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Independent Contractor v. Employee

Whether a person is an independent contractor or an employee is the subject of much debate with both employment and unemployment claims, as well as workers' compensation claims. For instance, is the person an independent contractor and not entitled to minimum wage or overtime under the FLSA? Is the person an employee and entitled to workers' compensation benefits if injured on the job?

The U.S. Department of Labor on January 5, 2021 rolled out a multi-factor test for determining whether workers are independent contractors for purposes of the FLSA regarding overtime and minimum wage issues. In essence, the test is to determine whether a worker is economically dependent on another business and therefore is its employee or is more like a small operator who is in business for oneself. The proposed test is quite similar to the rule issued by the Dept. on September 25, 2020, and determines that an employment relationship exists for any provision of the FLSA to apply to any person, who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant. In essence, there are two core factors that examine the control that a person has over their own work and the opportunity for profit or loss as a result of personal investment. If these factors point to the same conclusion, there is likely no need to explore further.

The U.S. Supreme Court has on several occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

Certain other factors, such as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Colorado utilizes a “right of control” test to determine whether a worker is an employee or an independent contractor. This is a common-law test. The General Assembly has created a statutory definition of independent contractor. Although the legislative declaration states only the factors in Colo. Rev. Stat. § 8-40-202(2) are to be used to determine whether an individual is an employee, the appellate courts still may consider prior case law construing Colo. Rev. Stat. § 8-70-115. However, Colo. Rev. Stat. § 8-40-202(2) supersedes the case law.

The test gets somewhat muddled under Colorado’s Employment Security Law, as any “service performed by an individual for another shall be deemed to be employment, and “employment” is defined as any “service performed by an individual for another, even where the common-law relationship of master and servant does not exist.” See Colo. Rev. Stat. § 8-70-115(1)(b).

Regarding workers’ compensation claims, a recent legislative declaration established that for the purposes of the “Worker’s Compensation Act of Colorado” the test for establishing whether an individual qualifies as an employee includes the nine criteria set forth in Colo. Rev. Stat. § 8-40-202(2)(b)(II) and that the new test supersedes prior case law. The test establishes that in order to prove one is an independent contractor, it must be shown that the person the independent contractor is working for does not: (1) require the independent contractor to work exclusively for the contractor; (2) establish a quality standard for the independent contractor, oversee the actual work or instruct the independent contractor as to how the work is to be performed, except the parties may agree that the independent contractor’s services and products will be consistent with generally accepted industry standards for the independent contractor’s customary services and products; (3) pay the independent contractor a salary or hourly rate; (4) terminate the independent contractor’s current services for particular work the independent contractor accepts from the contractor unless the independent contractor fails to produce a result that meets the specifications of this Agreement; (5) provide more than minimal training for the independent contractor; (6) provide tools or benefits to the independent contractor; (7) dictate the time of performance, except that a completion schedule and a range of mutually agreeable work hours may be established through a written agreement mutually acceptable to both parties for particular work the independent contractor accepts from the contractor; (8) pay the independent contractor individually if the independent contractor is an individual; instead, the contractor will make all compensation checks payable to the trade or business name under which the independent contractor does business; or (9) combine its business operations in any way with the independent contractor’s business, but instead both parties must maintain their own operations as separate and distinct. Colo. Rev. Stat. 8-40-202(2)(b)(II).

In sum, before you can properly assess whether an individual is an independent contractor or an employee, you must first examine the appropriate claim for the type of case and apply the respective test. However, it is becoming well established that an independent contractor under any scenario must be truly economically independent from the business to qualify.