

UNRAVELING INDEPENDENT CONTRACTOR LAW: A GUIDE FOR WASHINGTON EMPLOYERS

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THE DIFFERENCE BETWEEN AN INDEPENDENT CONTRACTOR & EMPLOYEE

- If an employee, employer must:
 - Pay workers' compensation
 - Meet wage and hour requirements (overtime)
 - Pay unemployment tax
- If an independent contractor, you do not
- Employees are default classification
- High burden to prove independent contractor

WHAT'S THE BIG DEAL?

- Increasing scrutiny and difficulty of proving independent contractor
- Stiff penalties and liability:
 - Back taxes
 - Back wages
 - Unemployment insurance premiums
 - Penalties
 - Interest
- Applies for all misclassified workers

HOW DO I KNOW IF A WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR?

- Complicated, no single factor controls
- Different laws/analyses apply in different contexts
- Multiple state agencies audit employers to uncover misclassifications → each agency uses a different test
- IRS also has a test (but WA more strict)
- Can pass one test but fail a different one, which still creates liability

DEPARTMENT OF LABOR AND INDUSTRIES TEST

- Created by Washington's Industrial Insurance Act, enforced by the Department of Labor and Industries
- Independent contractor if meet all of these six criteria:
 1. The individual must be free from direction and control;
 2. The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible for the costs of the principal place of business from which the service is performed;

DEPARTMENT OF LABOR AND INDUSTRIES TEST (CONT.)

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, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes;
4. The individual is required under IRS rules to file a business tax return with the IRS;
5. The individual has an active account and unified business identifier number (UBI) with the Department of Revenue; and
6. The individual maintains their own separate books and records showing business income and expenses of the business.

QUIZ: "FREE FROM DIRECTION AND CONTROL"

- Employer doesn't provide worker any training or equipment

QUIZ: "FREE FROM DIRECTION AND CONTROL"

- Worker works with other company staff

QUIZ: "FREE FROM DIRECTION AND CONTROL"

- Employer sets hours or keeps timesheets for worker

QUIZ: "FREE FROM DIRECTION AND CONTROL"

- General contractor mandates a subcontractor to attend general contractor's trainings

QUIZ: "FREE FROM DIRECTION AND CONTROL"

- Independent computer programmer works at company site, alongside company's own programming staff, to meet deadline coordinated by the company's project manager

WA EMPLOYMENT SECURITY ACT TEST

- Enforced by Washington's Employment Security Department
- Two alternative tests

WA EMPLOYMENT SECURITY ACT TEST

(CON'T.)

The first test is:

1. Whether the individual is free from direction or control over performance of the service under the contract and in practice;
2. Such service is either outside the usual course of business for which such service is performed, or such service is performed outside of all the places of business of the enterprises for which such 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.

WA EMPLOYMENT SECURITY ACT TEST

(CON'T.)

The second test is:

1. Whether the individual is free from direction or control over performance of the service under the contract and in fact;
2. Such service is either outside the usual course of business for which such service is performed, or such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible under contract and fact for the costs of the principal place of business from which the service is performed;
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, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes;

WA EMPLOYMENT SECURITY ACT TEST

(CON'T.)

4. The individual is responsible for filing a schedule of expenses with the internal revenue service for the type of business the individual is conducting;
5. The individual has an account with the department of revenue and has registered for and received a UBI number; and
6. The individual maintains their own separate books and records showing business income and expenses of the business.

WASHINGTON COURT CONSIDERATIONS

- Interpreting Washington's Minimum Wage Act
- The test considers whether the alleged employee is, as a matter of economic reality, dependent on the business to which he or she renders the service.

WASHINGTON COURT CONSIDERATIONS

(CON'T.)

The factors are:

1. The permanence of the working relationship between the parties;
2. The degree of skill the work entails;
3. The extent of the worker's investment in equipment or materials;
4. The worker's opportunity for profit or loss;
5. The degree of the alleged employer's control over the worker; and
6. Whether the service the worker performs is an integral part of the employer's business.

EMPLOYER'S BIGGEST MISTAKES

- No contract
- Worker has no UBI number
- Having a non-compete
- Referring to the worker as an "employee"
- Contracting with someone who does not act like a business
- Meeting only some of the requirements, not all
- Failing to look at all applicable tests and examples

TO AVOID PROBLEMS, YOU MUST HAVE A CONTRACT

- Title it: "Independent Contractor Agreement"
- Agreement needs to state that independent contractors:
 - Are free from direction/control
 - Have their own UBI numbers, and state what it is
 - Keep their own books and records
 - Are responsible for and pay for their own taxes
 - Bear their own costs and expenses

TO AVOID PROBLEMS, YOU MUST HAVE A CONTRACT (CON'T.)

- Agreement needs to state that independent contractors: (con't.)
 - Perform tasks outside the company's typical operations
 - Provide their own tools and materials
 - Are limiting the job to a fixed project or term instead of ongoing
 - Are not entitled to any benefits
 - Will not be trained by the company
 - Are free to work for other companies
 - Are paid differently than employee payroll
- Follow the contract in practice!

Thank You!

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