

Independent Contractors / Contract Labor

Introduction

"Contract labor" may be the most widely used misnomer in business today. The issue is really whether a given worker is an employee or an independent contractor. In basic terms, an employee is someone over whose work an employer exercises direction or control and for whom there is extensive wage reporting and tax responsibility. An independent contractor is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer's direction and control. The distinction depends upon much more than what the parties call themselves.

The Texas Unemployment Compensation Act does not directly define "independent contractor". Instead, it sets forth a broadly inclusive test, known as the "direction or control" or "common law" test, for who is an employee: "'employment' means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the Commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact". By implication, an "independent contractor" would be a person whose services do not meet the above test. To aid in application of the common-law test, TWC has adapted the old IRS twenty-factor test for use by the agency (see Appendix E to this article).

It is important to note that it does not matter that one or both parties may call their arrangement "contract labor". The above definition makes clear that the important consideration is the underlying nature of the work relationship. The law creates a presumption of employment and places the burden for proving otherwise on the employer. It sets forth the primary factor in an independent contractor relationship, namely, the absence of direction and control over the work.

Independent contractors

- independent contractors are self-employed – they are independent business entities in a position to make a profit or loss based upon how they manage their own independent enterprise – an employer of such an individual is merely one of the clients of that contractor
- most states and IRS use similar tests to determine whether given workers are employees or independent contractors
- whether the test applied is the common-law direction and control test, the ABC test, the economic realities test, or the IRS eleven-factor test, the issues are basically the same – all the tests boil down to whether the employer exercises direction and control over the performance of the services of the worker
- all the laws presume that a worker performing services for pay is an employee – if an employer thinks otherwise, it has the burden of proof in almost any possible legal situation.

TWC Audits

The Texas Workforce Commission is charged with auditing businesses to ensure that employee wages are properly reported and appropriate taxes paid on such wages. If TWC rules that an employer has failed to properly report all wages and pay taxes, it will assess back taxes and interest. Non-payment of taxes leads TWC to inform the Internal Revenue Service that the non-paying employer is not entitled to the federal tax credit with respect to the wages in question, which in turn can lead to an IRS audit.

A TWC audit generally begins in one of four different ways. First, a former worker may file an unemployment claim. If no wages were reported for that claimant by the employer, the claim may be disallowed, in which case the claimant will probably appeal. The Tax Department will investigate, and such an audit has the highest priority. Second, a competitor or someone else may report that an employer is misclassifying its workers. The Tax Department will audit the employer's entire workforce and will hold the source of its information confidential. Third, TWC may perform a random audit of the employer as part of its goal of auditing 4% of all businesses every year. Fourth, TWC may decide to target a specific industry or geographical area. For instance, the hair salon industry was targeted in that way back in the late 1980s due to a high number of reports both from within the industry and from ex-workers.

APPENDIX D

INDEPENDENT CONTRACTOR TEST INTERNAL REVENUE SERVICE

IRS Independent Contractor Test

The IRS formerly used what has become known as the "Twenty Factor" test. Under pressure from Congress and from representatives of labor and business, it has recently attempted to simplify and refine the test, consolidating the twenty factors into eleven main tests, and organizing them into three main groups: behavioral control, financial control, and the type of relationship of the parties. Those factors appear below, along with comments regarding each one (source: IRS Publication 15-A, 2006 Edition, page 6; available for downloading from <http://www.irs.gov/pub/irs-pdf/p15a.pdf>).

Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of—

- *Instructions the business gives the worker.* An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
 - When and where to do the work
 - What tools or equipment to use
 - What workers to hire or to assist with the work
 - Where to purchase supplies and services
 - What work must be performed by a specified individual
 - What order or sequence to follow

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

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

Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- *The extent to which the worker has unreimbursed business expenses.* Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.
- *The extent of the worker's investment.* An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

- *The extent to which the worker makes services available to the relevant market.* An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- *How the business pays the worker.* An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- *The extent to which the worker can realize a profit or loss.* Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

Type of relationship

Facts that show the parties' type of relationship include:

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

Former IRS Twenty-Factor Test

The previous twenty-factor test used by the IRS can be seen in the test (see Appendix E of this article) officially adopted by the Texas Workforce Commission, the agency which enforces the state unemployment tax in Texas. That test may be found on the Internet at <http://www.texasworkforce.org/ui/tax/forms/c8.pdf>. Employers may also request a copy in printed form by asking for Form C-8 from "Texas Workforce Commission, Tax Department, 101 E. 15th Street, Austin, Texas, 78778".

Do not underestimate the difficulty of applying these standards to specific individuals performing services. In doubtful cases, always consult a knowledgeable labor and employment law attorney.