationship at will. Shriner v. Rausch, 108 P.3d 375, 378 (Idaho 2005); Moore v. Moore, 269 P.3d 802, 807 (Idaho 2011).

Revenue

For federal tax purposes, Idaho uses the 20-factor test employed by the Internal Revenue Service when determining whether a worker is an independent contractor or an employee. *See* A Guide to Idaho Income Tax Withholding (Idaho 2015).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding with Idaho.

Grant:

In 2014 Idaho was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Idaho Department of Labor
Wage & Hour Frequently Asked Questions
Insurance Fund / Workers' Compensation
Idaho Workers' Compensation Statutes:

- Idaho Code § 72-102(12) – Employee defined
- Idaho Code § 72-102(13) – Employer defined
- Idaho Code § 72-102(17) – Independent contractor defined

Idaho State Tax Commission
A Guide to Idaho Income Tax Withholding (Idaho 2015)

ILLINOIS

Misclassification occurs when an employer incorrectly defines a worker as an “independent Contractor” rather than an employee.

The Illinois Employee Classification Act that pertains specifically to construction contractors became effective on January 1, 2008. Under the act, every individual performing services for a contractor is deemed to be an employee of the employer, unless the worker specifically qualifies for an exception under the Act.

“Performing services” means the performance of any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project, development, real property or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site.

The exceptions are:

An individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;

(2) The service performed by the individual is outside the usual course of services performed by the contractor; and

(3) The individual is engaged in an independently established trade, occupation, profession or business; or

(4) The individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this Section.

The sole proprietor or partnership (subcontractor) performing services for a contractor is deemed legitimate if it is shown that:

(1) The sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;

(2) The sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(3) The sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;

(4) The sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;

(5) The sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;

(6) The sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

(7) The sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;

(8) When the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;

(9) The sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) If necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;

(11) The contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and

(12)The sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

An employer or entity that violates this Act is subject to a civil penalty not to exceed $1,000 for each violation found in the first audit by the Illinois Department of Labor. Following a first audit, an employer or entity shall be subject to a civil penalty not to exceed $2,000 for each repeat violation found within a 5 year period. In addition, upon a second violation, no state contract may be awarded to the violator until 4 years have elapsed from the date of the last violation.

The Act also creates a private right of action. Any interested party has the right within three years of last performance of services to file an enforcement suit in state court. This includes both workers and labor unions on behalf of workers who believe that there has been a misclassification. Remedies under the private right of action include:

(1) The amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages;

(2) Compensatory damages and an amount up to $500 for each violation of this Act or any rule adopted under this Act; and

(3) Attorney's fees and costs.

A contractor shall not be liable under the Act for any failure by a subcontractor to properly classify its workers as employees, nor is a subcontractor liable for any lower tiered subcontractor's failure to properly classify workers.

Memorandum of Understanding

On September 28, 2011, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Illinois Department of Labor (IDOL) entered into a Memorandum of Understanding (MOU) pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law. The initial MOU agreement was for a period of three years, and was subsequently renewed on October 23, 2014. The current expiration date is October 23, 2017.

Additional Resources:

The Illinois Employee Classification Act - 820 Ill. Comp. Stat. 185/1 through 185/999.
IDL's Employee Classification Act FAQ
Memorandum of Understanding
Amendment and Renewal of MOU

INDIANA

There is no single definition of "Independent contractor" under Indiana law.

According to the Indiana Department of Labor, worker misclassification occurs when a worker who meets the statutory or common law definition of an employee is treated as a self-employed worker or independent contractor. Whether by agreement, out of ignorance or misunderstanding, or intentionally, there are employers who fail to properly claim a worker as an employee.

Worker's Compensation

Ind. Code §22-3-6-1(b) (7) states:

"A person is an independent contractor in the construction trades and not an employee under IC 22-3-2 through IC 22-3-6 if the person is an independent contractor under the guidelines of the United States Internal Revenue Service."

The IRS employs a multi-factor common law test that consolidates twenty factors into eleven main tests, and organizes them into three main categories: (1) behavioral control, (2) financial control, and (3) the type of relationship between the parties.

Unemployment Compensation

Services performed by an individual for remuneration shall be deemed to be employment irrespective of whether the common-law relationship of master and servant exists, unless and until all the following conditions are shown to the satisfaction of the department:

(1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract of service and in fact.

(2) The service is performed outside the usual course of the business for which the service is performed.

(3) The individual:

(A) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or

(B) is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort.

Ind. Code §22-4-8-1

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Indiana has not entered into any MOU with DOL.

Grant

In 2014 Indiana was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://www.in.gov/dol/2868.htm
http://www.indianasenaterepublicans.com/news/2014/04/24/2014/sen.-waterman-the-issue-of-worker-misclassification/
http://www.irs.gov/publications/p15a/ar02.html#en_US_2015_publink1000169489
http://www.in.gov/dol/files/IDOL_PMOC_Report_9_29_10.pdf
http://www.in.gov/legislative/igareports/agencyarchive/reports/DWD22.pdf
Snell v. C.J. Jenkins Enters, Inc., 881 N.E.2d 1088 (Ind. Ct. App. 2008 (in action for damages and unpaid wages under Indiana wage statute, court applied a seven-factor test to determine that worker was an independent contractor)

IOWA

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Iowa, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

In the areas of **Unemployment Insurance, Wage and Hour issues, and Workers' Compensation** worker classification status is determined by The Iowa Workforce Development Department (IWDD).

Factors used by the IWDD to determine if a worker is an "employee" or an "independent contractor"

The right to control the work to be done and how it will be done, whether or not used, is the most important factor. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control.

Other factors may include:

- How much does the employer actually control the way the services are performed?
- Does the person performing the services have a separate, established occupation or business?
- Is the work usually performed without supervision?
- What skill is needed to perform the services and accomplish the desired result?
- Who supplies the tools, equipment, and place of work for the person doing the work?
- Is performance of services an isolated or continuous event?
- How is the worker paid? Is it by time (hourly or weekly), a piece rate, or by the job?
- Is the work part of the regular business of the employer?
- Are the services performed for the employer as an individual or for the employer's business?
- Can the worker make business decisions that result in a financial profit or loss for the worker? The worker's investment of time is not enough to show a risk of loss.
- Is the worker required to perform the service personally? Can the worker hire assistants? If the worker hires substitutes or helpers, is approval required? Who pays the substitutes or helpers? Is the worker reimbursed if the worker pays the substitutes or helpers?
- Does the customer pay the worker or the business?
- What type of advertising does the worker do (e.g. business listing in a directory, business cards, etc.)?

The facts in each case are different, and multiple factors will be considered.

Taxation

For State Income Tax purposes, The Iowa Department of Revenue (IDR) defers to the IRS, indicating that the IRS will make the determination of whether or not a worker is an employee by the filing of IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Memorandum of Understanding

On January 17, 2013, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Iowa Workforce Development Department (IWDD) entered into a Memorandum of Understanding (MOU) for a period of three years pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing

resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law.

Additional Resources:

In Stark Const. v. Lauterwasser 2014 WL 1495479 (Iowa App. 2014), 847 N.W.2d 612 (unpublished decision), the court held that… "the most important consideration in determining if a person is an employee or independent contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service [that person] is an independent contractor, if it is vested in the employer, such person is an employee. Only if that control is debatable, does the trier of fact need to consider the parties' intention or community customs."

IWDD's FAQs about Iowa Workers Misclassification

IDR's "Employers: do you have employees or independent contractors?"

IRS Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
Memorandum of Understanding
MOU press release

Income Tax: Iowa Code § 422.4 to 422.31
Wage and Hour: Iowa Code § 91A.1 to 91A.14 and 91D.1
Workers' Compensation: Iowa Code § 85.1 to 85.62
Unemployment Insurance Taxes: Iowa Code § 96.1 to 96.51.

KANSAS

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

The Kansas Department of Revenue together with the Kansas Department of Labor use a common-law right to control test to determine worker employment status in the areas of **State Income Taxes, Unemployment Insurance, Wage and Hour issues, and Workers' Compensation**

An employer-employee relationship exists when an employer has the right to exercise control over the manner and means by which the individual performs services. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control.

The following factors are also taken into consideration:

- Is the one performing the services engaged in a separately established occupation or business?
- Is the work usually performed without supervision in that locality?
- What skill is required in performing the services and accomplishing the desired result?
- Who supplies the tools, equipment, and place of work for the person doing the work?
- Is the performance of services an isolated or continuous event?
- What is the method of payment, whether by time, a piece rate, or by the job?
- Is the work part of the regular business of the employer?
- What is the extent of actual control exercised by the employer over the manner and means of performing the services?
- Are the services performed for the benefit or convenience of the employer as an individual or for the employer's business enterprise?
- Can the worker make business decisions that would result in a financial profit or loss for the worker? Investment of the worker's time is not sufficient to show a risk of loss.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Kansas has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

In determining worker status, Kansas courts will also consider other common law right to control factors, including the factors in the IRS's 20 point test. Craig v. FedEx Ground Package System, Inc. 335 P.3d 66 (Kan. 2014)

The IRS's 20 factor test
The KDR together with the KDL – Misclassification of Workers – Frequently Asked Questions
Income Taxes: K.S.A. § 79-3201, et seq.
Wage and Hour: K.S.A. § 44-313 to 327
Workers' Compensation: K.S.A. § 44-501 to 44-565
Unemployment Insurance Taxes: K.S.A. § 44-701 to 7692

KENTUCKY

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Kentucky, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

The Kentucky agencies responsible for state **Income Taxes** (the Kentucky Department of Revenue), **Workers' Compensation** (The Department of Workers' Claims), **Unemployment Insurance Taxes** (The Office of Employment and Training), and **Wage and Hour** (The Kentucky Labor Cabinet) do not post any employee/independent contractor classification tests on their websites.

Kentucky court decisions provide the basis for determining employee/independent contractor classification status.

For **Workers' Compensation** determinations, the right to control the details of the work is the primary test, but various factors are used to make that determination. Originally there were nine control factors to be considered (Ratliff v. Redmon, 396 S.W.2d 320, 324 (Ky.1965)), but these were subsequently reduced to four primary factors (Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969).

1.) The nature of the work as related to the business generally carried on by the alleged employer;

2.) The extent of control exercised by the alleged employer;

3.) The professional skill of the alleged employee; and

4.) The true intentions of the parties.

Unemployment Insurance determinations - In Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc. 91 S.W.3d 575, 579 -580 (Ky. 2002), the Kentucky Supreme Court held that the chief criterion is the right to control the details of the work, and that the following matters of fact are to be considered:

1. The extent of control which, by the agreement, the master may exercise over the details of the work;
2. Whether or not the one employed is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is a part of the regular business of the employer;
9. Whether or not the parties believe they are creating the relation of master and servant; and

10. Whether the principal is or is not in business.

For **State Income Tax** purposes, The Kentucky Department of Revenue (IDR) defers to the IRS, indicating that the IRS will make the determination of whether or not a worker is an employee by the filing of IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Kentucky has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

Pending legislation - KS S.B. 77, Act Relating to Employee Misclassification (Feb. 27, 2012), (Defining person, contractor, prime contractor, and subcontractor; specifies the Department of Revenue as the determining authority in issues related to the classification of a person as an employee or independent contractor; defines characteristics of an independent contractor, to stipulate that a prime contractor is not responsible for a subcontractor's misclassification of independent contractors as employees; *not yet approved--Sent to House Committee on Appropriations and Revenues).*

Income Taxes: KRS § 141.010, et seq.
Wage and Hour: KRS § 337.010 to 337.994
Workers' Compensation: § 342.0011 to 342.990
Unemployment Insurance Taxes § 341.005 to 341.990

LOUISIANA

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

Because Louisiana is not a common law state, the definition for an employee is fixed by statute, La. Rev. Stat. Ann. §23:1472(12)E.

Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this Chapter unless and until it is shown to the satisfaction of the administrator that;

I. Such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact; and

II. Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

III. Such individual is customarily engaged in an independently established trade, occupation, profession or business.

The Louisiana Workforce Commission (LWC) administers both workers' compensation and unemployment insurance, and uses the same three part worker classification test for worker classification determinations in both areas.

The LWC publishes factor guidelines for worker status determinations of both employees and independent contractors. Guidelines The distinction between employee and independent contractor status is a factual determination to be decided on a case-by-case basis.

Memorandum of Understanding

On February 23, 2012, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Louisiana Workforce Commission (LWC) entered into a Memorandum of Understanding (MOU) for a period of three years pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law. The MOU was subsequently renewed, and the current expiration date is February 23, 2018.

Additional Resources:

Memorandum of Understanding
MOU press release
MOU renewal
Louisiana Workforce Commission worker misclassification assessment tool
Income taxes: LA R.S. § 47:21, et seq.
Wage and Hour: LA R.S. §23:621, et seq.
Workers' Compensation: LA R.S. § 23:1020 to 23:1415
Unemployment Insurance Taxes: LA R.S. § 23:1472 to 23:1769

MAINE

There is no single definition of “Independent contractor” under Maine law.

The employment status of a worker as an employee or an independent contractor affects who is responsible for paying employment taxes and withholdings, liability for workers compensation and unemployment insurance coverage, and applicability of labor laws.

Worker misclassification occurs when an employer hires a worker and improperly classifies the person as an “independent contractor” rather than as an "employee." An employer that intentionally or knowingly misclassifies an employee as an independent contractor commits a civil violation for which a fine of not less than $2,000 and not more than $10,000 per violation may be adjudged. Me. Rev. Stat. tit. 26 § 591-A.

Maine law establishes a common "employment" definition for workers' compensation, unemployment insurance and wage & hour coverage. Maine Revenue Services follows the same standards as the Internal Revenue Service.

As of January 2013, a person who performs services for remuneration is presumed to be an employee unless the employing unit proves that the person is free from the essential direction and control of the employing unit, both under the person's contract of service and in fact and the person meets specific criteria. In order for a person to be an independent contractor they must meet the test in Me. Rev. Stat. tit. 39, § 102(13-A). Pursuant to this test:

A. The following criteria must be met:

(1) The person has the essential right to control the means and progress of the work except as to final results;
(2) The person is customarily engaged in an independently established trade, occupation, profession or business;
(3) The person has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
(4) The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
(5) The person makes the person's services available to some client or customer community even if the person's right to do so is voluntarily not exercised or is temporarily restricted; and

B. At least 3 of the following criteria must be met:

(1) The person has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the person to complete the work;
(2) The person is not required to work exclusively for the other individual or entity;
(3) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
(4) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;
(5) Payment to the person is based on factors directly related to the work performed and not solely on the amount of time expended by the person;
(6) The work is outside the usual course of business for which the service is performed; or
(7) The person has been determined to be an independent contractor by the federal Internal Revenue Service.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Maine has not entered into any MOU with DOL.

Additional Resources:

http://www.maine.gov/labor/misclass/legal.shtml

http://www.maine.gov/wcb/departments/Coverage/ICFAQ.htm

http://www.irs.gov/publications/p15a/ar02.html#en_US_2015_publink1000169489

MARYLAND

There is no single definition of "Independent contractor" under Maryland law.

Workplace fraud is the intentional misclassification of employees as independent contractors or through "off-the-books" labor. Employers often engage in workplace fraud in an attempt to circumvent the payment of overtime wages, employment taxes, and workers' compensation coverage that employers are legally obligated to provide to their employees. Source – *Annual Report of the Joint Enforcement Task Force on Workplace Fraud* (December 2011).

The Workplace Fraud Act of 2009 requires the different state agencies and divisions that are impacted by workplace fraud to share information when they find or suspect that misclassification has occurred. The Act created a new misclassification violation in the construction industry.

The Act adopts the "ABC Test" to identify legitimate independent contractors. The three prongs of the so-called "ABC test" are: (a) the individual is free from control and direction; (b) the individual is customarily engaged in an independent business of the same nature; and (c) the work is outside the usual course of business of the employer or performed outside of any place of business of the employer.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On September 19, 2011, the DOL's Wage and Hour Division entered into this agreement with the Maryland Department of Labor, Licensing and Regulation, Division of Unemployment Insurance, and the Maryland Department of Labor, Licensing and Regulation, Division of Labor and Industry. The MOU was renewed on October 17, 2014 and it will expire on October 17, 2017.

Grant

In 2014 Maryland was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://www.dllr.state.md.us/workplace/wfempfaqs.shtml
https://www.dllr.state.md.us/workplacefraudtaskforce/wpftfannrep2011.pdf
http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=09.12.40*
Memorandum of Understanding
Amendment No. 1 to the Memorandum of Understanding

MASSACHUSETTS

Different definitions of “employee” are used for purposes of:

- Wage and hour laws under Mass. Gen. Laws Ann. ch. 149, §148B.
- Income tax withholding laws under Mass. Gen. Laws Ann. ch. 62B, §1.
- Workers’ Compensation Law under Mass. Gen. Laws Ann. ch. 152, §1(4).
- Unemployment insurance purposes under Mass. Gen. Laws Ann. ch. 151A, §2.

Wage and Hour

Mass. Gen. Laws Ann. ch. 149, §148B, provides a three-part test which requires that all three elements (commonly referred to as prongs one, two and three or the A, B, C test) must exist in order for an individual to be classified other than as an employee. The burden of proof is on the employer, and the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee.

Pursuant to this section, to show that a worker qualifies as an independent contractor, an employer must demonstrate that:

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Income Tax Withholding

The Commissioner of Revenue is charged with administering the income tax withholding laws found in chapter 62B. Chapter 62B does not contain a specific definition of "independent contractor." Chapter 62B adopts the federal definition of "employee" found in section 3401(c) of the Internal Revenue Code. For purposes of distinguishing an employee relationship from other types of relationships (e.g., independent contractor) for withholding purposes, the Commissioner follows federal Treasury regulation § 31.3401(c) - 1. The Internal Revenue Service has issued Rev. Rul. 87-41, which provides guidance in the form of 20 factors that are used to determine whether an employee/employer relationship exists for federal employment tax purposes.

Workers' Compensation

The workers' compensation law defines an employee as "every person in the service of another under any contract of hire, express or implied, oral or written." There is an exception for salesmen of real estate who work on a commission (with a written contract stating they are not treated as an employee under federal tax law).

Questions to be considered in determining whether an individual is an employee or an independent contractor include, but are not limited to:

- How much control or supervision does the “principal” have over the “contractor”?
- Who supplies the tools?

- What is the duration of the employment?
- How is the individual paid - hourly or by the job?
- What is the understanding between the parties, do they believe that they have established an employee/employer relationship?

Unemployment Insurance

Pursuant to Mass. Gen. Laws ch. 151A, §2, service provided by an individual shall be deemed to be employment irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that—

(a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, 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.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On November 17, 2014, the DOL's Wage and Hour Division entered into this agreement with the Commonwealth of Massachusetts, Joint Enforcement Task Force on the Underground Economy and Employee Misclassification through the Secretary of the Executive Office of Labor and Workforce. The MOU will expire on November 17, 2017.

Grant

In 2014 Massachusetts was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/independent.html (Massachusetts Law About Independent Contractors)

Memorandum of Understanding

MICHIGAN

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Michigan, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Workers Compensation
Effective January 1, 2013, a section of Michigan Workers' Disability Act (MWDA) M.C.L.A. § 418.161(n) was amended to require use of the IRS's 20 factor test to determine employee/independent contractor status.

Unemployment Insurance
Effective January 1, 2013, the Michigan Unemployment Insurance Agency (UIA) announced that it will use the IRS's 20 factor test for worker classification determinations under the Michigan Employment Security Act (MES). The previously used economic reality test was discontinued by UIA for worker classification purposes.

Wage and Hour
Effective May 27, 2014, the Michigan Workforce Opportunity Wage Act (MWOA) repealed and replaced the Michigan Minimum Wage Law. MWOA is administered by the Department of Licensing and Regulatory Affairs (LARA), which also administers the Michigan agencies responsible for workers' compensation and unemployment insurance. LARA has not provided information on how determinations of employee/independent contractor status will be made under MWOA, but given the determination changes in the areas of workers' compensation and unemployment insurance, it may be assumed that the IRS 20 factor test will also apply to wage and hour determinations. However, be advised that Michigan Court decisions previously have used an economic reality test to make those determinations for minimum wage and overtime pay purposes.

The economic reality test takes into account the totality of the circumstances around the work performed, with an emphasis on the following factors:

(1) The control of a worker's duties,

(2) The payment of wages,

(3) The right to hire and fire and the right to discipline, and

(4) The performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.

Under this test, no one factor is dispositive. The list of factors is nonexclusive and a court may consider other factors as each individual case requires. However, weight should be given to those factors that most favorably effectuate the objectives of the statute in question." Buckley v. Professional Plaza Clinic Corp. 281 Mich. App. 224, 234-235, 761 N.W.2d 284, 291 (2008).

Income Taxes
For state income tax purposes the Michigan Department of Treasury defers to the IRS, indicating that every Michigan employer who is required to withhold federal income tax for an employee under the Internal Revenue Code must withhold Michigan income tax for that employee.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Michigan has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

Questions and Answers Regarding Changes to the MES Act for Employers

IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Report to Governor Jennifer M. Granholm, Interagency Task Force on Employee Misclassification (July 1, 2009)

Income Tax: M.C.L.A. §206.1, et seq.

Workforce Opportunity Wage Act - M.C.L.A. §408.411 to 408.424

Workers' Compensation: Workers' Disability Compensation Act - M.C.L.A. § 418.301 to 418.391

Michigan Employment Security Act – M.C.L.A. § 421.1 to 421.72.

MINNESOTA

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

For construction contractors, Minnesota enacted a statute, M.S.A. § 181.723, defining employee/independent contractor status in the construction industry. The law requires that individuals operating as independent contractors in the construction industry must be registered with the Minnesota Department of Labor and Industry (DLI) as independent contractors prior to starting their work. An individual who is not registered as an independent contractor is presumed to be an employee. The person for whom the services were performed may rebut this presumption by showing that the unregistered individual met all nine statutory factors at the time the services were performed.

The nine factors:

An individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation only if the individual:

(1) Maintains a separate business with the individual's own office, equipment, materials, and other facilities;

(2)(i) Holds or has applied for a federal employer identification number, or
(ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;

(3) Is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;

(4) Is incurring the main expenses related to the services that the individual is performing for the person under the contract;

(5) Is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;

(6) Receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;

(7) May realize a profit or suffer a loss under the contract to perform services for the person;

(8) Has continuing or recurring business liabilities or obligations; and

(9) The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

In the course of registration, the worker must provide a sworn statement under penalty of perjury that that he or she meets all nine conditions. Employers are not liable for misrepresentations made by the worker. The only requirement for an employer is to obtain a copy of the independent contractor certificate and to retain it for a period of five years.

Memorandum of Understanding

On September 19, 2011, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Minnesota Department of Labor and Industry (MDLI) entered into a Memorandum of Understanding (MOU) pertaining

to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law. The initial MOU agreement was for a period of three years, and was subsequently renewed on October 24, 2014. The current expiration date is October 24, 2017.

Additional Resources:

Memorandum of Understanding
Amendment No. 1 to the Memorandum of Understanding
Income Tax: M.S.A. § 290.001 to 290.9744
Wage and Hour: M.S.A. § 177.21, et seq.
Workers' Compensation: M.S.A. § 176.0001 to 176.862
Unemployment Insurance: M.S.A. § 268.001 to 268.96.

MISSISSIPPI

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Mississippi, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Income Taxes

The Mississippi Department of Revenue (MDR) relies on the determination of the IRS following instructional materials made available to the employer. Withholding Tax FAQs

Unemployment Insurance Taxes

Mississippi Department of Employment Security (MDES) determines worker status based on the following criteria:

1. The Extent of Control
2. The Nature of the Business
3. Who furnishes the Tools and the Place of Work?
4. Can Services be Terminated without Liability?
5. The Method of Payment
6. The Relationship of the Worker to the Firm

MDES provides further information about its basis of determination on its Worker Classification website.

Workers' Compensation

The Mississippi Workers' Compensation Commission (MWCC) does not post a worker classification test on its website. In cases involving status determinations for workers' compensation purposes, Mississippi courts have employed a right to control test based on statutory language.

MCA § 71-3-3(d) (Rev.2000)… "(A)n employee is "any person ... in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors ...."

MCA § 71-3-3(r) (Rev.2000). "An independent contractor is defined as: any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result".

"The (Mississippi) Supreme Court has held that the traditional test of the employer-employee relationship is the right of the employer to control the details of the work." Concert Systems USA, Inc. v. Weaver, 33 So.3d 1186, 1189 (Miss. App. 2010).

Wage and Hour

The MDES defers to the U.S. Department of Labor, Wage and Hour Division (WHD) for employee status determinations under the Fair Labor Standards Act (FSLA). Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. Mississippi has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

Withholding Tax FAQs **- How do I know if a worker is an employee or an independent contractor for Withholding Tax purposes?**

IRS Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

Income Tax: MCA § 27-7-1, et seq.

Workers' Compensation: MCA § 71-3-1 to 71-3-129

Unemployment Insurance Taxes: MCA § 71-5-1 to 71-5-21.

MISSOURI

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Missouri, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Income Taxes
The Missouri Department of Revenue (MDR) refers to the IRS's 20 factor test as the determinant of employee/independent contractor status.

Unemployment Insurance Taxes
The Missouri Division of Employment Security (MDES) applies the IRS's 20 factor test, but may use additional factors. "Classifying Employees for Insurance Tax Purposes"

Workers' Compensation
The Missouri Division of Workers' Compensation (MDWC) does not post an employee/independent contractor classification test on its website.

In State ex rel. MW Builders, Inc. v. Midkiff 222 S.W.3d 267 (Mo. 2007), the court employed the following classification test for workers' compensation purposes:

"In determining whether a party is an independent contractor, a court considers:

(1) The existence of a contract for the performance by a party of a certain piece of work at a fixed price;

(2) The independent nature of the party's business or occupation;

(3) The party's employment of assistants with the right to supervise their work;

(4) The party's obligation to furnish necessary tools, supplies, and materials;

(5) The party's right to control the progress of the work, except as to final results;

(6) The time for which the party is employed; and

(7) Employment by time or by the job.

Wage and Hour
The Missouri Division of Labor Standards (MDLS) does not post an employee/independent contractor classification test on its website. As such, it may be assumed that Missouri applies the employee status determination test used by the U.S. Department of Labor, Wage and Hour Division (WHD) under the Fair Labor Standards Act (FSLA).

Memorandum of Understanding
On September 19, 2011, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Missouri Department of Labor and Industrial Relations (MDLIR) entered into a Memorandum of Understanding (MOU) for a period of three years pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information

consistent with applicable law. The MOU was subsequently renewed on November 1, 2014, and the current expiration date is November 1, 2017.

Additional Resources:
The IRS's 20 factor test

"The twenty factors identified by the Internal Revenue Service (IRS) for establishing an employer-employee relationship are meant simply to be guides or aids in determining the nature of the employment relationship, and are not the only factors to consider in determining whether an employee-employer relationship exists for purposes of Missouri Employment Security Law; additional factors are (1) the provision of employee benefits, and (2) the tax treatment of the hired party." C.L.E.A.N., LLC. v. Division of Employment Sec., 405 S.W.3d 613 (Mo. Ct. App. 2013)

Missouri Department of Labor & Industrial Relations – Potential Worker Misclassification Assessment
Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)
Memorandum of Understanding
Amendment No. 1 to the Memorandum of Understanding
Income Tax: Mo. Rev. Stat. § 143.005, et seq.
Wage and Hour: Mo. Rev. Stat. § 290.010, et seq.
Workers' Compensation: Mo. Rev. Stat. § 287.010 to 287.975
Unemployment Insurance Taxes: Mo. Rev. Stat. § 288.010 to 288.501

MONTANA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. Montana does not use one single test with respect to establishing independent contractor status. Montana uses an AB test to determine whether a worker is an independent contractor for purposes of Workers' Compensation and the wage and hour laws.

Unemployment and Workers Compensation

Under the AB test, a worker is an independent contractor if the worker has an Independent Contractor Exemption Certificate (ICEC) and meets the following conditions when the worker renders service in the course of an occupation: the worker (A) has been and will continue to be free from control or direction over the performance of the services, both under contract and in fact; and (B) is engaged in an independently established trade, occupation, profession or business, and further acknowledges no coverage under the Workers' Compensation and Occupational Disease Act. *See,* Montana Independent Contractor Central Unit.

The same requirements are applied in the context of unemployment insurance. *See, e.g.,* Mont. Code Ann. § 39-71-417.

Under the state's common law, courts will determine who has the right to control within the first prong of the AB test. The Montana Supreme Court ruled in 2011 that the "right to control constitutes the most crucial factor in distinguishing between employees and independent contractors." Eldredge v. Asarco Inc., 252 P.3d 182 (Mont. 2011). Courts will use factors to help "guide the inquiry of whether a right of control exists sufficient to give rise to an employer-employee relationship: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." *Id.*

Revenue

For federal tax purposes, Montana uses the right to control test with respect to services to be performed and the manner of performance. The term "wages" has the same meaning as found in the Internal Revenue Service Code, 26 U.S.C. § 3401.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On September 26, 2011, DOL's Wage and Hour Division entered into a Memorandum of Understanding with Montana's Department of Labor & Industry. The agreement expired September 26, 2014, but was renewed on October 15, 2014 for an additional three years, and it now expires October 15, 2017.

Grant:

In 2014 Montana was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Memorandum of Understanding
Montana Department of Labor & Industry
Montana Independent Contractor Central Unit
- Independent Contractor Central Unit - FAQs

Montana Legislative memo analyzing Independent Contractor Status with respect to state workers' compensation laws
Mont. Code §§ 39-71-401 *et seq*.
Mont. Code § 15-30-2501 – Definition of Employee
Admin. Rules of Mont. §§ 24.35.101 – 24.35.303 – Independent Contractors

NEBRASKA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. No one test is used in Nebraska to determine whether a worker meets the requirements of an independent contractor. Different agencies will examine different elements to establish whether a worker would be covered by Workers' Compensation statutes or unemployment compensation.

Unemployment Compensation

Nebraska uses several variations of the "common law test" to determine whether an individual is an independent contractor or employee, depending on the program involved. The Unemployment Insurance Tax program uses the "ABC" test. The Contractor Registration Act and the Employee Classification Act programs use the traditional common law utilized by the Internal Revenue Service. Contractors and subcontractors doing business in Nebraska are required to register with the Nebraska Department of Labor.

Under the ABC test, "[s]ervices performed by an individual for wages, including wages received under a contract of hire, shall be deemed to be employment unless it is shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. Neb. Rev. Stat. §48-604(5).

Under the common law, an independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *See* Omaha World-Herald v. Dernier, 570 N.W.2d 508, 514 (Neb. 1997). There is no single test for determining whether one performs services for another as an employee or as an independent contractor; rather, the following factors must be considered:

(1) the extent of control which, by the agreement, the employer may exercise over the details of the work,
(2) whether the one employed is engaged in a distinct occupation or business,
(3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision,
(4) the skill required in the particular occupation,
(5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work,
(6) the length of time for which the one employed is engaged,
(7) the method of payment, whether by the time or by the job,
(8) whether the work is part of the regular business of the employer,
(9) whether the parties believe they are creating an agency relationship, and
(10) whether the employer is or is not in business.

Id. at 514.

Workers' Compensation

Workers' Compensation laws also apply these ten factors when determining coverage under the statute. Neb. Rev. Stat. § 48-101. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. See Pettit v. Dep't of Social Servs., 544 N.W.2d 855, 861 (Neb. 1996).

Revenue

For state tax purposes, Nebraska defines by statute who is and who is not an employee. *See,* Neb. Rev. Stat. § 48-604.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with Nebraska.

Additional Resources:

Nebraska Department of Labor
- NDOL Annual Report on the Employee Classification Act (2014)

Nebraska Employee Classification Act – Neb. Rev. Stat. §§ 48-2901 to 48-2912
Nebraska Unemployment Insurance
Nebraska Department of Revenue
Nebraska Contractor Registration Information
Nebraska Workers' Compensation Court
Neb. Rev. Stat. §48-604(5) – defining when a worker is an independent contractor
Neb. Rev. Stat. §48-604(6) – giving industry exceptions

NEVADA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. No one test is used in Nevada to determine whether a worker meets the requirements of an independent contractor. Different agencies will examine different elements to establish whether a worker would be covered by Workers' Compensation statutes or unemployment compensation.

Unemployment Compensation

With respect to Unemployment Compensation, Nevada uses the "ABC" test and requires that all three conditions of the test be met for a worker to qualify: (A) the person has been and will continue to be free from control or direction over the performance of the services, both under his contract of service and in fact; (B) the service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and (C) the service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service. Nev. Rev. Stat. § 612.085(1)-(3).

Workers' Compensation

With respect to Workers' Compensation, Nevada uses a "normal work" test to determine whether an entity is an employer for purposes of the Nevada Industrial Insurance Act. An entity is not an "employer" if the entity (1) enters into a contract with an "independent enterprise"; and (2) the contracting entity is not in the "same trade, business, profession or occupation" as the independent enterprise. Nev. Rev. Stat. § 616B.603(1); *See also,* Meers v. Haughton Elevator Co., 701 P.2d 1006, 1007-08 (Nev. 1985*); see also,* Employers Ins. Co. of Nevada v. United States, 322 F. Supp. 2d 1116 (D. Nev. 2004).

"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the person's work only and not as to the means by which such result is accomplished. Nev. Rev. Stat. § 616A.255.

Revenue

Under the state wage and hour laws, in order to be considered an independent contractor, a worker must be "a self-employed person who agrees with a client to do work for the client, for a certain fee, according to the means or methods of the self-employed person and not subject to the supervision or control of the client except as to the result of the work." Nev. Admin. Code § 608.155(4).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with Nevada.

Related Legislation:

S.B. 208 (creating a task force on employee misclassification) was introduced in Nevada but vetoed by the Governor on June 14, 2011.

Additional Resources:

Nevada Department of Labor
Unemployment Insurance Benefits

- Independent Contractor Criteria

Workers' Compensation
Department of Taxation
Bulletin No. 11-07 on employee misclassification (Jan. 2011).
Nev. Rev. Stat. § 612.085 – three conditions required for independent contractor status
Nev. Rev. Stat. § 616A.110 – exclusions from definition of employee
Nev. Rev. Stat. § 616A.255 – independent contractor defined

NEW HAMPSHIRE

There is no single definition of “Independent contractor” under New Hampshire law.

Workers’ Compensation and Wage and Hour

Pursuant to N.H. Rev. Stat. § 281-A:2, vi (b) and N.H. Rev. Stat. § 275:4, with some exceptions, any person who performs services for pay for an employer, is presumed to be an employee. This presumption may be rebutted by proof that an individual meets all of the following criteria:

(A) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(B) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(C) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(D) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(E) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(F) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(G) The person is not required to work exclusively for the employer.

Unemployment Compensation

Pursuant to N.H. Rev. Stat. § 282-A:9 services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner of the department of employment security that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(b) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

Revenue (Business Profits Tax)

Pursuant to N.H. Code Admin. R. Rev 301.17 "Independent contractor" means a person who:

(a) Exercises an independent employment;
(b) Contracts to do work for multiple business organizations that are not related parties;
(c) Holds himself or herself out to the public as an independent contractor in the regular course of business; and
(d) Meets one of the following criteria:

(1) Has been granted independent contractor status by the Internal Revenue Service for federal income tax purposes; or

(2) Works according to his or her own judgment or methods, without being subject to any employer except as to the results of the work and, has the right to employ and direct the action of other workers independently of such employer and freed from any superior authority to say how the specified work will be done.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On November 12, 2014, the DOL's Wage and Hour Division entered into this agreement with the New Hampshire Department of Labor and Workforce Development Agency. The MOU will expire on November 12, 2017.

Grant

In 2014 New Hampshire was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://www.nh.gov/nhworkers/index.htm
http://www.nh.gov/nhworkers/documents/emplmisclnews12-10.pdf
Memorandum of Understanding
Vector Marketing Corp. v. Dep't of Rev. Admin., 942 A.2d 1261 (N.H. 2008).

NEW JERSEY

New Jersey uses the ABC test to establish whether a worker is an independent contractor for purposes of the following:

Construction Industry Independent Contractor Act
Unemployment Compensation
Wage and Hour Laws

In Workers' Compensation cases courts employ two different tests: the "control test," and the "relative nature of the work test" to determine whether a party qualifies as an independent contractor.

Construction Industry Independent Contractor Act

The Construction Industry Independent Contractor Act applies to all companies that perform construction work in New Jersey, including subcontractors and lower tier contractors.

The Act creates a presumption that workers performing construction services for a business in New Jersey are its employees. The business can rebut this presumption only by establishing all three prongs of the "ABC" test. The criteria are:

(1) the worker has been and will continue to be free from the company's control or direction as to how the services are performed,

(2) the services are either outside the usual course of business of the company for which the services are to be performed or are performed "outside of all the places of business of the employer for which the service is performed," and

(3) the worker is customarily engaged in an independently established trade, occupation, profession, or business.

Unemployment Compensation

New Jersey applies the three-pronged "ABC" test to determine whether an employment relationship exists for the purposes of unemployment compensation.

Under the ABC test, the New Jersey Supreme Court has noted, "[T]he failure to satisfy *any one* of the three criteria results in an 'employment' classification."

Wage and Hour Law

For the purposes of the New Jersey Wage Payment Law, the courts use the "ABC" test to determine whether a worker is an independent contractor.

Workers' Compensation

In general, courts have applied two distinct legal tests in workers' compensation cases when determining if a worker is an eligible employee or, alternatively, an ineligible independent contractor: (1) the "control" test, and (2) the "relative nature of the work" test.

Under the "control" test, an employer/employee relationship exists when the employer retains the right to choose not only what is done, but how it is done. The right to control is more determinative than the exercise of control.

Under the "relative nature of work" test, an employer-employee relationship exists if a "substantial economic dependence" upon the employer is proven and it is also demonstrated that there is a "functional integration" of their respective operations.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, New Jersey has not entered into any MOU with DOL.

Grant

In 2014 New Jersey was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://lwd.dol.state.nj.us/labor/wagehour/lawregs/indep_contractor_act.html

Hargrove v. Sleepy's, LLC, No. A-70-12 (072742) (N.J. Jan. 14, 2015) (Independent contractor test under New Jersey Wage Payment Law).

Lesniewski v. W.B. Furze Corp. 705 A.2d 1243 (N.J. Super. A.D. 1998) (Setting forth the tests used in Workers' Compensation cases).

NEW MEXICO

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. No one test is used in New Mexico to determine whether a worker meets the requirements of an independent contractor. Different agencies will examine different elements to establish whether a worker would be classified as an employee or an independent contractor.

Unemployment Compensation

With respect to Unemployment Compensation, New Mexico uses the "ABC test" to determine whether a worker is an independent contractor or an employee. The statute defines a non-employee as one who established by a preponderance of the evidence that: (a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; (b) such service is either outside the usual course of business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such 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 contract of service. N.M. Stat. § 51-1-42(F)(5).

Workers' Compensation

By contrast, under the state Workers' Compensation law, New Mexico uses the "right to control test" to determine whether an employer-employee or independent contractor relationship exists. Korba v. Atlantic Circulation, Inc., 231 P.2d 118 (N.M. Ct. App. 2010). The test focuses on "whether the principal exercised sufficient control over the agent to hold the principal liable for the acts of the agent." *Id.* The New Mexico Supreme Court adopted the factors and method used by the Restatement (Second) of Agency § 220(a)-(j) (1958) to distinguish an employee from an independent contractor in evaluating the right to control. See *Harger v. Structural Services, Inc.,* 916 P.2d 1324 (N.M. 1996) (holding that the common law right to control test is appropriate for cases arising from the Workers' Compensation Act); Korba v. Atlantic Circulation, Inc.*,* 231 P.2d 118 (N.M. Ct. App. 2010).

Revenue

For federal tax purposes, New Mexico uses the Internal Revenue Service's criteria for worker classification purposes. *See* N.M. Stat. § 7-3-2 (defining "employer" and "employee" for the purposes of the Withholding Tax Act).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with New Mexico.

Grant

In 2014 New Mexico was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

New Mexico Department of Taxation & Revenue

- Employee versus Independent Contractor
- Employee or Independent Contractor: A brief look at the difference

Department of Workforce Solutions

New Mexico Workers' Compensation Administration

N.M. Stat. § 51-1-42(F)(5) – “ABC test”
N.M. Stat. §§ 51-1-42(12) – statutory exceptions to “employment”
N.M. Stat. § 52-1-22 – work not casual employment

NEW YORK

Construction Industry Fair Play Act

The Act creates a presumption of employment in the construction industry unless an employer can meet the ABC test. Under the ABC Test, an individual is considered an employee unless he or she meets all three criteria below. The individual must be:

(1) Free from control and direction in performing the job, both under contract and in fact

(2) Performing services outside of the usual course of business for the company **and**

(3) Engaged in an independently established trade, occupation or business that is similar to the service they perform.

Agencies covered

The new standard for determining employment applies to determinations under the Labor Law (including labor standards, prevailing wage law and unemployment insurance) and the Workers' Compensation Law. It does not apply to determinations under the New York State Tax Law.

The New York State Department of Taxation and Finance will continue to use the "common law" test for determining employment status. The essential elements of the common law test involve determining whether the worker is subject to the control and supervision of the employer in performing the job, whether the work that is performed is part of the usual work of the employer's business, and whether the worker has an independently established business offering services to the public, similar to the service they are performing for the employer.

Separate Business Entity

The Act also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a "separate business entity" from the contractor for whom it provides a service.

Posting

Construction industry employers must post a notice about the Fair Play Act in a prominent and accessible place on the job site.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. On November 18, 2013, the DOL's Wage and Hour Division entered into this agreement with the New York Department of Labor and the Labor Bureau of the New York State Office of the Attorney General. The MOU will expire on November 18, 2016.

Grant

In 2014 New York was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf
http://www.labor.ny.gov/formsdocs/wp/P738.pdf
Poster for Construction Sites
Poster for Construction Sites (Spanish)
Memorandum of Understanding with the Labor Bureau of the New York State Office of Attorney General
Memorandum of Understanding with the New York State Department of Labor

NORTH CAROLINA

To determine whether a worker is an independent contractor, North Carolina courts use the common law test, which asks whether the party for whom the work is being done has the right to control the worker with respect to *the manner or method of doing work*, regardless of whether such right is exercised or not, as distinguished from the mere right to require certain results.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, North Carolina has not entered into any MOU with DOL.

Additional Resources:

http://www.nclabor.com/wh/fact%20sheets/erfs.htm
http://www.ncjustice.org/sites/default/files/KYR_Misclassification_English.pdf
Cooper v. Asheville Citizen-Times Publishing Company, 129 S.E.2d 107 (N.C. 1963).

NORTH DAKOTA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. North Dakota does not have a single established definition of independent contractor. Rather, status is determined using a common law test to establish whether a worker is an employee or an independent contractor for both Unemployment Insurance and Workers' Compensation.

Unemployment and Workers' Compensation

The common law test focuses upon the employer's right to direct and control the means and manner of performing the work. This test contains twenty factors that have been developed, based on an examination of case law and rulings, considering whether an individual is an employee or an independent contractor. These factors have been incorporated in the state administrative code and include: instructions, training, integration, services rendered personally, hiring supervising and paying assistants, continuing relationship, set hours of work, full time required, doing work on the premises of the person or persons for whom the services are performed, order or sequence set, oral/written reports, payment by hour, week, month, payment of business or travel expenses, furnishing of tools and materials, significant investment, realization of profit or loss, working for more than one firm at a time, making service available to the general public, right to discharge and right to terminate. N.D. Admin. Code § 27-02-14-01(5)(b). There is no certain number of the twenty points of the Common Law test that must be met in order to qualify as an independent contractor, and the degree of importance of each factor varies depending on the occupation and factual context in which the services are performed. *See also,* Myers-Weigel Funeral Home v. Job Ins. Div. of Job Serv. N.D., 578 N.W.2d 125, 127 (N.D. 1998).

North Dakota also has a statutory provision in place that allows the Department of Labor and Human Rights to verify the independent contractor status of future or existing work relationships in the state. While verification is not mandatory for parties wishing to work as or hire independent contractors, it is available on a voluntary basis to workers and firms who would like to receive a formal verification from the State as to the status of their work relationship.

Revenue

The State's Department of Labor and Human Rights is responsible for enforcing the wage and hour laws within the state and therefore any determinations on independent contractor status would fall within the "right to control" test and the supporting factors referenced above to fully assess status.

For state tax purposes, North Dakota uses the Internal Revenue Service's criteria for worker classification. *See, e.g.,* N.D. Cent. Code § 34-05-01.4 (determinations of independent contractor status made by commissioner); N.D. Cent. Code § 57-38-59 (withholding from wages of employees).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with North Dakota.

Additional Resources:

Department of Labor and Human Rights

- Independent Contractor Verification
- Laws and Rules for Labor and Employment

Unemployment Insurance

- N.D. Cent. Code § 52-01-01(17)(e)

Department of Revenue and Tax

Workers' Compensation

N.D. Cent. Code § 65-01-02(16)(b) – statutory exceptions to "employee"

N.D. Cent. Code § 34-05-01.4 – determinations made by commissioner of independent contractor status

N.D. Cent. Code § 57-38-59 – withholding from wages of employees)

N.D. Admin. Code § 27-02-14-01(5)(b) – twenty factors determining status as an employee or independent contractor

OHIO

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Ohio, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Workers' Compensation

For worker classification purposes Ohio employs the 20 factor statutory test that set out in Ohio Revised Code § 4123.01. The test is modeled on the IRS 20 factor test, and provides that… "(e)very person who performs labor or provides services pursuant to a construction contract… (is an employee)… if at least ten of the following criteria apply:

(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(ii) The person is required by the other contracting party to have particular training;

(iii) The person's services are integrated into the regular functioning of the other contracting party;

(iv) The person is required to perform the work personally;

(v) The person is hired, supervised, or paid by the other contracting party;

(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(vii) The person's hours of work are established by the other contracting party;

(viii) The person is required to devote full time to the business of the other contracting party;

(ix) The person is required to perform the work on the premises of the other contracting party;

(x) The person is required to follow the order of work set by the other contracting party;

(xi) The person is required to make oral or written reports of progress to the other contracting party;

(xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;

(xiii) The person's expenses are paid for by the other contracting party;

(xiv) The person's tools and materials are furnished by the other contracting party;

(xv) The person is provided with the facilities used to perform services;

(xvi) The person does not realize a profit or suffer a loss as a result of the services provided;

(xvii) The person is not performing services for a number of employers at the same time;

(xviii) The person does not make the same services available to the general public;

(xix) The other contracting party has a right to discharge the person;

(xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement."

Unemployment Compensation

For worker classification purposes Ohio employs another 20 factor statutory test that set out in Ohio Revised Code §4141.01(B)(2)(k). The test is essentially the same as the statutory test for workers' compensation, but there are variations in terminology.

Wage and Hour

Ohio Revised Code §4111.14(B) adopts the definition of "employee" in the U.S. Code §203(e). For wage and hour purposes, Ohio applies the employee status determination test used by the U.S. Department of Labor, Wage and Hour Division (WHD) under the Fair Labor Standards Act (FSLA).

Income Taxes

For State Income Tax purposes, the Ohio Department of Taxation will use federal IRS determinations of employee/independent contractor status. IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Ohio has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)
IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Income Tax: ORC § 5747.01, et seq.
Wage and Hour: ORC § 4111.01 – 4111.99
Workers' Compensation: ORC § 4123.01 to 4123.99
Unemployment Compensation: ORC § 4141.01 to 4141.99

OKLAHOMA

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than an employee.

In Oklahoma, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Wage and Hour

The Oklahoma Department of Labor (ODL) determines independent contractor status based on the eleven factors set out in Oklahoma Administrative Code §380:30-1-2:

"Independent contractor" means one who renders service in the course of independent employment or occupation according to his own methods and is subject to his employer's control only as to the end product or final result of his work and not as to the means whereby it is to be accomplished. The following factors are considered significant in determining the employment relationship and whether a person is an employee or an independent contractor:

(A) The nature of the contract between the parties, whether written or oral;

(B) The degree of control which, by the agreement, the employer may exercise on the details of the work or the independence enjoyed by the contractor or agent;

(C) Whether or not the one employed is engaged in a distinct occupation or business for others;

(D) The kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(E) The skill required in the particular occupation;

(F) Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

(G) The length of time for which the person is employed;

(H) The method of payment, whether by the time or by the job;

(I) Whether or not the work is a part of the regular business of the employer;

(J) Whether or not the parties believe they are creating the relationship of master and servant; and

(K) The right of either to terminate the relationship without liability. No one factor is controlling, and the relationship must be based on the set of facts peculiar to the case.

Workers' Compensation

In Carbajal v. Precision Builders, Inc. 333 P.3d 258 (Okla. 2014), the Oklahoma Supreme Court employed the same eleven factors set out in Oklahoma Administrative Code §380:30-1-2 in the determination of worker status supporting an award of benefits under Workers' Compensation Act.

Unemployment Insurance

The Oklahoma Employment Security Commission (OESC) will determine worker status based on an A and B or C test set out in the Oklahoma Employment Security Act 40 Okla. Stat. § 1-210 (14). (If part A is shown [freedom from control], then showing either part B or part C is sufficient to establish an independent contractor status).

(14) Notwithstanding any other provision of this subsection, services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to the Employment Security Act of 1980 unless and until it is shown to the satisfaction of the Commission that:

(a) such individual has been and will continue to be free from control or direction over the performance of the services, both under the contract of hire and in fact; and

(b) such individual is customarily engaged in an independently established business; or

(c) such service is outside the usual course of the business for which the service is performed and that the service is performed outside of all the places of business of the enterprise for which the service is performed.

Income Taxes

The Oklahoma Administrative Code § 710:90-1-2 provides that any term used in the Oklahoma Income Tax Code shall have the same meaning as when used in a comparable context in the Internal Revenue Code. The Oklahoma Tax Commission (OTC) follows a right to control test in determinations of employee/independent contractor status.

"(i) Generally, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

(ii) An employee is subject to the will and control of the employer, not only as to what shall be done, but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. In general, if the individual is subject to the control or direction of another merely as to the result to be accomplished by the work, and not as to the means and methods for accomplishing the result, he is not an employee.

(iii) The existence of an employer-employee relationship shall be determined, when in doubt, by an examination of the particular facts of each case.

(iv) If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

(v) It is of no consequence that an employee is designated as a partner, co-adventurer, agent, independent contractor, contract labor, or the like. It also does not matter how payments are made, what they are called or whether the service is performed full or part-time.

(B) Generally, persons who follow an independent trade, business, or profession, in which they offer their services to the public, such as physicians, attorneys, dentists, veterinarians, contractors and others, are not "employees."

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The State of Oklahoma has not entered into a Memorandum of Understanding (MOU) with the U.S. Department of Labor's Wage and Hour Division regarding the misclassification of workers.

Additional Resources:

"An independent contractor is one who engages to perform a certain service for another, according to his own manner and method, free from control and direction of his employer in all matters connected with the performance of service, except as to the result or product of the work." The ability to discharge an employee is indicative of the ability to control. The second part of the test under Section 1–210(14), is that independent contractors are customarily engaged in an independent enterprise, business, or profession. Elemental to an independent enterprise, business, or profession is a proprietary interest. Other aspects of an independent enterprise include the ability to "operate without hindrance from any individual or force whatsoever," to operate without control by another entity, to earn a profit or sustain a loss, to sell the enterprise, and the "right of continuity."

Reliable Referring Service, Inc. v. Assessment Bd., Oklahoma Employment Sec. Com'n, 149 P.3d 1078, 1082 (Okla. Civ. App. Div. 4, 2006)

Income Tax: Okla. Admin. Code §§ 710:90-1 to 710:90-7
Wage and Hour: Okla. Admin. Code §§ 380:30-1-1 to 380:30-5-12
Workers' Compensation: Okla. Stat. tit. 85, §§ 375.1 to 399
Unemployment Compensation: Okla. Stat. tit. 40, §§ 2-201 to 2-803

OREGON

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than an employee. Oregon does not use a single test for determining whether a worker is an employee or an independent contractor. Four agencies use a "right to control" test while two other agencies use the "economic reality test" to establish whether a worker is an independent contractor.

Revenue and Unemployment Compensation

With respect to the Department of Revenue, Employment Department, Construction Contractors Board, and the Landscape Contractors Board, to qualify as an independent contractor, a worker must be: (1) free from direction and control; (2) customarily engaged in an "independently established business,"; (3) licensed under statute chapters 671 or 701 (State Board of Architect Examiners, Landscape Architect Board, Landscape Contractors Board or Construction Contractors Board) if licensure is required for the service; and (4) responsible for any other licenses or certificates necessary to provide the service. Or. Rev. Stat. § 670.600.

To qualify under the law, an "independently established business" must meet 3 out of the following 5 criteria: (1) maintain a business location that is separate from the business or work location of the service recipient; or that is in a portion of their own residence that is used primarily for business; (2) bear the risk of loss; (3) provide contracted services for two or more different persons within a 12-month period, or routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services; (4) make a significant investment in the business; (5) have the authority to hire and fire other persons to provide assistance in performing the services.

With respect to wage and hour laws, Oregon uses an "economic reality test" to determine whether a worker is an independent contractor or employee. The five factors of the test are weighed to determine whether a worker is an independent contractor as a matter of economic reality. The five factors include: (1) the degree of control; (2) extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; (5) the permanency of the relationship. No single factor is determinative.

Workers' Compensation

The Bureau of Labor and Industries uses the "right to control test" and weighs four factors to determine whether a worker is free from the right to control by the business receiving the worker's services. As with other tests used in Oregon, no single factor is determinative. These factors include: (1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) furnishing of equipment; (4) the right to fire.

When the "right to control test" is not conclusive, the Workers' Compensation Division will utilize the "nature of the work test," which considers the character of the work or business, as a supplement to the "right to control test." Factors examined will include: (1) how much is the work a regular part of the hiring entity's business; (2) how skilled it is; (3) whether the work is continuous or intermittent; (4) whether the duration is sufficient to amount to the hiring of continuous services as distinguished from contracting for completion of a particular job; (5) the extent to which it may be expected to carry its own accident burden.

Task Force:

Oregon created the Interagency Compliance Network (ICN) to improve employers' and workers' compliance with employment and tax laws. *See* Or. Rev. Stat. § 670.700. The Task Force is comprised of seven agencies that include: Bureau of Labor and Industries, construction Contractors Board, Department of Consumer and Business Services, Department of Justice, Department of Revenue, Employment Department, and Landscape

Contractors Board. For more information, see the Interagency Compliance Network's Third Report to the Oregon Legislature (March 2015). Reports are submitted every two years.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with Oregon.

Grant

In 2014 Oregon was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Bureau of Labor & Industry
- Oregon Independent Contractors
- Brochure on Worker Classification – Employee or Independent Contractor

Unemployment Insurance
- Or. Rev. Stat. § 657.030 – exclusions to Unemployment Insurance Law
- Or. Rev. Stat. § 657.040

Department of Revenue

Construction Contractors Board

Workers' Compensation Division
- Or. Rev. Stat. § 656.005(31)
- Or. Rev. Stat. § 656.017

Or. Rev. Stat. § 670.600 – Independent Contractors

Or. Admin. Rule – Independent Contractors

Oregon State Agency Criteria for Independent Contractors – chart setting out the tests utilized by each agency and related statutes

Or. Rev. Stat. § 656.027 – defining non-subject workers for Workers' Compensation

PENNSYLVANIA

The Construction Workplace Misclassification Act

The Construction Workplace Misclassification Act, which went into effect on February 10, 2011 establishes a definition of "independent contractor" for purposes of workers' compensation, unemployment compensation, and improper classification of employees.

No individual may be classified as an independent contractor *unless* the individual:

A. Has a written contract to perform construction services with the business or person,
B. Is free from control or direction over the performance of these services, and
C. Is customarily engaged in an independently established trade, occupation, profession or business.

An individual is "customarily engaged in an independently established trade, occupation, profession or business" only if the worker meets the following criteria:

1. The individual possesses the essential tools to perform the services independent of the business for which the services are performed.
2. The individual must realize a profit or suffer a loss for the project.
3. The individual must have a proprietary interest in their business.
4. The individual must have a business location separate from the business or person for whom the services are being performed.
5. The individual independently performed the same services for another person, or was available and able to independently perform these services for another person and represented that these services could be independently performed for another person.
6. The individual must maintain liability insurance of at least $50,000 during the term of the contract.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Pennsylvania has not entered into any MOU with DOL.

Additional Resources:

The Construction Workplace Misclassification Act (Act 72)
Independent Contractors in the Construction Industry
Construction Workplace Misclassification Complaint Form
Construction Workplace Misclassification Act Poster

RHODE ISLAND

There is no single definition of "Independent contractor" under Rhode Island law.

Employment Security

Pursuant to R.I. Gen. Laws § 28-42-7 "The determination of independent contractor or employee status for purposes of chapters 42 – 44 of this title shall be the same as those factors used by the Internal Revenue Service in its code and regulations."

Workers' Compensation

Pursuant to R.I. Gen. Laws § 28-29-2(11) "Independent contractor" means a person who has filed a notice of designation as independent contractor with the director of labor and training pursuant to § 28-29-17.1 or as otherwise found by the workers' compensation court.

Pursuant to the common law test, an *employee* is anyone performing service for an employer who controls what will be done and how it will be done by the worker. What is important is *does the employer have the right to control the details of the services being performed?*

Independent Contractors have an independent trade, business or profession. Their services are offered to the public and they have the right to control the means and methods of how the work is performed.

If an employer retains the right to control over what will be done and how it will be done, the individual is performing services as an employee.

Revenue (Taxation)

Factors considered in the determination of independent contractor or employee status shall be the same as those factors used by the Internal Revenue service in its code and regulations.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Rhode Island has not entered into any MOU with DOL.

Additional Resources:

http://www.dlt.ri.gov/misclass.htm
http://www.dlt.ri.gov/pdf/WorkerMisclass0814.pdf
http://www.uitax.ri.gov/faq.htm
http://www.tax.ri.gov/taskforce/index.php

SOUTH CAROLINA

There is no single definition of "Independent contractor" under South Carolina law.

Unemployment Insurance

S.C. Code Ann. § 41-27-230(1)(b) states that the status of an employee will be defined by common law. The primary common law test for distinguishing employees from independent contractors focuses on the right and authority of the employer to control and direct work. The factors which demonstrate the right of control are:

- direct evidence of right or exercise of control;
- method of payment;
- furnishing of equipment, and
- right to fire.

Workers' Compensation

The definition of an employee for workers' compensation purposes is quite broad. The critical test is the degree of control the employer exercises over the worker. The statutory definition of an employee "means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed…." The term "employee" excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer. S.C. Code Ann. § 42-1-130.

The South Carolina Workers' Compensation Commission determines whether an individual is an employee for workers' compensation purposes**.**

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, South Carolina has not entered into any MOU with DOL.

Additional Resources:

http://www.wcc.sc.gov/Pages/FAQEmployers.aspx
http://www.scstatehouse.gov/code/t42c001.php
https://www.dew.sc.gov/emp-taxes.asp

SOUTH DAKOTA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than as an employee. No one test is used in South Dakota to determine whether a worker meets the requirements of an independent contractor. Different agencies will examine different elements to establish whether a worker would be classified as an employee or an independent contractor.

The state Workers' Compensation and Unemployment Compensation agencies use the same two primary tests and courts will review each case on its own facts and consider all features of the relationship when making a determination. Egemo v. Flores, 470 N.W.2d 817, 820 (S.D. 1991).

Unemployment Compensation

When making a determination of a worker's status in the general labor and employment context, courts will consider a number of factors including: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) the independent nature of the individual's business or calling; (3) the employment of assistants with the right to supervise their activities; (4) an obligation to furnish necessary tools; (5) the right to control the progress of the work, except as to final results; (6) the time for which the worker is employed; (7) the method of payment (by the job or by time); (8) whether the work is part of the regular business of the employer. Baer v. Armour & Co., 258 N.W. 135, 137 (S.D. 1934); Dumire v. Martin, 174 N.W.2d 215 (S.D. 1970).

Workers' compensation

Under the state workers' compensation statutes, two primary factors are utilized to establish whether a worker qualifies as an independent contractor: (1) whether the individual has been and will continue to be free from control or direction over the performance of the services, both under contract of service and in fact; and (2) whether the individual is customarily engaged in an independently established trade, occupation, profession, or business. St. Paul Reinsurance Co., Ltd. V. Baldwin, 503 F. Supp. 2d 1255, 1263 (D. S.D. 2007).

Under the right of control test, an analysis includes consideration of the following factors: (1) direct evidence of the right of control; (2) the method of payment; (3) furnishing major items of equipment, and (4) the right to terminate the employment relationship at will and without liability. Davis v. Frizzell, 504 N.W.2d 330, 331-32 (S.D. 1993).

The independently established trade, business of occupation analysis looks at a four part test: (1) An enterprise independently established; (2) An enterprise created and existing separate and apart from the relationship with the particular employer; (3) An enterprise that will survive the termination of that relationship; (4) An enterprise in which the individual possesses a proprietary interest to the extent that it can be operated without hindrance from any other individual. *See* Davis v. Frizzell, 504 N.W.2d 330, 331-32 (S.D. 1993); Moonlight Rose Co. v. S.D. Unemployment Ins. Div., 668 N.W. 2d 304, 309 (S.D. 2003).

Revenue

With respect to revenue, South Dakota does not have an income tax, so it uses the Internal Revenue Service's criteria for worker classification for other revenue purposes.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However,

the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with South Dakota.

Grant

In 2014 South Dakota was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Department of Labor and Regulation

- Fact Sheet – Independent Contractor or Employee?

Department of Revenue

S.D. Codified Laws §§ 61-1-1 *et seq*. – Unemployment Insurance

S.D. Codified laws § 62-1-3 – definition of "employee"

TENNESSEE

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than as an employee.

In Tennessee, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Workers' Compensation

Tennessee has enacted a statutory test Tenn. Code § 50–6–102(10)(D) for workers' compensation purposes that is used to determine employee/independent contractor status based on right to control principles.

(D) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

(i) The right to control the conduct of the work;

(ii) The right of termination;

(iii) The method of payment;

(iv) The freedom to select and hire helpers;

(v) The furnishing of tools and equipment;

(vi) Self-scheduling of working hours; and

(vii) The freedom to offer services to other entities;

However, in 2011 the Tennessee Code was amended to provide that the statutory classification test shall not apply to construction workers (who will be deemed independent contractors) if the requirements of the amended section, Tenn. Code § 50–6–102(10)(E), are met.

"(E) "Employee" does not include a construction services provider, as defined in § 50-6-901, if the construction services provider is:

(i) Listed on the registry established pursuant to part 9 of this chapter as having a workers' compensation exemption and is working in the service of the business entity through which the provider obtained such an exemption;

(ii) Not covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider is providing services; and

(iii) Rendering services on a construction project that:

(*a*) Is not a commercial construction project, as defined in § 50-6-901; or

(*b*) Is a commercial construction project, as defined in § 50-6-901, and the general contractor for whom the construction services provider renders construction services complies with § 50-6-914(b)(2).

Wage and Hour – Unemployment Insurance
These areas are administered by the Tennessee Department of Labor and Workforce Development (TDLWD).

The following guide is published on the TDLWD employee misclassification web site:

General Characteristics of Employees and Independent Contractors

Independent Contractor

- Free from direction and control
- Has necessary skills and training to complete job
- Has a business location
- Performs services for multiple customers
- Sets own hours
- Determines own price for contracted services
- Not eligible for employee benefits
- Provides equipment and tools used to complete job
- Supplies materials needed to do job
- Personally liable for errors and/or accidents
- Files self-employment taxes
- Has right to hire and fire workers
- Must legally complete each contract

Employee

- Means and manner of work are (or can be) controlled by employer
- May be trained by employer to perform job
- May work at employer's business location
- Works for one employer, may serve that employer's customers
- Hours set by employer
- Accepts wage, salary, or commission determined by the employer
- Employer may provide and control equipment and tools
- Employer may purchase materials and supplies
- Employer liable for employee errors and/or accidents
- Is hired and can be fired by employer
- May quit working for an employer at any time
- Employer may require specific attire to be worn while at work such as a uniform or shirts with company logo

Income Taxes
The Tennessee Department of Revenue does not post a worker classification test on its web site. By default, a federal IRS employee/independent contractor status determination will apply for state income tax purposes.

Memorandum of Understanding
The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor's Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with the State of Tennessee.

Federal Grant to Fund Worker Misclassification Enforcement

Tennessee has been awarded a federal grant in the amount of $499,260 to fund state initiated worker misclassification detection enforcement activities. The funds will be used to increase the ability of Tennessee unemployment insurance tax administrators to identify instances where employers improperly classify employees as independent contractors or fail to report wages paid to workers.

Additional Resources:

IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.
U.S. Department of Labor news release – grants awarded states to fund unemployment insurance misclassification enforcement initiatives
Income Tax: Tenn. Code §§ 67-2-102 to § 67-2-123
Wage and Hour: Tenn. Code §§ 61.001 to 62.205
Workers' Compensation: Tenn. Code §§ 401.001 to 419.007
Unemployment Insurance Taxes: Tenn. Code §§ 50-7-101 to 50-7-807

TEXAS

Misclassification occurs when an employer incorrectly defines a worker as an “independent Contractor” rather than as an employee.

In Texas, different agencies are responsible for separate aspects of the law, and those agencies use different rules and tests to determine employment status.

Unemployment Taxes

The Texas Workforce Commission (TWC) has adopted Agency Form C-8 as the Agency's official guideline for use in determining worker status for unemployment tax purposes. The test is similar to the IRS’s 20 factor test. An "independent contractor" would be a person whose services do not meet the above test. Not all factors listed apply to each and every case.

Workers’ Compensation

Workers’ compensation is administered by the Texas Department of Insurance (TDI). Under Section 401.012 of the Texas Workers' Compensation Act, (b) the term “employee” includes:

(1) an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business;

(2) a person, other than an independent contractor or the employee of an independent contractor, who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer; and

In section 406.121(2) of that law, an independent contractor is defined as "a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

A. acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
B. is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;
C. is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
D. possesses the skills required for the specific work or service."

Wage and Hour

Texas labor laws do not have laws governing the payment of overtime. Federal overtime laws apply. Texas has adopted by statute V.T.C.A. Labor Code § 62.051, the federal minimum wage rate set forth in the Fair Labor Standards Act.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. However, the U.S. Department of Labor’s Wage and Hour Division (WHD) does not currently have a Memorandum of Understanding (MOU) with the State of Texas.

Federal Grant to Fund Worker Misclassification Enforcement

Texas has been awarded a federal grant in the amount of $500,000 to fund state initiated worker misclassification detection enforcement activities. The grant money will be used to increase the ability of Texas unemployment insurance tax administrators to identify instances where employers improperly classify employees as independent contractors or fail to report wages paid to workers. Also, Texas is one of four states to receive a "high performance bonus" of additional grant funds in recognition of the state's high performance in detecting worker misclassification. With the "high performance bonus," the total amount of the federal grant to Texas is $1,275,529.

Additional Resources:

U.S. Department of Labor news release – grants awarded states to fund unemployment insurance misclassification enforcement initiatives

TWC Independent Contractor Test - Employment Status - A Comparative Approach

Texas Department of Insurance – Agreement Between General Contractor and Subcontractor to Establish an Independent Relationship Form DWC-85 is used to verify the independent relationship and the intent of the parties to exclude the independent contractor from the general contractor's workers' compensation insurance. This form does not need to be filed with DWC or the carrier, but should be ready for inspection at audit time or upon request.

Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)

Unemployment Taxes: Texas Labor Code § 201.001 to 201.101
Workers' Compensation: Texas Labor Code § 401.001 to 419.007
Wage and Hour: Texas Labor Code § 61.001 to 62.205

UTAH

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than as an employee. No one test is used in Utah to determine whether a worker meets the requirements of an independent contractor.

Unemployment Compensation

In the context of Utah's Unemployment Insurance, services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment unless it is shown to the satisfaction of the division that: (a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and (b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact. Utah Code § 35A-4-204(3)(a)-(b).

To determine whether these two factors have been met, the state administrative code identifies a series of factors. These include: (1) independently established trade, occupation, profession or business; and (2) the control and direction over the performance of a service. Utah Admin. Code R994-204-303. Additional factors are used for the first prong of this test with respect to independently established business. Analysis includes demonstrating that the independently established entity is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence.

Further, Utah's Administrative Code identifies factors that will assist in determining whether a worker is customarily engaged in an independently established trade or business. These factors include: (1) a separate place of business; (2) the worker's investment in tools, equipment or facilities customarily required for the business; (3) regularly performing work for other clients of the same nature; (4) realizing profit or loss from expenses and debts incurred through the business activity; (5) advertising activities that demonstrate an effort to generate business; (6) licenses obtained by the worker for the business or trade; and (7) maintaining business records and tax forms and other documents that validate expenses. Utah Admin. Code R994-204-303.

Under the second prong, involving control and direction, additional factors will be used to determine whether an employer has the right to exercise control and direction over the worker. These include (1) instructions; (2) training; (3) pace or ordered sequence of duties; (4) work on employer's premises; (5) requiring the work to be performed personally and not assigned to others; (5) presence of the requirement for personal service in that the worker is not allowed to assign work to others; (6) evidence of a continuous service relationship between the worker and the employer; (7) set hours of work or a specific number of hours set by the employer; (8) method of payment by the employer. See Utah Admin. Code R994-204-303; *see also* Petro-Hunt, LLC v. Dep't of Workforce Servs., 197 P.3d 107, 113, 116 (Utah Ct. App. 2008) (finding that employers are generally accountable to those they hire based on the reality of the relationship regardless of the formal labels).

Workers' Compensation

Under the Utah Workers' Compensation Act, courts focus on whether the employer had the right to control the worker. Hogan v. Utah Telecom. Open Infrastructure Agency, Nos. 13-4069 & 13-4073 (10th Cir. 2014). A number of factors are relevant to establish the right to control including actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker." *Id*. "'Regardless of how the parties intended to structure their relationship, a worker is considered to have been an employee if the employer had the right to control the worker's manner or method of executing or carrying out the work.'" *Id.*

The Workers' Compensation Act defines an independent contractor as "any person engaged in the performance of any work for another who, while so engaged, is: (A) independent of the employer in all that pertains to the execution of the work; (B) not subject to the routine rule or control of the employer; (C) engaged only in the performance of a definite job or piece of work; and (D) subordinate to the employer only in effecting a result in accordance with the employer's design. Utah Code § 34A-2-103(2)(b)(i) (effective July 1, 2015) (NOTE: the text of this section, valid until July 1, is the same). "Regularly" includes all employments in the usual course of the trade, business, profession, or occupation of the employer, whether continuous throughout the year or for only a portion of the year. *Id.* at § 34A-2-103(2)(b)(ii).

Courts in Utah have consistently held that "it is the right to control which is determinative; the degree of control [actually asserted] is not essential." Utah Home Fire Ins. Co. v. Manning, 985 P.2d 243, 246-47 (Utah 1999). The main facts to be considered as bearing on the relationship are: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment; and (4) the furnishing of equipment. *Id.*

Revenue

For tax liability, Utah uses the Internal Revenue Service's criteria for worker classification purposes.

Taskforce:

The Worker Classification Coordinated Enforcement Council is a multi-agency taskforce was created by the 2011 Utah Legislature. It is a multi-agency taskforce composed of the Labor Commission, the Departments of Commerce and Workforce Services, the Tax Commission and Attorney General's Office.
The taskforce has the following purposes: (1) to investigate the nature and extent of worker misclassification in Utah; (2) assess the results of regulatory and law enforcement efforts; (3) improve information sharing by member agencies; and (4) recommend legislative changes.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. DOL and Utah signed a Memorandum of Understanding on September 19, 2011, which expired on September 19, 2014. The parties renewed the MOU on October 6, 2014 for an additional three years and it now expires on October 6, 2017.

Grant

In 2014 Utah was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Memorandum of Understanding
Utah Department of Labor

- Worker Classification Coordinated Enforcement Council

Unemployment Insurance

- Utah Admin. Code R994-204-303 – Factors for Determining Independent Contractor Status

Workers' Compensation Act

- Utah Code § 35A-2-104(b)(1) – definition of "employee"
- Utah Code § 35A-2-103(2)(a) – definition of independent contractor

Employment Security Act – Utah Code §§ 35A-4-101 to 35A-4-508

- Utah Code § 35A-4-204 – definition of "employee"
- Utah Code § 35A-4-204(3)(a)-(b) – exception to definition of "employee"

Utah State Tax Commission

VERMONT

Vermont law has several definitions defining who is an employer, and who is an employee.

Unemployment Compensation
For unemployment purposes, the appropriate test to determine whether a worker is an employee or independent contractor is often referred to as the "ABC" test. The person is an employee if:

(A) the individual has been and will continue to be free from control or direction over the performance of such services, both under the contract of service and in fact; and
(B) the service is either outside all the usual course of business for which such service is performed, or outside all the places of business of the enterprise for which such service is performed; and
(C) the individual is customarily engaged in an independently established trade, occupation, profession or business.

See, Vt. Stat. Ann. tit. 21, §1301(6) (B).

Workers' Compensation
An independent contractor is someone you hire who:

- Performs a job that is not similar or connected to your business, and
- Whose work you have no direction or control over

The Department of Labor uses two tests to determine if a worker is independent contractor or an employee.

- Right to Control
- The Nature of Business

The "Right to Control" test demonstrates that an employer "controls" the worker. It merely requires that an employer *could*, if it chose to do so, exercise control over the employee. For a sample list of questions used to assist in the determination of whether the employer has the requisite "right to control," See http://labor.vermont.gov/workers-compensation/misclassification/

The "nature of the business" test must be applied if the "right to control" test fails to identify a worker as an employee for workers' compensation purposes.

Under this test two questions are asked:

1. Is the work being performed of the type that normally could be carried out by an employee in the usual course of business?
2. Are the activities being performed by the workers an integral part of the employer's regular business.

Revenue (State Taxation)
Vermont defers to the IRS common law variation test for determining worker status.

Wage and Hour Law
Vermont's wage and hour law does not define the term "independent contractor." The law broadly defines employee as "a person who has entered into the employment of an employer," where the employer is unable to show that the worker meets the ABC test for determining independent contractor status.

http://legislature.vermont.gov/statutes/section/21/005/00341

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Vermont has not entered into any MOU with DOL.

Grant

In 2014 Vermont was one of 19 states awarded a grant by the U.S. Department of Labor for continued independent contractor misclassification detection and enforcement.

Additional Resources:

Adam H. Miller, *Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve A National Problem*, 39, Vermont L. Rev. 207, 230 (Fall 2014).

Vermont Bar Journal Fall, 2008 Special Focus: *Employment Law NEW WORKERS' COMPENSATION LEGISLATION* J. Stephen Monahan, Esq. Nathaniel K. Seeley, Esq., 34-FALL Vt. B.J. 54

EO 08-12 Misclassification Task Force –
http://governor.vermont.gov/sites/governor/files/executiveorders/EO%2008-12%20Misclassification%20Task%20Force.pdf

http://legislature.vermont.gov/statutes/section/21/017/01301

VIRGINIA

There is no single definition of "Independent contractor" under Virginia law.

Unemployment Insurance

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon an application of the 20 factors set forth in Internal Revenue Service Revenue Ruling 87-41, issued pursuant to 26 C.F.R. 31.3306(i)-1 and 26 C.F.R. 31.3121(d)-1. See Va. Code § 60.2-212(C)

Workers' Compensation

A claimant seeking benefits under the Workers' Compensation Act bears the burden of establishing that he is an employee as that term is defined in Code § 65.2-101. The Act defines "employee" as a person "in the service of another under a contract of hire or apprenticeship, written or implied," except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer.

Whether the existing status is that of an employee or an independent contractor is governed, not by any express provision of the workmen's compensation law, but by common law. No hard and fast rule can be laid down for ascertaining whether the status is one or the other. It must be determined from the facts of the particular case in the light of well settled principles. See Creative Designs Tattooing Associates, Inc. v. Estate of Parrish, 693 S.E.2d 303 (Va. Ct. App. 2010).

In determining whether a person is an independent contractor, the main factor is whether the alleged employer has a "right of control" over the alleged employee.

Revenue (State Taxation)

Virginia law conforms to the provisions of federal law with respect to whether an employer-employee relationship exists between parties. If you are considered to have an employer-employee relationship with your subcontractors under federal regulations, you are an employer for Virginia purposes.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, Virginia has not entered into any MOU with DOL.

Additional Resources:

Executive Order 24 (On August 14, 2014, Governor Terry McAuliffe signed Executive Order 24 establishing an interagency task force on worker misclassification and payroll fraud).
http://www.doli.virginia.gov/laborlaw/claim_%20for_wages_instructions_spanish.html

http://www.tax.virginia.gov/content/business-faq

WASHINGTON

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than as an employee. No one test is used in Washington to determine whether a worker meets the requirements of an independent contractor.

Unemployment Compensation

With respect to unemployment insurance, Washington's Employment Security Act does not cover workers that meet the same test set out in the workers' compensation statute Wash. Rev. Code § 50.04.140. Washington uses the shorter ABC test for unemployment insurance purposes and the statute provides that services performed by an individual for compensation is *employment* **unless** it is shown that:

1. The individual is free from direction and control over the performance of the service; and
2. The service is either performed: outside of the usual course of business for which the service is performed, or outside of all the places of business of the enterprise for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in service contract.

Or, *as a separate alternative*, service performed by an individual for compensation is *employment* **unless** it is shown that:

1. The individual is free from direction and control over the performance of the service; **and**
2. The service is either performed: outside the usual course of business for which the service is performed, or outside of all places of business of the enterprise for which the service is performed, or the individual has a principal place of business and is responsible for the costs; **and**
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service contract, or has a principal place of business that is eligible for a federal income tax business deduction; **and**
4. On the effective date of the contract of service, the individual is responsible for filing a schedule of expenses with the Internal Revenue Service; **and**
5. On the effective date of the contract or within a reasonable period after the effective date of the contract, the individual has an active account with the Department of Revenue, active account with any other state agencies, and a Unified Business Identifier (UBI) number; **and**
6. On the effective date of contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting.

Wash. Rev. Code § 50.04.140.

Workers' Compensation

Under the state Workers' Compensation laws, Washington uses two tests – one for electrical and construction contractors and a second for all other industries. When services are performed for compensation by an individual in the electrical or construction industries, it is considered employment unless it is shown that:

1. The individual is free from direction and control over the performance of the service; **and**
2. The service is either performed: outside of the usual course of business for which the service is performed, or outside of all the places of business of the enterprise for which the service is performed; or the individual has a principal place of business and is responsible for the costs; **and**
3. The individual: is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service contract, or has a principal place of business that is eligible for a federal income tax business deduction; **and**

4. On the effective date of the contract of service, the individual is responsible for filing a schedule of expenses with the Internal Revenue Service; **and**
5. On the effective date of the contract or within a reasonable period after the effective date of the contract, the individual has an: active account with the Department of Revenue, active account with any other state agencies, and a Unified Business Identifier (UBI) number; **and**
6. On the effective date of contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting; **and**
7. On the effective date of the contract, the individual has a valid contractor registration under RCW 18.27 or an electrical contractor license under RCW 19.28 if the work requires a registration or license.

See Wash. Rev. Code § 51.08.181 (registered contractor exclusions).

Revenue

Washington applies an "economic-dependence" test when determining a worker's status under Washington's Minimum Wage Act. *See* Anfinson v. FedEx Ground Package Sys., Inc., 281 P.3d 289 (Wash. 2012) (recognizing legislative intent to adopt the federal Fair Labor Standards Act which uses the "economic dependence" test); Wash. Rev. Code § 49.46.010; Wash. Admin. Code § 296-126-002. The relevant question is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." Anfinson, 281 P.3d at 297.

Washington does not have a state income tax. Washington defers to the Internal Revenue Service's criteria for worker classification purposes regarding other revenue issues.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The U.S. Department of Labor's Wage and Hour Division (WHD) signed a Memorandum of Understanding with Washington on September 19, 2011 for three years expiring on September 19, 2014. The parties renewed the MOU on October 27, 2014 for an additional three years and the MOU now expires Oct. 27, 2017.

Additional Resources:

Memorandum of Understanding
Department of Labor & Industry
- Independent Contractor Guide

Employment Security Department
- Independent Contractors

Department of Revenue
Workers' Compensation
Wash. Rev. Code § 50.04.140 – Unemployment Insurance
Wash. Rev. Code § 51.08.195 – Industrial Insurance
Wash. Rev. Code § 51.12.020—statutory exclusions to definition of "employment"

WEST VIRGINIA

There is no single definition of "Independent contractor" under West Virginia law.

Unemployment Compensation

Service performed for wages is considered employment unless:

(a) the individual is free from control or direction in the performance of the service; and

(b) the service is outside the usual course of the business for which it is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession or business.

W. Va Code § 21A-1A-16. Employment

Workers' Compensation

All individuals performing services for compensation paid by an employer are presumed to be employees and required to be covered by a West Virginia workers' compensation insurance policy unless and until it is shown that the worker is an independent contractor. The burden of proving that an individual is an independent contractor is at all times, on the party asserting independent contractor status.

See W. Va. Code § 85-8-6(6.2) for criteria that are dispositive of whether an individual is an independent contractor for purposes of West Virginia workers' compensation coverage.

Wage Payment and Collection Act

An "employee" is defined to include "any person suffered or permitted to work by a person, firm or corporation." W. Va. Code § 21-5-1(b).

Genuine issue of material fact existed as to whether sales representative was primarily managed by employer while he was working in its behalf, thus making him an employee under the Act. Saunders v. Tri-State Block Corp., 535 S.E.2d 215 (W. Va. 2000).

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. To date, West Virginia has not entered into any MOU with DOL.

Additional Resources:

http://www.wvcommerce.org/app_media/assets/doc/businessandworkforce/workforcewv/unemploymentcompensation/employers/Employer_Handbook_Revised_11_16_10.pdf

WISCONSIN

Misclassification occurs when an employer incorrectly defines a worker as an "independent Contractor" rather than as an employee.

A single agency, the Wisconsin Department of Workforce Development (WDWD) administers workers' compensation, unemployment insurance and wage and hour issues. However, different employee classification tests are used in each of those subject areas. Each distinct classification test can be found on the WDWD Worker Classification website.

Workers' Compensation

Wisconsin has adopted a statutory test for employee/independent contractor determinations in workers' compensation instances.

Wisconsin Statutes Annotated § 102.07(8)(a) Except as provided in paragraph (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.

3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.

4. Incurs the main expenses related to the service or work that he or she performs under contract.

5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.

6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.

8. Has continuing or recurring business liabilities or obligations.

9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Unemployment Insurance

Wis. Stat § 108.02(12) requires a two part test that general private employers or for profit businesses must utilize to determine if their workers are employees or independent contractors.

Part 1: Direction and Control - The first part of the two part test concerns "direction and control." The worker must be free of the employer's direction and control to be considered an independent contractor. If the worker is found to be **under** the direction and control of the employer, the worker is an employee. If the worker is free from the direction and control of the employer, the second section of the test is applied.

Part 2: Six of Nine Conditions - The second part of the two part test is "six of nine conditions". The worker must meet six of nine conditions to be considered an independent contractor. If the worker does not meet at least six of the nine conditions, the worker is an employee.

1. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

2. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.

3. The individual operates under multiple contracts with one or more employing units to perform specific services.

4. The individual incurs the main expenses related to the services he or she provides under contract.

5. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.

6. The services performed by the individual do not directly relate to the employing unit retaining the services.

7. The individual may realize a profit or suffer a loss under contracts to perform such services.

8. The individual has recurring business liabilities or obligations.

9. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

Wage and Hour

The Wisconsin wage and hour laws are enforced by the Labor Standards Bureau (LSB, a division of the WDWD. The Labor Standards Bureau will presumes that a worker is an employee unless the worker is not considered under to be an employee for the purposes of the federal Fair Labor Standards Act (FSLA).

Income Taxes

The Wisconsin Department of Revenue (WDR) administers state income taxes. State tax withholding requirements conform to the federal Internal Revenue Code. IRS worker classification determinations will apply.

Wisconsin Withholding Tax Guide – Subsection T. - Willful Misclassification Penalty for Construction Contractors. Any employer engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects who willfully provides false information to the WDR, or who willfully and with intent to evade any withholding requirement, misclassifies or attempts to misclassify an individual who is an employee of the employer as a nonemployee shall be fined $25,000 for each violation.

Memorandum of Understanding

On December 23, 2014, The U.S. Department of Labor's Wage and Hour Division (WHD) and the Wisconsin Department of Workforce Development (WDWD) entered into a Memorandum of Understanding (MOU) for a period of three years pertaining to employee misclassification with the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law.

Federal Grant to Fund Worker Misclassification Enforcement

Wisconsin has been awarded a federal grant in the amount of $499,607 to fund state initiated worker misclassification detection enforcement activities. The funds will be used to increase the ability of Wisconsin unemployment insurance tax administrators to identify instances where employers improperly classify employees as independent contractors or fail to report wages paid to workers.

Additional Resources:

Wisconsin Department of Workforce Development - WORKER CLASSIFICATION website
Memorandum of Understanding
MOU press release
U.S. Department of Labor news release – grants awarded states to fund unemployment insurance misclassification enforcement initiatives
Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA)
IRS Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) with the IRS.

Workers' Compensation: Wis. Stat. § 102.01 to 102.89
Unemployment Compensation: Wis. Stat. § 108.01 to 108.26.
Wage and Hour: Wis. Stat. §103.001 to 103.97
Income Tax: Wis. Stat. § 71.01 to 71.98

WYOMING

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than as an employee. Wyoming uses the ABC test when determining whether a worker is an employee or independent contractor with respect to unemployment insurance and workers' compensation.

Unemployment and Workers' Compensation

The Wyoming statutes for unemployment insurance and workers' compensation define an "independent contractor" as an individual who performs services for remuneration and is:

1. Free from control or direction over the details of the performance of services by contract and by fact.
2. Represents his services to the public as a self-employed individual or an independent contractor; and,
3. May substitute another person to perform his services.

See Wyo. Stat. § 27-3-104(b); Wyo. Stat. § 27-14-102(a)(xxiii). The individual must meet all three requirements to be considered independent. The statutes do not define "control" but Wyoming courts will refer to the common law to establish meaning. Under the state common law, in establishing the concept of control in the employer/employee context, the courts have recognized an independent contractor as "one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. When a worker is an independent contractor, the employer is typically interested only in the results of the work and does not direct the details of how the work is performed. Circle C Resources, Inc. v. Kobielusz, 320 P.3d 213 (Wyo. 2014).

Revenue

For purposes of wage claims, "employee" is defined as "any person who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Wyo. Stat. 27-4-501(a)(ii); Diamond B Servs. v. Rohde, 120 P.3d 1031 (Wyo. 2005). An independent contractor "is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." Diamond B Servs., 120 P.3d at 1041.

Wyoming does not have a state income tax. Wyoming defers to the Internal Revenue Service's criteria for worker classification purposes regarding other revenue issues.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding (MOU) with states from coast to coast to coordinate enforcement efforts and share information between the state and federal agencies about non-compliant companies. The U.S. Department of Labor's Wage and Hour Division (WHD) entered into a Memorandum of Understanding (MOU) with Wyoming on October 27, 2014 for a period of three years and that agreement will expire on October 27, 2017.

Additional Resources:

Memorandum of Understanding
Department of Workforce Services
Unemployment Insurance
- Wyo. Stat. § 27-3-104(b)

Workers' Compensation
- Wyo. Stat. §§ 27-14-101 *et seq.*

Department of Revenue
Employee / Independent Contractor Questionnaire

DISTRICT OF COLUMBIA

Misclassification occurs when an employer incorrectly identifies a worker as an "independent contractor" rather than as an employee.

The Workplace Fraud Amendment Act of 2012, which is applicable to the Construction Services Industry, imposes liability on employers in the District of Columbia for misclassifying employees as independent contractors. D.C. Code Ann. § 32–1331.02.

Under the law, an employer-employee relationship shall be presumed to exist when work is performed by an individual for remuneration paid by an employer, unless to the satisfaction of the Mayor, the employer demonstrates that:

(1) The individual is an exempt person; or
   a. The individual who performs the work is free from control and direction over the performance of services, subject only to the right of the person or entity for whom services are provided to specify the desired result;
   b. The individual is customarily engaged in an independently established trade, occupation, profession, or business; and
   c. The work is outside of the usual course of business of the employer for whom the work is performed.

D.C. Code Ann. § 32–1331.04.

Any agreement between an employer and employee in which the employee, despite not being an exempt person, agrees to be classified as an independent contractor shall be no defense to any action to recover unpaid wages or liquidated damages. D.C. Code Ann. § 32–1331.08.

A D.C. employer will be assessed a penalty of $1,000 to $5,000 for each employee it improperly classifies as an independent contractor. D.C. employers must keep records for at least three years containing information regarding the: 1) name, address, occupation, and classification of each employee or independent contractor; 2) the rate of pay for each employee, or method of payment for the independent contractor; 3) the classification of each individual; 4) the amount that is paid each pay period to each person; 5) the hours that each person worked each day and each work week; 6) for each person that is classified as an independent contractor, evidence supporting that classification; and 7) other information that may be required by regulation. D.C. Code Ann. § 32–1331.12.

"Construction services" includes, without limitation, all building or work on buildings, structures, and improvements of all types such as bridges, dams, plants, highways, parkways, streets, tunnels, sewers, mains, power lines, pumping stations, heaving generators, railways, airports, terminals, docks, piers, wharves, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing and landscaping. The term "construction services" shall also include moving construction-related materials on the job site. D.C. Code Ann. § 32–1331.01.

Memorandum of Understanding

The U.S. Department of Labor has initiated a Misclassification Initiative in which it has entered into memorandums of understanding with states from coast to coast to coordinate enforcement efforts and share

information between the state and federal agencies about non-compliant companies. To date, the District of Columbia has not entered into any MOU with DOL.

Additional Resources:

Chapter 13. Wages and Workplace Fraud