

**COURIERS: INDEPENDENT CONTRACTORS OR EMPLOYEES**

**A STATE-BY-STATE SURVEY  
OF  
UNEMPLOYMENT COMPENSATION LAWS**

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**APPENDIX**

**STATE DEFINITIONS OF "EMPLOYMENT"  
LAWS, REGULATIONS, AND CASES**

**Rev. October 14, 2003**

**ALABAMA**

**LAW**

**Ala. Code §25-4-10**

**Employment.**

(a) Subject to other provisions of this chapter, "employment" means:

(1) Any service performed prior to January 1, 1978, which was employment as defined in this section prior to such date and, subject to the other provisions of this section, services performed for remuneration after December 31, 1977, including service in interstate commerce, by:

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b. Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;...

**ALASKA**

**LAW**

**Alaska Stat. § 23.20.525 "Employment" Defined**

**(a)** In this chapter, unless the context otherwise requires, "employment" means

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**(2)** service performed by an individual who under (10) of this subsection has the status of an employee;

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**(10)** service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

**(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 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)** 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;

## ARKANSAS

### LAW

## ARIZONA

### LAW

#### Ariz. Rev. Stat. §23-613.01. Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

B. Notwithstanding this section, an individual or class of individuals shall not be treated as an employee by the department for purposes of this chapter if, before the department's determination that the individual or class of individuals at issue is an employee:

1. The individual or class of individuals had been performing services for the employing unit.

2. The department had inspected work records of the employing unit for time periods that the individual or class of individuals had been performing these services.

3. The individual or class of individuals at issue was not included on the contribution and wage reports of the employing unit.

4. After its inspection the department concluded in writing provided to the employing unit that either:

(a) No change or changes in the inspected reports were necessary.

(b) The individual or class of individuals in question did not constitute an employee for purposes of this chapter.

5. At no time between the date of the written determination prescribed in paragraph 4 of this subsection, and the department's subsequent conclusion that the individual or class of individuals at issue constitutes an employee, did the department notify the employing unit in writing that the individual or class of individuals at issue now constitutes an employee for purposes of this chapter.

C. Subsection B of this section shall not apply if either:

1. There has been a substantial and material change in the facts upon which the writing required by subsection B, paragraph 4 of this section was based.

2. The conclusion reached by the department pursuant to subsection B, paragraph 4 of this section was the result of false statements, misrepresentation, fraud or intimidation on the part of the employing unit.

D. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.

E. Notwithstanding this section, an individual or class of individuals determined to be an employee or employees for purposes of the federal unemployment tax act, as amended (26 United States Code sections 3301 through 3311), are employees under this chapter.

F. Notwithstanding any other provision of this chapter, this section shall apply to an employing unit to which the provisions of section 23-750 apply only to the extent not inconsistent with the requirements of 26 United States Code sections 3304 (A)(6) and 3309.

## **REGULATIONS**

### **R6-3-1723. Employee defined**

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in [A.R.S. § 23-613.01](#), includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

C. The following services are exempt **employment** under this Chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection (A) of this Section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services by an individual for an employing unit which are not a part or process of the organization, trade or business of the employing unit, and the individual is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

a. Services by an individual not treated by the employing unit in a manner generally characteristic of the treatment of employees means the individual performing the services is not treated by the employing unit in substantially the same manner as employees of that employing unit.

b. The words "part" and "process" are not synonymous. If the individual performs services which are either a part of or process in the organization, trade or business, the conditions of this paragraph are not met and the services cannot be exempt under this paragraph. "Process" refers to those services which are directly responsible for carrying out the fundamental purpose or purposes for which the organization, trade or business exists; e.g., painting and repairing automobile bodies in an automobile body paint and repair shop. "Part" refers to any other services which are essential to the operation or maintenance of the organization, trade or business; e.g., routine cleaning of premises and maintenance of tools, equipment and building. In addition to services which are a part of or process in the organization, trade or business, there are those services which are for the purposes of the organization, trade or business but are merely ancillary or incidental and are not essential or necessary to the conduct of the organization, trade or business; e.g., landscaping area around the automobile body paint and repair shop.

2. Services by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.

a. The phrase "isolated or occasional" has its commonly understood meaning. The intent of the relationship between the employing unit and the individual performing the services is to be considered with the intent of the parties being that it is on a permanent basis or for a long period; e.g., an individual employed who either quits or is discharged after a brief period of **employment**, would not be considered an isolated or occasional transaction regardless of how brief the period of **employment** may be.

b. An individual who performs services on less than thirteen days in a calendar quarter will be presumed to be performing isolated or occasional transactions. An individual who performs services on thirteen days or more in a calendar quarter will be presumed not to be performing isolated or occasional transactions. In all cases in which there is a standing or continuing arrangement with an individual to perform required

services on either a regularly scheduled basis or on call as requested, it will be presumed the individual is not performing isolated or occasional transactions.

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an **employment** relationship.

1. The existence of control solely on the basis of the existence of the **right to control** may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to

customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the **right** has **control**. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The **right** of **control** is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default, and may not be indicative of the existence of the **right** to **control**. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an **employment** relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical

because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is

customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may

work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the particular situation. Some factors may not apply to particular occupations or situation, while there may be other factors not specifically identified herein that should be considered.

G. An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by federal law to be covered by state law.

### **COURT DECISIONS**

*Fullerton v. Ariz. Dept. of Economic Security*, 661 P.2d 210 (Ariz. App. 1983). Applying the common law test, the court concluded that certain process servers were independent contractors.

*See also:*

*Dial-A-Messenger, Inc. v. Ariz. Dept. of Economic Security*, 648 F.2d 1053 (Ariz. App. 1982) (parcel delivery drivers); *Smith v. Ariz. Dept. of Economic Security*, 623 P.2d 810 (Ariz App. 1980) (truckers).

**Ark. Stat. § 11-10-210 - Employment**

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(e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:

(1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her 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 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 service performed.



## CALIFORNIA

### LAW

#### **Unemployment Insurance Code**

§621. "Employee" means all of the following:

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(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

### REGULATIONS

#### **Cal. Admin. Code tit. 22**

#### **§ 4304-1. Employee Defined, Rules Generally Applicable to Determinations of Employment.**

Whether an individual is an employee for the purposes of Sections 621(b) and 13020 of the code will be determined by the usual common law rules applicable in determining an employer-employee relationship. Under those rules, to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists. Strong evidence of that right to control is the principal's right to discharge at will, without cause.

(a) If it cannot be determined whether the principal has the right to control the manner and means of accomplishing a desired result, the following factors will be taken into consideration:

- (1) Whether or not the one performing the services is engaged in a separately established occupation or business.
- (2) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
- (3) The skill required in performing the services and accomplishing the desired result.
- (4) Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (5) The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.

- (6) The method of payment, whether by the time, a piece rate, or by the job.
- (7) Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.
- (8) Whether or not the parties believe they are creating the relationship of employer and employee.
- (9) The extent of actual control exercised by the principal over the manner and means of performing the services.
- (10) Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

(b) The factors enumerated in (a) above are indicia of the **right to control**. Where there is independent evidence that the principal has the **right to control** the manner and means of performing the service in question it is not necessary to consider the above enumerated factors. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed.

For personal income tax withholding purposes only, whether an individual provides equipment in the performance of services for remuneration shall not be Considered in a determination of whether that individual is an employee.

(1) Instrumentalities and facilities. Whether the principal or worker provides the instrumentalities or facilities necessary to accomplish the work would have little relevance if those instrumentalities are not significant in nature. Examples are hand tools commonly provided by workers or an automobile for personal transportation. On the other hand, if they were of substantial value and supplied by the principal it would indicate that the principal had the **right to control** the manner and means of their use and that the worker would follow a principal's direction in the use of such valuable instrumentalities if the principal chose to give such directions. Similarly, if the facilities are of an intangible nature or unavailable except through the principal, such as a trade name, office facilities, advertising, merchandise, inventory, or communications, the worker would also be presumed to use such facilities in a way specified by the principal if the principal so chose to specify so that the worker can insure their continued use and availability.

(2) Effect of custom. Unskilled labor is usually supervised and persons performing services, which require little or no skill or experience are customarily regarded as employees. Even where skill is required, such as an artisan, and the services are an incident of the business of the principal, the principal would usually be considered to have the **right to control** the manner and means of performing the service incident to its business, and the worker would be considered an employee. On the other hand, if the

service of the artisan, such as a plumber, were engaged to repair the plumbing for an insurance company in the company's office facilities, the manner and means of performing services would not normally be controlled by persons in the insurance company's offices.

(3) The period of employment and method of payment. If the time in which the service is performed is short, the worker is less apt to subject himself to control as to details of performing the service. This is especially true if the payment is to be made by the job and not by the hour, commission, or piece rate. On the other hand, if the work is not skilled, and the principal supplies the instrumentalities necessary to perform the work, and it is an integral part of the principal's business activity, the worker would be an employee even though the time period was short and the payment was by the job. If the services are performed on a continuing basis it would be evidence of employment, especially if the services are a regular part of the principal's business. The time of performing the service and the method of payment may result in strong evidence of employment if the performance and payment occur during regular intervals at regular times and payment is in regular amounts.

(4) Control of the premises. If the services are performed upon the premises of the principal who is in business and the worker uses the facilities of the principal in performing the services in compliance with policies or regulations for the conduct of workers on the premises, the worker would be an employee. On the other hand, if the rules are made only for the general safety, or security of the premises, and do not relate to the manner and means of performing the actual service in question, adherence to such rules would not raise the inference that the worker is an employee and the relationship would depend on other factors. Similarly, if the worker has only agreed to accomplish a desired result, rules or policies for the handling of the result upon completion, such as distribution, storage, transportation, or display, will not raise the inference that the worker is an employee.

(5) Belief of the parties. The terminology used in an agreement between a principal and a worker is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement, an inference will arise that the agreement does not express the intention of the parties and an employer- employee relationship does in fact exist. If an agreement between a worker and a principal specifically denies an employment relationship, but contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the provision that an employment relationship does not exist does not express the intent of the parties that their relationship is one of independent contractors.

(6) Services performed as a part of the regular business of the principal. Since for the purposes of these regulations, **employment** is only significant where remuneration (wages) is paid for services performed, **employment** will generally occur where the principal is in business. In some situations, **employment** may occur where there is no business activity of the principal, but it is presumed that those occasions will be rare.

If the principal is in business and the services performed are a regular part of the business of the principal, it is evidence that the services are performed in **employment**. It is presumed that if the principal is in business, he has the **right** to **control** the manner and means by which services in that business are performed as an incident to the principal's right to protect his business interests. There must be a strong showing that the principal has abandoned that right to overcome the evidence of **employment** under those circumstances. For example, if the principal is in the business of selling insurance, and an individual performs services for remuneration selling insurance, it is evidence that those insurance sales services are in **employment**. On the other hand, if the principal is in the business of selling insurance and the services are performed by a plumber fixing the pipes in the insurance company's office facilities, it is not evidence that the services of the plumber are performed in the employ of the insurance sales company.

(7) Separately established occupation or business. If the person performing services for the principal is not in a separately **established** occupation or business it will be evidence that the services are performed in **employment**. If the individual performing the services does not have an independently established occupation or business, and the services are a regular part of the business of the principal, it will be presumed that the services are performed in **employment**. Evidence that an occupation or business is separately established is that the individual holds himself or herself out to the general public or a significant segment of the business community, in some readily identifiable way, as ready to perform services similar to those performed for the principal at or about the same time as they are being performed for the principal in the normal course of the independently established occupation or business. A readily identifiable way to hold oneself out as in an independently established occupation or business would include the name of the person or the person's business name in media advertising, commercial telephone listing, signs or displays on vehicles or premises, or brochure.

#### **§ 4304-11. Specific Application of Rules for Determination of **Employment** Status to Circumstances in the Process Server's Industry.**

(a) To determine whether services are performed as an employee or independent contractor, refer to the common law rules contained in Section 4304-1 of these regulations. Section 4304-1 provides that "to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result." Section 4304-1 lists factors that are evidence of the existence or absence of the **right** of **control** to be considered when making an **employment** determination. Section 4304-11 provides standards to be used when applying the common law rules specifically to process servers and is intended to

make clearer those circumstances under which a process server is an independent contractor or employee.

(b) Definitions:

For the purposes of this regulation, the following definitions will apply:

(1) A "process" is any means used by the court to acquire or exercise its jurisdiction over a person or over specific property.

(2) A "service" as used in the context of Service of Process is the exhibition or delivery of a legal document such as a writ, summons and complaint, criminal summons, notice, or order, by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he or she is concerned, and is thereby advised or warned of some action or step which he or she is commanded to take or to forbear.

(3) A "process server" is a person authorized by law to serve process papers on an individual or entity.

(4) A "principal" is any individual or entity for whom or for which the process server performs process serving services.

(c) Determination Factors:

To determine whether one performs services for another as an employee, the most important factor is whether or not the principal has the **right** to **control** the manner and means of accomplishing a desired result. Each of the following factors shall be used to determine if an **employment** relationship exists. Not all factors listed in this section (4304-11) are necessary to make a determination that a particular relationship exists. A determination of whether services are being performed as an employee or independent contractor will depend upon a grouping of the factors that are significant in relationship to the services being performed. (See following factors.)

**TABLE OF DETERMINATION FACTORS-PROCESS SERVERS**

<b>FACTORS</b>	<b>EVIDENCE OF EMPLOYEE</b>	<b>INDEPENDENT CONTRACTOR</b>	<b>WEIGHT</b>
<b>(1) Policies, Rules or Procedures of Conduct.</b>	Set by the principal as evidenced by written or verbal instructions necessary as to the details (manner and means) or methods to serve a process. For example, the principal provides a manual for the process server to establish procedures or rules for dealing with various situations when performing a service, such as better ways of performing service.	The process server performs his or her services independent of any policies, rules or procedures of conduct (other than compliance with state and federal statutes or rules of court) when service process.	The setting of policies, rules, procedures and instructions by the principal is an indication of direction and control over the process server's services and carries great weight. Conveying instructions and/or requirements received from the client would not, by itself, be an indication of employment.
<b>(2) Supervision on the Job.</b>	The process server is subject to supervision from the principal. The principal reviews the work performance as to how the process server conducts himself or herself on the job. For example, the principal requires the process server to report on the progress of his or her work on a daily basis. The process server is instructed by the principal on how to handle problems encountered while service a process.	Details (manner and means) of the work are not subject to supervision by the principal. The process server is on his or her own to perform the service using any method they choose consistent with the direction of the client and in compliance with state and/or federal statutes. The process server may be required to provide a report of activities to the court, to substantiate a diligent attempt to serve process. The principal may review completed assignments to verify	To the extent that the principal exercises control over the work through supervision, it is evidence that the principal has the right to control the work, and that this <b>right to control</b> the work is complete and authoritative. This right to control (whether or not exercised) carries the greatest weight in making an employer-employee determination.

		that the client's instructions, court rules and statutes were followed.	
<b>(3) Reporting into the Office and/or Contacting the Principal.</b>	The principal requires the process server to report into the office in person or by phone on a routine basis. The process server reports into the office for new assignments or to get directions or instructions. He or she must notify the principal if he or she is sick, unable to work, or if problems arise while serving process.	The process server is not required to report into the office. The process server performs services when he or she chooses. The process servers are on their own performing the services and the principal does not direct or instruct them in any way. Failure to report to work or contact the principal does not result in any adverse action taken against the process server although there can be instances where failure to go into the office results in loss of assignments.	Requirements placed on process servers by the principal are indications of direction and control and carry great weight. Requiring a process server to report into the office in person or by phone on a routine basis restricts the process server from making independent business decisions regarding his or her business operations.
<b>(4) Reports</b>	The principal requires the process server to submit reports regarding the service of process. (For example, reports regarding the process server's daily activities.) Failure of the process server to submit reports would result in adverse action taken by the principal, such as the withholding of commissions or termination.		
<b>(5) Training.</b>	Training is provided to inexperienced	Training is not provided. Attendance	The act of holding informational

	<p>process servers by the principal. The principal instructs the worker on details of the job, company policies or rules. The principal places the process server with an experienced process server for on-the-job training.</p>	<p>at training is not required. Process server is not paid for time at training.</p>	<p>meetings to communicate the requirements of statutory and court rules, by itself, does not indicate <b>employment</b> or independence. However, if by intent or fact the purpose of the meeting is to convey policies, rules, procedures or instructions, it implies that the process servers are not in control of their services and not independent. This should carry great weight.</p>
<p><b>(6) Meetings.</b></p>	<p>The principal conducts meetings and the process server's attendance is required or expected. The principal pays the process server for his or her time spent at meetings.</p>	<p>The principal does not hold mandatory meetings. Attendance at meetings is not required and nonattendance is viewed without negative consequence.</p>	<p>The act of holding informational meetings to communicate the requirements of statutory and court rules, by itself, does not indicate <b>employment</b> or independence. However, if by intent or fact the purpose of the meeting is to convey policies, rules, procedures or instructions, it implies that the process servers are not in control of their services and not independent. This should carry great weight.</p>
<p><b>(7) Principal and Process Server</b></p>	<p>Agreement between the principal and the</p>	<p>The agreement forbids the principal from</p>	<p>Terminology used in a written agreement is</p>

<p><b>Contract.</b></p>	<p>process server gives the principal the right to direct and control the manner and means of accomplishing the work. Agreement contemplates that the process server will perform the services personally.</p>	<p>directing the process servers as to the details (manner and means) of accomplishing the work. The process server holds the principal; harmless by indemnifying the principal for losses. Agreement contemplates the process server is an independent contractor. An agreement in which the principal expresses only an interest in the end result and abandons the <b>right to control</b> the details (manner and means) of the work is evidence of independence.</p>	<p>not conclusive of the relationship, but is evidence of the relationship intended. Written agreements do not necessarily depict the action practices of the parties in a relationship. The actual practices of the parties in a relationship are more important than the working of an agreement in making an employer-employee relationship determination.</p>
<p><b>(8) Termination.</b></p>	<p>Both the principal and the process server have the right to terminate the relationship at will, without prior notice or without cause, and without any further contractual liability (except for work already performed).</p>	<p>By agreement or practice, the principal is required to pay for work not performed if the principal unilaterally terminates the relationship, other than for cause. The contract makes the process server liable for damages if he or she fails to complete the terms of the contract for reasons other than good cause.</p>	<p>The right to terminate conveys an inherent power of the principal over the process server. The right to terminate at will, without cause, is strong evidence of <b>employment</b>. The right to sever the working relationship without notice for breaches of statutory of regulatory requirements for the protection of the public or for a material breach by the process server is not evidence of <b>employment</b>.</p>

<p><b>(9) Engagement in a Distinct Business.</b></p>	<p>The process server does not operate his or her own business. Work performed is a direct and essential part of the principal's business. The process server does not advertise his or her services to the general public as a separate business. The process server performs services under the principal's business name. This includes signing the proof of service with the principal's name on it. The principal handles the billings and collections. The principal provides insurance coverage. The process server is prohibited from providing services for others while performing services for the principal. The principal is responsible for arranging for a substitute if the process server is unable to perform the services. The process server does not have an entrepreneurial risk of loss.</p>	<p>The process server operates an independent business separate from that of the principal. The process server advertises under his or her own trade name, has a certificate of registration, surety bond, and business license where required. The process server provides his or her own insurance. If necessary, the process server arranges for his or her own substitute if he or she is unable to complete the services. Billings between the principal and the worker are independent, separate and apart from any other contractual obligations of the principal or the process server. Payment of services by the process server is contingent upon his or her fulfilling the requirements of the contract. The process server is not prohibited by the principal from providing services for others when performing services for the principal and is free to make business decisions which influence future profit and loss. The process</p>	<p>In spite of the fact that both the process server and the principal work in the general area of process serving, if the process server has established a separate, business, distinct from that of the principal, great weight would be given toward independence. If the process server does not have an established separate business in the field of process serving, distinct from that of the principal, great weight would be given towards an <b>employment</b> relationship since the work is an integral part of the regular business of the principal.</p>
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		<p>serve assumes an entrepreneurial risk of loss. (For example, a process server is paid to serve a process. He or she is paid the same amount regardless of the number of attempts needed to complete the service. Therefore, there may be instances where the costs exceed the payment for serving the process, thereby resulting in a loss.)</p>	
<p><b>(10) Required Level of Skill of the Process Server.</b></p>	<p>Little or no experience is required. No particular education is needed.</p>	<p>The process server is required to serve process under the most difficult situations and, as a result, he or she must possess a greater amount of skill and expertise.</p>	<p>Level of skill, by itself, generally does not weight heavily toward independence. However, a high level of skill will weigh more heavily when combined with other factors such as separate and distinct business. A low level of skill weighs in favor of <b>employment</b>, since as skill level declines, the worker has less room to exercise the discretion necessary for independent.</p>
<p><b>(11) Duration of Services.</b></p>	<p>The process server performs services on a continuous basis.</p>	<p>The process server provides services on a sporadic, per job basis.</p>	<p>Generally, independent contractors perform work on a job basis for shorter, designated periods of time. <b>Employment is</b> usually of open-ended duration. A long series of short term</p>

			<p>assignments from a single principal will tend to show continuity and <b>employment</b> but will not, by itself, be conclusive when each assignment was separate for purposes of billings and performance expectations. However, where a process server performs services for multiple principals on a continuous basis, that is evidence of independence.</p>
<p><b>(12) Whether the Principal or the Process Server Supplies the Instrumentalities, Tools, and Place of Work.</b></p>	<p>The principal provides the process server with the supplies and equipment to perform the services, such as business cards, a beeper, telephone, or an automobile. The process server is expected to spend time in the principal's office.</p>	<p>The process server pays for his or her own car, office, equipment, support services, forms, supplies and business cards.</p>	<p>If the process server has established his or her own office, and pays all the expenses connected with that separate office, there is a strong indication of independent. On the other hand, if the process server generally works out of the principal's office where all necessities are provided and paid for by the principal, then there is a strong indication of an <b>employment</b> relationship. If the principal provides a place for the process server to wait until an assignment is received, that would be considered a neutral factor. The neutrality of this</p>

			factor is contingent on the principal providing the waiting area for the convenience of the process server only. There can be no requirement by the principal that the process server use the waiting area at any time.
<b>(13) Custom in Industry and Location.</b>	Principals treat their process servers as employees.	Process servers typically operate their own separately established businesses.	Industry custom merely gives an inference or director to the determination. The fact that the principal may utilize the services of both employee and independent contractor process servers is not an indication of <b>employment</b> .
<b>(14) Method of Payment.</b>	Payment by the hour or piece rate. Compensation set by the principal. Benefits are furnished at no cost to the process server. The principal reimburses the process server for his or her business	The fees are negotiated including hourly fees for specific assignments, such as stake-outs. The process server pays for his or her own expenses. The principal furnishes no benefits to the process	This factor is only an indication of the type of relationship. A process server may be paid solely by the job, but the controls are sufficient to create an employer-employee relationship. A process server could

	expenses.	server. The principal may reimburse or advance fees, such as filing fees and witness fees provided for by statute, on behalf of the client.	also be paid at regular intervals but because the controls are not sufficient, no employer-employee relationship would exist. The advancing of witness or filing fees (statutory or other payments) by the principal, on behalf of the client or the process serve would not be indicative of <b>employment</b> .
<b>(15) Belief of Parties.</b>	Both parties believe the relationship is one of <b>employment</b> .	Both parties agree that the relationship is one of independence.	The belief of the parties only implies the intent of the relationship.

**Administrative decision**

*In the Matter of Anthony \_\_\_\_\_ (\_\_\_\_\_Messenger), Case Nos. AO-39853 and AO-42848 (Unempl. Ins. App. Bd., Sept. 6, 2001):* Independent contractor couriers were adequately distinguished from employees by furnishing their own vehicles and insurance, ability to choose work hours and to work for others, ability to substitute, and requirement of 30 days' notice before termination.

## COLORADO

### LAW

#### Colo. Rev. Stat. §8-70-115. Employment - "Federal Unemployment Tax Act".

(1) (a) "Employment", subject to other provisions of this subsection (1), includes any service performed prior to January 1, 1972, which was employment as defined in this subsection (1) prior to such date and service performed after December 31, 1971, by an employee as defined in section 3306 (i) of the "Federal Unemployment Tax Act" and any service performed after December 31, 1977, by an employee, as defined in subsection (o) of section 3306 of the "Federal Unemployment Tax Act", including service in interstate commerce.

(b) Notwithstanding any other provision of this subsection (1) and notwithstanding the provisions of section 8-80-101, service performed by an individual for another 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 division that such individual is free from control and direction in the performance of the service, both under his contract for the 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. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service, if exercised pursuant to the requirements of any state or federal statute or regulation, shall not be considered.

(c) To evidence that such individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may either show by a preponderance of the evidence that the conditions set forth in paragraph (b) of this subsection (1) have been satisfied, or they may demonstrate in a written document, signed by both parties, that the person for whom services are performed does not:

(I) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document;

(II) Establish a quality standard for the individual; except that such person can 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;

(III) Pay a salary or hourly rate but rather a fixed or contract rate;

(IV) Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(V) Provide more than minimal training for the individual;

(VI) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(VII) Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;

(VIII) Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and

(IX) Combine his business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.

(d) A document may satisfy the requirements of paragraph (c) of this subsection (1) if such document demonstrates, by a preponderance of the evidence, the existence of such factors listed in subparagraphs (I) to (IX) of paragraph (c) of this subsection (1) as are appropriate to the parties' situation.

(2) Where the parties use a written document pursuant to paragraph (c) of subsection (1) of this section, such document may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties, where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by the independent contractor or some other entity, and that the independent contractor is obligated to pay federal and state income tax on any moneys paid pursuant to the contract relationship.

**CONNECTICUT**

**LAW**

**Conn. Gen. Stat., Chapter 567, §31-222**

**Sec. 31-222. Definitions.** As used in this chapter, unless the context clearly indicates otherwise:

(a) (1) "Employment", subject to the other provisions of this subsection, means:

\*\*\*\*\*

(B) Any service . . . subject to the other provisions of this subsection, service performed after December 31, 1977, including service in interstate commerce, by any of the following: (i) Any officer of a corporation; (ii) any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, 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 control and direction in connection with the performance of such service, both under his contract for the performance of service 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 of all 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; . . .

## DELAWARE

### LAW

#### **19 Del. Code §3302(10)**

(10) "Employment" means:

(A) Any service performed prior to January 1, 1978, which was employment as defined in this subdivision prior to such date and, subject to the other provisions of this subdivision, service performed after December 31, 1977, including service in interstate commerce, by

(ii) Any individual who, under paragraph (K) of this subdivision, has the status of an employee; . . .

(K) Notwithstanding any other provisions of this chapter and irrespective of whether the common-law relationship of employer and employee exists, services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department that:

- (i) Such 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 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 of all 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.

**DISTRICT OF COLUMBIA**

**LAW**

**D.C. Code § 51-101. Definitions**

As used in this subchapter, unless the context indicates otherwise:

\* \* \* \* \*

(2) (A) "Employment" means:

(i) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1971, including service in interstate commerce, by:

\* \* \* \* \*

(II) Any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee;...

**FLORIDA**

**LAW**

**Fla. Stat. § 443.1216 - Employment**

Employment, as defined in s 443.036, is subject to this chapter under the following conditions:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

\* \* \* \* \*

(a)(2) An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.

\* \* \* \* \*

(w) Service performed by an individual for remuneration for a private, for-profit delivery or messenger service, if the individual:

1. Is free to accept or reject jobs from the delivery or messenger service and the delivery or messenger service does not have control over when the individual works;
2. Is remunerated for each delivery, or the remuneration is based on factors that relate to the work performed, including receipt of a percentage of any rate schedule;
3. Pays all expenses, and the opportunity for profit or loss rests solely with the individual;
4. Is responsible for operating costs, including fuel, repairs, supplies, and motor vehicle insurance;
5. Determines the method of performing the service, including selection of routes and order of deliveries;
6. Is responsible for the completion of a specific job and is liable for any failure to complete that job;
7. Enters into a contract with the delivery or messenger service which specifies that the individual is an independent contractor and not an employee of the delivery or messenger service; and
8. Provides the vehicle used to perform the service.

## **GEORGIA**

### **LAW**

#### **Ga. Code § 34-8-35**

(a) As used in this chapter, the term 'employment' means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

....

(f) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:

(1) 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;

(2) Such service is 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

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

## HAWAII

### LAW

#### Hawaii Rev. Statutes

**§383-2 Definition of employment.** (a) As used in this chapter, unless the context clearly requires otherwise, "employment", subject to sections 383-3 to 383-9, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

**§383-6 Master and servant relationship, not required when.** Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that:

- (1) The individual has been and will continue to be 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.

**IDAHO**

**LAW**

**Idaho Code**

**§72-1316. COVERED EMPLOYMENT.** (1) "Covered employment" means an individual's entire service performed by him for wages or under any contract of hire, written or oral, express or implied.

\* \* \* \* \*

(4) Services performed by an individual for remuneration shall, for the purposes of the employment security law, be covered employment unless it is shown;

(a) That the worker has been and will continue to be free from control or direction in the performance of his work, both under his contract of service and in fact; and

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

## ILLINOIS

### LAW

#### Illinois Compiled Statutes

##### **820 ILCS 405/206**

**Sec. 206.** Subject to the provisions of Sections 207 to 233, inclusive, and of subsection B of Section 245, "employment" means any service performed prior to July 1, 1940, which was employment as defined in this Act prior to that date, and any service after June 30, 1940, performed by an individual for an employing unit, including service in interstate commerce and service on land which is owned, held or possessed by the United States, and including all services performed by an officer of a business corporation, without regard to whether such services are executive, managerial, or manual in nature, and without regard to whether such officer is or is not a stockholder or a member of the board of directors of the corporation.

##### **820 ILCS 405/212**

**Sec. 212.** Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it is proven in any proceeding where such issue is involved 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 engaged in an independently established trade, occupation, profession, or business.

##### **820 ILCS 405/212.1**

###### **Sec. 212.1. Truck Owner-Operator.**

(a) The term "employment" shall not include services performed by an individual as an operator of a truck, truck-tractor, or tractor, provided the person or entity to which the individual is contracted for service shows that the individual:

(1) Is either:

(i) Registered or licensed as a motor carrier of real or personal property by the Illinois Commerce Commission, the Interstate Commerce Commission, or any successor agencies, or

(ii) Operating the equipment under an owner-operator lease contract with the person or entity, when the person or entity is registered, licensed, or both, as a motor carrier of real or personal property licensed by the Illinois Commerce Commission, the Interstate Commerce Commission, or any successor agencies; and

(2) Has the right to terminate the lease contract and thereafter has the right to perform the same or similar services, on whatever basis and whenever he or she chooses, for persons or entities other than the person or entity to which the individual is contracted for services;

(3) Is not required by the person or entity to which the individual is contracted for services to perform services, or be available to perform services, at specific times or according to a schedule or for a number of hours specified by the person or entity, provided that pickup or delivery times specified by a shipper or receiver shall not be deemed specified by the person or entity;

(4) Either leases the equipment or holds title to the equipment, provided that the individual or entity from which the equipment is leased, or which holds any security or other interest in the equipment, is not:

(i) The person or entity to which the individual is contracted for service, or

(ii) Owned, controlled, or operated by or in common with, to any extent, whether directly or indirectly, the person or entity to which the individual is contracted for services or a family member of a shareholder, owner, or partner of the person or entity;

(5) Pays all costs of licensing and operating the equipment (except when federal or State law or regulation requires the carrier to pay), and the costs are not separately reimbursed by any other individual or entity; and

(6) Maintains a separate business identity, offering or advertising his or her services to the public, by displaying its name and address on the equipment or otherwise.

(b) Subsection (a) shall not apply:

(1) If, as a condition for retaining the individual's services, the person or entity to which the individual is contracted specifies the person or entity from which the equipment is to be leased or purchased; or

(2) To any services that are required to be covered as a condition of approval of this Act by the United States Secretary of Labor under Section 3304(a)(6)(A) of the Federal Unemployment Tax Act.

(c) Nothing in this Section shall be construed or used to effect the existence or non-existence of an employment relationship other than for purposes of this Act.

(d) For purposes of this Section:

(1) "Family member" means any parent, sibling, child, sibling of a parent, or any of the foregoing relations by marriage.

(2) "Ownership", "control", or "operation" may be through any one or more natural persons or proxies, powers of attorney, nominees, proprietorships, partnerships, associations, corporations, trusts, joint stock companies, or other entities or devices, or any combination thereof.

(3) "Person or entity" means a sole proprietorship, partnership, association, corporation, or any other legal entity.

## **REGULATIONS**

### **56 Ill. Adm. Code § 2732.205**

#### **§ 2732.205 Owner-Operators Of Motorized Vehicles**

a) Section 212.1 of the Act [820 ILCS 405/212.1] applies only to services performed on or after August 8, 1995.

b) The burden of proving that services are exempt, under Section 212.1, from the Act's definition of "employment" rests with the person or entity to which the individual is contracted to perform the services.

c) Section 212.1 applies only to services an individual performs as an operator of a truck, truck-tractor or tractor.

Example: Smith performs services for Company A, which is licensed by the Illinois Commerce Commission as a motor carrier of personal property. These services consist entirely of loading and unloading trucks at Company A's loading dock. Section 212.1 does not exempt Smith's services for Company A from the Act's definition of "employment."

d) For purposes of applying Section 212.1:

1) "Truck" has the meaning ascribed to it in Section 1-211 of the Illinois Vehicle Code [625 ILCS 5/1-211]. [Under this rule, a "truck" is "every motor vehicle designed, used, or maintained primarily for the transportation of property."]

2) "Truck-tractor" has the meaning ascribed to it in Section 1-212 of the Illinois Vehicle Code [625 ILCS 5/1-212].

3) "Tractor" has the meaning ascribed to "road tractor" in Section 1-178 of the Illinois Vehicle Code [625 ILCS 5/1-178].

4) "Family member" means any parent, sibling, child, sibling of a parent, or any of the foregoing relations by marriage.

5) A person or entity owns, controls or operates another entity when:

A) by virtue of its ownership interest in that other entity, it has the power to direct the management of the other entity; or

B) by virtue of its ownership interest in that other entity combined with the ownership interest of one or more others, it actually directs, by itself or in conjunction with others, the management of the other entity; or

C) it has responsibility for overseeing the day-to-day operations of that other entity.

6) Ownership, control or operation may be through any one or more natural persons or proxies, powers of attorney, nominees, proprietorships, partnerships, associations, corporations, trusts, joint stock companies or other entities or devices or any combination thereof.

7) "Person or entity" means a sole proprietorship, partnership, association, corporation or any other legal entity.

8) A requirement imposed by a governmental regulatory or licensing agency with respect to services an individual performs as an operator of a truck, trucktractor or tractor is not a requirement imposed on the individual by any person or entity to which the individual is contracted to perform the services.

e) Section 212.1(a)(1) of the Act. Section 212.1(a)(1) is not satisfied unless:

1) The services are performed by an individual who is registered or licensed as a motor carrier of real or personal property by the Illinois Commerce Commission, the Interstate Commerce Commission, the United States Department of Transportation or any successor agencies; or

2) Both:

A) The individual performing the services is doing so under an owner-operator lease contract; and

B) The person or entity with which the individual is contracted to perform the services is registered or licensed as a motor carrier of real or personal property by the Illinois Commerce Commission, the Interstate Commerce Commission, the United States Department of Transportation or any successor agencies.

Example: Jones, who owns her own pickup truck, works for ABC Hardware Store. As part of the regular course of Jones' work for ABC, she uses her pickup truck to make deliveries to customers. Neither Jones nor ABC is licensed or registered as a motor carrier of property. Section 212.1 does not exempt the delivery services Jones performs for ABC from the Act's definition of "employment."

f) Section 212.1(a)(2) of the Act Section 212.1(a)(2) is not satisfied unless both paragraphs (1) and (2) of this subsection (f) are satisfied.

1) The individual performing the services must be able, with reasonable notice if required by the contract, to terminate the lease contract with the person or entity to which the individual is contracted to perform the services, prior to the termination date specified in the contract, without incurring any legal or equitable liability to such person or entity other than liability for damage to the property being carried or damage or injury caused as a result of the operation of the truck, truck-tractor or tractor.

A) Example: The lease contract between Smith and Motor Carrier A extends from January 1, 1997, through June 30, 1997, and provides that Smith's terminating the contract prior to June 30, 1997, under any circumstances, will result in Smith's being liable for liquidated damages determined according to a formula specified in the contract. Section 212.1 does not exempt the services Smith performs pursuant to the contract from the Act's definition of "employment" because Smith does not have the right to terminate the contract as contemplated by Section 212.1(a)(2) of the Act.

B) Example: The lease contract between Jones and Motor Carrier C extends from January 1, 1997, through June 30, 1997, but provides that Jones may terminate the lease contract prior to June 30, 1997, without incurring any liability to C other than liability for damage to the property being carried or damage or injury caused as a result of the operation of Jones' truck, on the condition that Jones provides C with reasonable notice of termination. If Jones terminates the contract without providing C with reasonable notice, Jones will be liable for liquidated damages determined in accordance with a formula specified in the contract. Under these facts, absent any other evidence that indicates C has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Jones performs for C are exempt from the Act's definition of "employment".

2) Following the termination of the lease contract, the individual must be able to perform the same or similar services for others, on whatever basis and whenever he or she chooses, without incurring any legal or equitable liability to the person or entity to which the individual was contracted to perform the services under the terminated lease contract.

Example: The lease between Davis and Motor Carrier B provides that, upon termination of the contract, Davis shall not, for a period of six months, perform services as an operator of a truck, truck-tractor or tractor for any other motor carrier located within a 90-mile radius of B's main office. The provision is enforceable by injunction. Section 212.1 does not exempt the services Davis performs pursuant to the contract from the Act's definition of "employment."

g) Section 212.1(a)(3) of the Act. Section 212.1(a)(3) is not satisfied unless the person or entity to which the individual is contracted to perform the services imposes no requirements on the individual to perform the services, or be available to perform the services, at a specific time or times, according to a specific schedule or for a specified number of hours. The person or entity is not considered as having imposed such a requirement where the person or entity informs the individual performing the services of a pickup or delivery time specified by the shipper or receiver of the property to be transported.

1) Example: Adams telephones Motor Carrier A at 8:00 A.M. each day Adams is available to provide truck driving services to see whether A has any work for Adams. After being informed that there is work, Adams must make himself available to perform the work by 9:00 A.M. If Adams fails to make himself available by 9:00 A.M., Motor Carrier A will enter a demerit on his personnel records. If Adams accumulates five demerits during a year, Motor Carrier A will terminate its relationship with Adams. Section 212.1 does not exempt the services Adams performs for Motor Carrier A from the Act's definition of "employment."

2) Example: Motor Carrier B telephones Smith in each of five consecutive weeks to offer Smith work providing truck driving services for B. Each time, Smith indicates he is not interested. B does not contact Smith after that. By itself, B's decision not to attempt to do further business with Smith, an individual who has consistently refused B's offers of work, is not evidence that B has imposed any requirements on Smith to perform services, or be available to perform services, at a specific time or times, according to a specific schedule or for a specified number of hours.

3) Example: ABC Produce Company has contracted with XYZ Trucking Company to deliver produce to various wholesalers every Tuesday, Thursday and Saturday; ABC has instructed XYZ the produce must be delivered to each wholesaler no later than 4 A.M. Jones is to perform the services for XYZ as the operator of a truck, transporting produce from ABC. XYZ informs Jones of the 4 A.M. deadline imposed by ABC. It is understood that Jones' failure to meet the deadline may jeopardize his ability to drive for XYZ again. The deadline was specified by the shipper. The fact that a carrier may be reluctant to transact future business with a driver who has failed to meet the shipper's deadline does not, by itself, indicate the carrier has failed to satisfy Section 212.1. Under these facts, absent any other evidence that indicates XYZ has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Jones performs for XYZ are exempt from the Act's definition of "employment".

4) Example: White operates a truck for the ABC Produce Company. ABC instructs White that produce picked up from ABC's terminal must be delivered to XYZ Wholesaler by 4 A.M. on the delivery date. It is understood that White's failure to meet the deadline may jeopardize his ability to drive for ABC again. The fact that ABC may be reluctant to transact future business with a driver who has failed to meet the delivery time ABC, as the shipper, has specified does not by itself indicate ABC has failed to satisfy Section 212.1. Under these facts, absent any other evidence that indicates ABC has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services White performs for ABC are exempt from the Act's definition of "employment".

5) Example: Under a contract between Reynolds and ABC Construction Company, Reynolds is to deliver asphalt to a specified ABC construction site at 8 A.M. on the designated day. Timely delivery of asphalt will require Reynolds to pick up the asphalt from the location specified by ABC no later than 7 A.M. It is understood that Reynolds' failure to pick up and deliver the asphalt on time may jeopardize his ability to drive for ABC again. The fact that ABC may be reluctant to transact future business with a driver who has failed to meet the pickup and delivery times ABC, as the receiver, has specified does not, by itself, indicate ABC has failed to satisfy Section 212.1. Under these facts, absent any other evidence that indicates ABC has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Reynolds performs for ABC are exempt from the Act's definition of "employment".

h) Section 212.1(a)(4) of the Act. Section 212.1 (a)(4) is not satisfied unless:

1) the individual performing the services leases or holds title to the truck, truck-tractor or tractor; and Example: Smith operates a truck for ABC Trucking Company. ABC holds title to the truck. Section 212.1 does not exempt the services Smith performs for ABC from the Act's definition of "employment."

2) the individual or entity from which the truck, truck-tractor or tractor is leased or which holds a security or other interest in the truck, truck-tractor or tractor is not:

A) the person or entity to which the individual operating the truck, truck-tractor or tractor is contracted to perform the services; or

B) owned, controlled or operated by or in common with, to any extent, directly or indirectly, the person or entity to which the individual operating the truck, truck-tractor or tractor is contracted to perform the services or a family member of a shareholder, owner or partner of the person or entity with which the individual is contracted to perform the services.

i) Example: Adams operates a truck for XYZ Trucking Company, a corporation in which Jones is the majority shareholder. While Adams holds title to the truck, ABC Trucking Company, of which Jones is the sole proprietor, holds a lien on Adams' truck. Section 212.1 does not exempt the services Adams performs for XYZ from the Act's definition of "employment," since ABC is owned or controlled in common with XYZ.

ii) Example: Madison operates a truck for XYZ Trucking, a corporation in which Jefferson is a five-percent shareholder. Madison holds title to the truck, but ABC Finance Company, which is managed by the brother of Jefferson's father-in-law, holds a lien on the truck. Section 212.1 does not exempt the services Madison performs for XYZ from the Act's definition of "employment," since the individual who operates ABC is a family member of a shareholder of XYZ.

iii) Example: ABC Trucking Company, a corporation, is being audited by the Department of Employment Security to determine, among other items, whether services that Jones provided for ABC were "employment" for purposes of the Act. ABC demonstrates that Jones held title to the truck he operated in service to ABC while he was performing the services for ABC. ABC also provides a written statement, signed by an owner or officer of ABC and attesting that the owner or officer has made reasonable inquiries into the matter and, to the best of the owner's or officer's knowledge, while Jones was performing the services for ABC, ABC did not have any interest in Jones' truck; no individual or entity that might have held an interest in Jones' truck was owned, controlled or operated by or in common with, to any extent, directly or indirectly, ABC, and no individual or entity that might have held an interest in Jones' truck was owned, controlled or operated by or in common with, to any extent, directly or indirectly, a family member of a shareholder of ABC. The auditor is not aware of any evidence that contradicts the written statement. These facts indicate that paragraph (4) of Section 212.1 is satisfied with respect to the services Jones performed for ABC.

i) Section 212.1(a)(5) of the Act.

1) Section 212.1(a)(5) is not satisfied unless the individual operating the truck, truck-tractor or tractor pays all costs of licensing and operating the truck, truck-tractor or tractor. Section 212.1(a)(5) is not satisfied if the costs of licensing or operating the truck, truck-tractor or tractor are separately reimbursed by an individual or entity other than the individual operating the truck, truck-tractor or tractor. Costs not directly associated with the operation or licensing of the truck, including but not limited to telephone charges, expenses related to the loading or unloading of cargo and workers' compensation premiums with respect to the operator of a truck, truck-tractor or tractor do not constitute costs of licensing or operating the truck, trucktractor or tractor.

A) Example: Smith operates a truck for ABC Trucking Company. At the end of each week in which Smith has performed services for ABC, the company furnishes Smith a check, accompanied by a statement itemizing the licensing and operational expenses for which Smith is being reimbursed, including wear and tear on Smith's truck. Section 212.1 does not exempt the services Smith performs for ABC from the Act's definition of "employment."

B) Example: Adams operates a truck for XYZ Trucking Company, which furnishes Adams with a company debit card Adams may use to purchase fuel. XYZ covers all approved charges against the debit card and does not charge them back to Adams. Section

212.1 does not exempt the services Adams performs for XYZ from the Act's definition of "employment."

C) Example: Jones operates a truck for XYZ Trucking Company. At the end of each week in which Jones has performed services for XYZ, the company furnishes Jones with a check. Jones deposits a portion of the payment received from XYZ in a checking account she maintains to cover the costs of operating the truck. Under these facts, absent any other evidence that indicates that XYZ has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Jones performs for XYZ are exempt from the Act's definition of "employment".

D) Example: Reynolds operates a truck for ABC Trucking Company. At the end of each week in which Reynolds has performed services for ABC, the company furnishes Reynolds with a check, based on a flat per mile fee. There is no indication that any portion of the fee is intended as a separate reimbursement to cover any costs directly associated with operating or licensing Reynolds' truck. Under these facts, absent any other evidence that indicates that ABC has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Reynolds performs for ABC are exempt from the Act's definition of "employment".

E) Example: Smith operates a truck for ABC Construction Company. At the end of each week in which Smith has performed services for ABC, the company furnishes Smith with a check, based on an hourly fee for his services. There is no indication that any portion of the check is intended as a separate reimbursement to cover any costs directly associated with operating or licensing Smith's truck. Under these facts, absent any evidence that indicates ABC has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Smith performs for ABC are exempt from the Act's definition of "employment".

F) Example: ABC Trucking Company pays for a customized paint job for the truck of any driver who drives over 1,000,000 miles for it without an accident, as long as the driver owns the truck. While technically, the cost of painting a truck may be considered an operating cost, the principal purpose of the payments in this case is not to reimburse the driver for operating costs but to reward his or her safe driving record. Under these facts, absent any other evidence that indicates that ABC has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services the driver performs for ABC are exempt from the Act's definition of "employment".

2) Paragraph (1) of this subsection does not apply where federal or State law or regulation requires that the costs of licensing or operating the truck, trucktractor or tractor be paid by the person or entity to which the individual operating the truck, trucktractor or tractor is contracted to perform the services.

j) Section 212.1(a)(6) of the Act.

1)Section 212.1(a)(6) is not satisfied unless:

A) the individual performing the services offers or advertises his or her services to the public; and

B) the individual performing the services maintains his or her own business identity.

2) Compliance with subsection (j)(1) can be demonstrated by the individual displaying his or her name on the truck, truck-tractor or tractor, or otherwise. Example: Smith has his name and address painted on the doors of his truck. While operating his truck in the performance of services for XYZ Trucking, Smith also has affixed to his truck an identification device indicating he is hauling for XYZ. There is nothing on the truck to indicate Smith does not offer his services to the public. Under these facts, absent any other evidence that indicates XYZ has failed to satisfy the elements of subsections (e) through (k) of this Section, the services Smith performs for XYZ are exempt from the Act's definition of "employment".

k) Section 212.1(a) of the Act is not satisfied if, as a condition for retaining an individual's services as an operator of a truck, truck-tractor or tractor, the person or entity to which the individual is contracted specifies the person or entity from which the individual is to purchase the truck, truck-tractor or tractor.

1) Example: Smith operates a truck for ABC Trucking Company. The truck was purchased from XYZ Company, from which ABC requires anyone who wishes to drive for ABC to purchase his or her truck. Section 212.1 does not exempt the services Smith performs for ABC from the Act's definition of "employment."

2) Example: Jones operates a truck for XYZ Trucking Company. Jones purchased the truck from Smith. Previously, Adams, the owner of XYZ, had advised Jones that Smith was interested in selling the truck. Adams had also indicated that, based on what he knew about the truck, he would have bought it if he had been in the market for a truck. However, at no time did Adams indicate that Jones' ability to perform services for XYZ was dependent upon Jones' purchasing a truck from Smith. Under these facts, absent any other evidence that indicates that XYZ has failed to satisfy the requirements of subsections (e) through (k) of this Section, the services Jones performs for XYZ are exempt from the Act's definition of "employment".

## **COURT DECISIONS**

*AFM Messenger Service, Inc. v. Dept. of Emp. Security*, 763 N.E.2d 272 (Ill. 2002). Applying “ABC” standard, court concluded that delivery drivers were employees because they did not engage in business independent of AFM.

*See also: Rozran v. Durkin*, 45 N.E. 2d 180 (Ill. 1942).  
*Zelney v. Murphy*, 56 N.E. 2d 754 (Ill. 1944).

*Contra: United Delivery Service, Ltd. v. Dickson*, 659 N.E.2d 82 (Ill. App. 1982) (overruled by *AFM* decision).

*And:* *Bauer v. Industrial Comm’n*, 282 N.E.2d 448 (Ill. 1972) (under common law rule, pizza delivery driver was independent contractor for worker’s compensation purposes).

## **INDIANA**

### **LAW**

#### **Indiana Code § 22-4-8-1**

Sec. 1. "Employment," subject to the other provisions of this Section, means service, including service in interstate commerce performed for remuneration or under any contract of hire, written or oral, expressed or implied.

(a) Services performed by an individual for remuneration shall be deemed to be employment subject to this article irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the board that (A) such 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 of service and in fact; (B) such service is performed outside the usual course of the business 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; or is a sales agent who receives remuneration solely upon a commission basis and who is the master of his own time and effort.

### **COURT DECISION**

*Twin States Pub. Col., Inc. v. Ind. Unempl. Ins. Bd.*, 678 N.E. 2d 110 (Ind. App. 1987). Workers who delivered shopping guides on routes were not employees of the publisher; they were engaged in an independent business because they provide their own transportation, choose their own hours of work, can select replacements, can hire and pay helpers, and may also work for other publishers.

## IOWA

## LAW

### Iowa Code – Title IV

#### **CHAPTER 96 EMPLOYMENT SECURITY--UNEMPLOYMENT COMPENSATION**

##### **§ 96.18 Definitions.**

##### **18. "Employment".**

a. Except as otherwise provided in this subsection "employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied. Employment also means any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, by:

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(2) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee, . . .

## REGULATIONS

### **Admin. Code § 871-23.19(96)**

871-23.19(96) Employer-employee and independent contractor relationship.

23.19(1) 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. 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. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. In general, if an 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, that individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business or profession, in which they offer services to the public, are independent contractors and not employees. Professional employees who perform services for another individual or legal entity are covered employees.

23.19(2) The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.

23.19(3) Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.

23.19(4) Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer-employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.

23.19(5) The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.

23.19(6) Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the department that the individual is in fact an independent contractor. Whether the relationship of employer and employee exists under the usual common law rules will be determined upon an examination of the particular facts of each case.

23.19(7) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

23.19(8) All classes or grades of employees are included within the relationship of employer and employee. For example, superintendents, managers and other supervisory personnel are employees.

## KANSAS

### LAW

#### Kansas Statutes

##### **§ 44-703 - Definitions**

(i) "Employment" means:

- (1) Subject to the other provisions of this subsection, service, including service in interstate commerce, performed by

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(B) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

- (3) The term "employment" shall also include:

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(D) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that: (i) 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 hire 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.

#### ADMINISTRATIVE PUBLICATIONS

##### **What is the difference between an employee and an independent contractor?**

An employer-employee relationship exists when a person who hires an individual to perform services has the **right** to exercise control over the manner and means by which the individual performs his or her services. The right of control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control. Among others, the following factors are also considered.

- ?? Whether the one performing the services makes the services available to the general public.
- ?? Whether the principal or the person providing the services supplies the tools, equipment, and place of work for the person doing the work.

- ?? The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
- ?? The method of payment, whether by time, a piece rate, or by the job.
- ?? Whether or not the work is part of the regular business of the principal.
- ?? The extent of actual control exercised by the principal over the manner and means of performing the services.
- ?? Whether the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

A written contract which claims to create the relationship of principal and independent contractor is not controlling if the practice of the parties shows that the principal retains the right of control under the common law test.

The strong indication of employment is when the work being done is an integral part of the regular business of the employer and the work is performed at the place of business.

If you are unsure as to whether your workers are employees or independent contractors, [see our handbook <http://www2.hr.state.ks.us/ui/html/EnSec03.htm>](http://www2.hr.state.ks.us/ui/html/EnSec03.htm) or [email us <mailto:uitax@hr.state.ks.us>](mailto:uitax@hr.state.ks.us).

<http://www2.hr.state.ks.us/ui/html/faqs.htm#whatis>

- ?? Independent contractors are excluded from coverage under the Kansas Employment Security Law. These are persons who are actually in business for themselves and hold themselves available to the general public to perform services.

While the law does not define an independent contractor, court decisions have held that the common law tests of master and servant must be applied in making determinations of whether services rendered by an individual are in the capacity of an employee or independent contractor.

The Kansas Employment Security Law provides two specific tests to be applied to the worker's service to determine if the service constitutes that of an independent contractual nature (K.S.A. 44-703).

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 hire and in fact.

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.

These tests are of a conjunctive nature and **BOTH MUST BE MET** for a worker to be considered as an individual contractor, rather than an employee.

The degree of control necessary to establish an employer/employee relationship must be assessed with regard to the custom and usage surrounding the performance of the particular service involved. A thorough examination of the employer/employee relationship should be made before classifying a person as an independent contractor.

<http://www2.hr.state.ks.us/ui/html/EnSec03.htm#exclude>

## KENTUCKY

### LAW

#### **KRS Chapter 341.00**

##### **341.050 Covered employment**

- (1) As used in this chapter, unless the context clearly requires otherwise and subject to the provisions of KRS 341.055, "covered employment" means service, including service in interstate commerce, performed by:
  - (a) An individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

### COURT DECISION

*Ky. Unemp. Ins. Comm'r v. Landmark Community Newsp. of Ky., Inc.*, 91 S.W. 3d 575 (Ky. 2002). Using common law standard, court concluded that sufficient evidence supported administrative finding that newspaper delivery persons were employees.

### ADMINISTRATIVE PUBLICATION

#### **WHAT IF I USE INDEPENDENT CONTRACTORS (CONTRACT LABOR) AND ISSUE 1099S FOR SERVICE INSTEAD OF HIRING EMPLOYEES?**

Independent contractors are self-employed and, as such, do not have to report to Unemployment Insurance. **However, many covered employees are misclassified as independent contractors.** The division determines whether an individual worker is an employee or an independent contractor based on "common law" rules. For example, we may classify a worker as an independent contractor if the following rules apply:

Is in business for himself and offers services to the public. Ordinarily, advertises services in some fashion. The services provided are not in the normal line of business for the client for whom the services are provided. (If the business contracting for these services requires the services on a regular basis in order to operate, the worker is not usually considered an independent contractor.) They possess a special skill or ability, and may require special tools which they provide and performs services without additional training and supervision. The services are usually provided for a limited time (a single job) and are paid for by the job rather than by the hour, etc. These are general examples; a formal determination of a worker's status can only be made by reviewing his particular relationship to the business for which he performs service. By law, a worker cannot contract away his rights to unemployment benefits. Therefore, a worker may be determined to be an employee even if he has willingly entered into a contract to work as an independent contractor. The division makes determinations of covered employment subject to Kentucky unemployment insurance law. These determinations may be different from those made by the Internal Revenue Service, the Kentucky Revenue Cabinet, or other tax authorities on the same worker. Determinations by these other agencies are not binding on the division. Furthermore, IRS "SAFE HARBOR" exemptions DO NOT apply to

determinations made by the division.

## **LOUISIANA**

### **LAW**

#### **Louisiana Revised Statutes**

#### **Title 23 – Labor and Worker’s Compensation**

#### **Chapter 11 – Unemployment Compensation**

#### **Section 1472 - Definitions**

(12)A. "Employment" means, subject to the other provisions of this subsection, any services including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

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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;

### **ADMINISTRATIVE PUBLICATION**

Employer Handbook: [www.ldol.state.la.us/forms/er/employerhandbook.pdf](http://www.ldol.state.la.us/forms/er/employerhandbook.pdf), pages 36-38.

## MAINE

### LAW

#### Maine Revised Statutes

#### Title 26: Labor and Industry

#### Chapter 13: Unemployment Compensation

#### Section 1043 - Definitions

**11. Employment.** "Employment," except as otherwise provided in paragraph F, subparagraph (2), means any service performed prior to July 26, 1940 which was employment as defined in this subsection prior to such date, and subject to the other provisions of this subsection service performed after July 26, 1940, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied.

#### **11. Employment.**

A. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

E. Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the bureau that:

(1) 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;

(2) 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

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

## **MARYLAND**

### **LAW**

#### **Maryland Labor Code**

##### **§ 8-101 - Labor and Employment**

- (l) "Covered employment" means work that an individual performs for an employing unit that is the basis for benefits.

##### **§ 8-206(d):**

(c) Messenger service drivers.- Work that a messenger service driver performs for a person who is engaged in the messenger service business is not covered employment if the Secretary is satisfied that:

- (1) the driver and the person who is engaged in the messenger service business have entered into a written agreement that is currently in effect;
- (2) the driver personally provides the vehicle;
- (3) compensation is by commission only;
- (4) the driver may set personal work hours; and
- (5) the written agreement states expressly and prominently that the driver knows:
  - (i) of the responsibility to pay estimated Social Security taxes and State and federal income taxes;
  - (ii) that the Social Security tax the driver must pay is higher than the Social Security tax the driver would pay otherwise; and
  - (iii) that the work is not covered employment.

## **REGULATIONS**

### **Code of Maryland Regulations, Sec. 09.32.01.18**

#### **.18 Presumption of Employee.**

A. Employee. A person performing services is presumed to be an employee, regardless of whether a common law master and servant relationship exists, unless specifically Exempted under the Unemployment Insurance Law or these regulations.

B. Independent Contractor.

(1) To overcome the employee presumption, an employing unit shall establish that the person performing services is an independent contractor.

(2) The Secretary shall determine that an employing unit has established that the person performing services is an independent contractor when the conditions in §B(3)(a)------(c) of this regulation are clearly shown.

(3) Circumstances evidencing the conditions mentioned in §B(2) of this regulation include, but are not limited to, the items listed after each condition:

(a) The person has been and will continue to be free from the employing unit's control or direction:

(i) The employing unit does not require the person to comply with detailed instructions about when, where, and how the person is to work,

(ii) The employing unit does not train the person to perform the service in a particular manner or using a particular method determined by the employing unit,

(iii) The employing unit does not establish set hours of work for the person performing the services,

(iv) The employing unit does not establish a schedule or routine for the person performing the service,

(v) The employing unit may not discharge the person for failure to obey the employing unit's specific instructions on how the service is to be performed;

(b) The service is outside the usual course of business of the employing unit:

(i) The person performs the work off the employing unit's premises,

(ii) The person performs work that is not integrated into the employing unit's operation,

(iii) The service performed is unrelated to the employing unit's business;

(c) The person performing the service is customarily engaged in an independently established business:

(i) Maintains a business listing in the telephone directory,

(ii) Has his or her own place of business,

(iii) Has a financial investment in a related business and can incur a loss in the performance of the service,

(iv) Has his or her own equipment needed to perform the service,

(v) Determines the price of the service to be performed,

(vi) Employs others to perform the service,

- (vii) Carries his or her own liability or workers' compensation insurance, or both,
- (viii) Performs the service for more than one unrelated employer at the same time,
- (ix) Sets his or her own hours,
- (x) Is paid by the job.

**Code of Maryland Regulations, Sec. 09.32.01.18-1**

**.18-1 Specific Exemptions from Covered Employment.**

A. Messenger Service Drivers. Work that a messenger service driver performs for a person who is engaged in the messenger service business is not covered employment if the Secretary is satisfied that certain statutory conditions are met.

B. Definitions. "Messenger service business" means a business primarily engaged in the hand delivery of individually addressed mail, messages, or documents, either in paper or magnetic media format, to the public or to industrial or commercial establishments, generally involving outside travel on foot, by bicycle, or by motor vehicle.

## MASSACHUSETTS

### LAW

#### Massachusetts General Laws

##### Chapter 151A – Employment and Training

Section 2. Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter 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.

### COURT DECISIONS

*Althol Daily News v. Bd. of Review, et al.*, 786 N.E. 2d 365 (Mass. 2003); Using ABC test adult newspaper deliveryman was not an employee of the paper. Workers could (and some did) deliver for other publishers. The court distinguished *Boston Bicycle Couriers*.

*Boston Bicycle Couriers, Inc. v. Div. of Empl. And Training*, 778 N.E. 2d 964 (Mass. App. 2002). Bicycle courier is an employee because he did not engage in an independent business. He had no business apart from the courier company.

**MICHIGAN**

**LAW**

**Michigan Compiled Laws**

**§ 421.42 “Employment” defined.**

(1) “Employment” means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied. . . .

\* \* \* \* \*

(5) Services performed by an individual for remuneration shall not be deemed to be employment subject to this act, unless the individual is under the employer's control or direction as to the performance of the services both under a contract for hire and in fact. Service performed by an individual for remuneration under an exclusive contract which provides for the individual's control and direction by a person, firm, or corporation possessing a public service permit or by a certificated motor carrier transporting goods or property for hire shall be deemed employment subject to this act. Service performed by an individual who by lease, contract, or arrangement places at the disposal of a person, firm, or corporation a piece of motor vehicle equipment and under a contract of hire, which provides for the individual's control and direction, is engaged by the person, firm, or corporation to operate the motor vehicle equipment shall be deemed to be employment subject to this act.

**COURT DECISION**

*Acme Messenger Service Co. v. Mich. Unempl. Comp. Comm’n*, 11 N.W. 2d 296 (Mich. 1943). Truck drivers and messengers were employees (under the ABC test), even though they provided their own vehicles. Most worked full-time and regularly waited on the premises for jobs, and had no independently established business.

**MINNESOTA**

**LAW**

**Minnesota Statutes**

**Section 268-035 - Definitions**

\* \* \* \* \*

Subd. 13. Employee. "Employee" means every individual, who is performing, or has performed services for an employer in employment.

\* \* \* \* \*

Subd. 15. Employment. "Employment" means service performed by:

(1) an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor;

**REGULATIONS**

**Minnesota Rules, part 3315.0555**

**3315.0555 DETERMINING WORKER STATUS.**

Subpart 1. Essential factors. When determining whether an individual is an employee or an independent contractor, five essential factors must be considered and weighed within a particular set of circumstances. Of the five essential factors to be considered, the two most important are those:

A. that indicate the right or the lack of the **right** to **control** the means and manner of performance; and

B. to discharge the worker without incurring liability. Other essential factors to be considered and weighed within the overall relationship are the mode of payment; furnishing of materials and tools; and control over the premises where the services are performed.

Other factors, including some not specifically identified in this part, may be considered if a determination is inconclusive when applying the essential factors, and the degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Subp. 2. Additional factors considered. Additional factors to be considered are those listed in items A to H.

A. Availability to public. That an individual makes services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer services to the public in a number of ways including having an office and assistants, displaying a sign in front of the home or office, holding a business license, having a listing in a business directory or a business listing in a telephone directory, or advertising in a newspaper, trade journal, or magazine.

B. Compensation on job basis. A person working in **employment** is usually paid by the hour, week, or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour or periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings indicates the existence of **employment**.

C. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of the individual's services is generally independent, while the individual who is working in **employment** is not in that position.

D. Obligation. An individual working in **employment** usually has the right to end the relationship with an employer at any time the individual wishes without incurring liability, although the individual may be required to provide notice of termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. An independent worker is responsible for its satisfactory completion and is liable for failure to complete the job.

E. Substantial investment. A substantial investment by a person in facilities used by the person in performing services for another tends to show an independent status. The furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, and similar items that are provided by individuals working in **employment** as a common practice in their particular trade. A substantial expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship. Substantial investment means a monetary investment representing something of considerable worth, in relation to the overall requirements of the person's chosen profession, trade, occupation, or vocation.

F. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because the worker is usually free from control by any of the firms. It is possible that a person may work for a number of people

or firms and still be an employee of one or all of them.

G. Responsibility. An employing unit is usually responsible for the negligence, personal behavior, and work actions of a person working in **employment** in contacts with customers and the general public during times that the person is performing services for the employing unit. An independent worker is usually accountable for his or her own actions.

H. Services in the course of the employing unit's organization, trade, or business. Services that are in the course of the employing unit's organization, trade, or business consist of services which are a part or process of the employing unit's organization, trade, or business and ancillary or incidental services. Services which are a part or process of the employing unit's trade or business are generally performed by individuals in **employment**. Therefore, it is a consideration in determining the status of an individual. This consideration, as with all other considerations, is not a sole determinative factor. "Part" and "process" are not synonymous. Process refers to those services which directly carry out the fundamental purposes for which the organization, trade, or business exists, for example, painting and repairing automobile bodies in an automobile body paint and repair shop. Part refers to any other services which are essential to the operation or maintenance of the organization, trade, or business, for example, routine cleaning of premises and maintenance of tools, equipment, and buildings. Ancillary or incidental services include landscaping the areas around an automobile body paint and repair shop. Other services that meet the part, process, or ancillary classification are those services in connection with purchasing, receiving, storing, pricing, displaying, selling, and delivery of merchandise and housekeeping services required for the safety and comfort of customers and the general public or to maintain the premises in a manner as to promote business.

Subp. 3. Determination of control. Items A to M describe criteria for determining if the employing unit has control over the method of performing or executing services. The total circumstances must be considered to determine if control is present.

A. Authority over assistants. Control over the individual is indicated when the employing unit hires and pays the individual's assistants and supervises the details of the assistant's work.

B. Compliance with instructions. Control is indicated when an individual is required to comply with detailed instructions about when, where, and how to work including the order or sequence in which the service is to be performed. Mere suggestions as to detail or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, the control factor is present if the employing unit has the right to instruct or direct the methods for doing the work and the results achieved. Instructions may be oral

or may be in the form of manuals or written procedures which show how the desired result is to be accomplished. However, instructions required by state or federal law or regulation or general instructions passed on by the employing unit from a client or customer, generally does not evince control.

C. Oral or written reports. Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employing unit. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job, or the reports are needed to determine compliance with the terms of a contract. Completion of receipts, invoices, and other forms customarily used in the particular type of business activity or required by law does not constitute written reports.

D. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work could be done elsewhere. When work is done off the premises it does indicate some freedom from control; however, in some occupations, the services are necessarily performed away from the premises of the employing unit and are still considered to be in **employment**.

E. Personal performance. Control is indicated if the services must be personally rendered to the employing unit. Personal performance of a very specialized work, when the worker is hired on the basis of professional reputation, as in the case of a consultant known in the academic and professional circles to be an authority in the field, is a less reliable indicator of control. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

F. Existence of a continuing relationship. The existence of a continuing relationship between an individual and the person for whom an individual performs services is a factor tending to indicate the existence of an employer-employee relationship. Continuing services may include work performed at frequently recurring, though somewhat irregular intervals, either on call of the employing unit or whenever work is available.

G. Right to discharge. The right to discharge is a very important factor indicating that the **right to control** exists particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. An independent worker generally cannot be terminated without the firm being liable for damages if he or she is producing according to his or her contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the **right to control**. That a right to discharge is restricted because of a contract with a labor union or with other entities does not mean there is no control.

H. Set hours of work. The establishment of set hours of work by the employing unit indicates control. Where fixed hours are not practical because of the nature of the

occupation, a requirement that the worker work at certain times is an element of control.

I. Training. Training of an individual by an experienced employee working with the individual, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.

J. Amount of time. If the worker must devote full time to the activity, control is indicated. Full time does not necessarily mean an eight-hour day or a five- or six-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels the person to devote all working time to that business, or the person may not be permitted to work for anyone else.

K. Tools and materials. The furnishing of tools, materials, and supplies by the employing unit is indicative of control over the worker. When the worker furnishes these items it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

L. Expense reimbursement. Payment by the employing unit of either the worker's approved business or traveling expenses, or both, is a factor indicating control over the worker. A lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

M. Satisfying requirements of regulatory and licensing agencies. If an employing unit is required to enforce standards or restrictions imposed by regulatory or licensing agencies, such action does not evince control.

Subp. 4. Procedures for determining control. The department shall determine if control exists by:

- A. reviewing written contracts between the individual and the employing unit;
- B. interviewing the individual or employing unit;
- C. obtaining statements of third parties;
- D. examining regulatory statutes governing the organization, trade, or business;
- E. examining the books and records of the employing unit; and

F. making any other investigation necessary to determine if the elements of control specified in subpart 3 exist.

Subp. 5. Obtaining a determination or opinion. If an employing unit is unsure of the status of an individual performing services for it, the employing unit may obtain a written determination by submitting all relevant facts to the commissioner on questionnaires prescribed for these determinations. The determination shall be final unless a written protest is filed with the commissioner as set forth in [Minnesota Statutes, section 268.12](#), subdivision 13. If any person contemplates hiring or engaging a worker to perform services and is unsure if the services would be deemed **employment**, a written opinion may be obtained by submitting information about the proposed work arrangement, as the hiring person perceives it will be, on questionnaires prescribed by the commissioner. The commissioner's opinion does not have the effect of a determination and is not subject to appeal. The person requesting the opinion shall clearly indicate that the situation is hypothetical and that an opinion, rather than a determination, is being sought. If an individual is hired or engaged to perform the services in question, a determination may be obtained. This part in no way limits the department's authority under [Minnesota Statutes, section 268.12](#), subdivision 13, clause (1) to make determinations on its own motion.

## MISSISSIPPI

### LAW

#### Miss. Code § 71-5-11

##### **I. "Employment" means and includes:**

(1) Any service performed, which was employment as defined in this section and, subject to the other provisions of this subsection, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

\*\*\*\*\*

(13) Service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or which as a condition for full tax credit against the tax Imposed by the Federal Unemployment Tax Act, 26 USCS Section 3301 et seq., is required to be covered under this chapter, notwithstanding any other provisions of this subsection.

(14) 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 commission that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

## REGULATIONS

### Code Miss. R. 38 000 006

#### 38 000 006. Unemployment Insurance Regulations

....

##### TR-11. Independent contractors

The Law provides that the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant. Generally, the relationship 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. That is, 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. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to

discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the service. In general, if an 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 an independent contractor, not an employee. If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor. The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists. Generally, physicians, lawyers, dentists, veterinarians, contractors, sub- contractors, public stenographers, auctioneers, and others who follow an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees. Whether or not persons performing services, directly or indirectly, for an employing unit are employees depends upon the particular facts in each case. No single test is conclusive and every employing unit claiming the existence of a relationship other than that of employer-employee shall make application to the Commission for determination of its status and shall furnish to the Commission a full and complete statement of all facts concerning its relationship with the person claimed to be an independent contractor, together with a copy of any contract existing between them. All persons performing services for any employing unit shall be deemed employees unless and until this rule shall have been complied with and their status shall have been otherwise determined by the Commission. After a decision has been made by the Commission relative to the employer-employee relationship, the employer will be notified in writing the mail. The employer has, within ten days from the mailing date of this decision, the right to protest the decision and request a hearing before the Commission, as provided in Section 71-5-355 (2)(b)(ix).

TR-12. Service in usual trade or business Any employing unit which contracts with or has under it any contractor or sub- contractor for any **employment** which it claims is not part of its usual trade, occupation, profession or business shall submit to the Commission a complete, detailed written statement of facts in support of such claim. No such claim shall be recognized until and unless) the Commission is satisfied of its validity and correctness.

TR-13. Contractors and sub-contractors must be reported.

Whenever and as an employing unit contracts with or has under it any contractor or sub-contractor for any **employment** which is part of its usual trade, occupation, profession or business, such employing unit may be required to furnish in writing to the Commission:

- (a) the name and address of each such contractor or sub-contractor,
- (b) the date of commencement of the work under such contract,

(c) the place or places at which the work is to be performed,

(d) whether such contractor or sub-contractor is registered as an employer under the **Employment** Security Law and,

(e) if registered, his registration number.

...

#### TR-16. Employed individuals

An individual is in the **employment** or employ of another within the meaning of the Law if he performs service, including service in interstate commerce, for such other, for wages or under any contract of hire, written or oral, expressed or implied. The relationship between the individual who performs such service and the person for whom such service is rendered must, however, as to such service, be the legal relationship of employer and employee. The Law makes no distinction between classes or grades of employees. Thus superintendents, managers, and other superior employees are employees within the meaning of the Law. The words "employ", "employer", and "employee", as used herein, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, trust, or estate, association, joint-stock company, insurance company, or corporation, whether domestic or foreign, syndicate group, pool, joint adventure, or other unincorporated organization, group or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator. Whether the relationship of employer and employee exists, will in doubtful cases be determined upon examination of the particular facts of each case.

## MISSOURI

### LAW

#### Missouri Revised Statutes

##### **Chapter 228 – Employment Security**

##### **§ 288.034 - Employment defined**

1. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, and notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal unemployment tax law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this law.

\*\*\*\*\*

5. Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

#### COURT DECISIONS

*Koontz Aviation, Inc. v. Labor & Ind. Rel. Comm'n*, 650 S.W. 2d 331 (Mo. App. 1983). Drivers engaged to deliver delayed baggage to passengers were not engaged in an independent trade or business.

*Rx Delivery Service, Inc. v. Labor & Ind. Rel. Comm'n*, 677 S.W.2d 936 (Mo. App. 1984) (drivers engaged to deliver packages for drug stores were employees).

*Stover Delivery Syst. Inc. v. Div. of Empl. Sec.* 11 S.W.3d 685 (Mo. App. 1999). Applying common law test, court concluded that couriers were employees. Drivers treated as independent contractors were required to sign non-compete agreements and follow a company manual, were disciplined or terminated for being late in reporting for work, were required to complete and obtain approval for detailed trip sheets, were referred to in company documents as "employees," wore company uniforms, and had no written agreement.

*Kirksville Pub. Co., v. Div. of Empl. Sec.*, 950 S.W. 2d 891 (Mo. App. 1997). Newspaper couriers who delivered papers by motor vehicle were independent contractors.

## MONTANA

### LAW

#### Montana Code

**§ 39-51-203. Employment defined.** (1) "Employment", subject to other provisions of this section, means service by an individual, by a manager or member of a manager-managed limited liability company that has filed with the secretary of state, or by an officer of a corporation, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

\*\*\*\*\*

(4) Service performed by an individual for wages is considered to be employment subject to this chapter until it is shown to the satisfaction of the department that the individual is an independent contractor.

### REGULATIONS

#### Mont. Admin. R. 24.35.302

##### **24.35.302. DEFINITION OF INDEPENDENT CONTRACTOR--EVIDENCE OF CONTROL**

(1) An individual is an employee and not an independent contractor if the hiring agent controls or retains the **right to control** the way the individual renders services. The following factors must be considered to determine whether control exists:

- (a) The individual is required to follow written or oral instructions concerning when, where, or how work is to be done. Although some individuals, because of skill or expertise, work without receiving instructions, they may still be employees if the employer has the right to give instructions on work performance;
- (b) The success or continuation of a business depends in great part upon the services performed by the individual;
- (c) The hiring agent directs the hiring, supervising, or payment of the individual's assistants;
- (d) The relationship between the individual and the hiring agent is on a frequent, recurring basis, even if irregular or part time;

- (e) The individual is required to perform services at certain established times;
  - (f) The work is performed on the business premises of the hiring agent. This factor is especially important if the work could be performed elsewhere;
  - (g) The hiring agent requires, or has the right to require, the individual to perform services in a certain manner, or in a certain order or sequence;
  - (h) The hiring agent requires the individual to submit oral or written reports;
  - (i) The individual is paid based on the time spent doing the work rather than a flat fee;
  - (j) The individual is paid or reimbursed for travel or other business-related expenses;
  - (k) The hiring agent furnishes the facilities, tools, materials or other equipment to the individual;
  - (l) The individual may be discharged at the will of the hiring agent, including the right to discharge for the failure to follow specified rules or methods. A union contract or statute which restricts the right of discharge does not indicate a lack of control;
  - (m) Training is provided to the individual by the hiring agent;
  - (n) The individual does not realize a profit or suffer a loss as a result of the services performed; or
  - (o) The individual is prohibited or restricted from working for others or is required to devote primary attention to the hiring agent.
- (2) The above factors are weighed and evaluated depending on the circumstance of each case. A combination of these factors may indicate control or the right to control. Service performed by an individual for pay is considered to be employment until it is shown to the satisfaction of the department that the individual is an independent contractor.

## NEBRASKA

### Nebraska Revised Statutes

#### **Section 48 – Labor**

#### **Section 48-604 - Employment, defined**

As used in the Employment Security Law, unless the context otherwise requires, employment shall mean:

(1) Any service performed after June 30, 1941, including service in interstate commerce, for wages under a contract of hire, written or oral, express or implied;

\*\*\*\*\*

(5) Services 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. The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written;

\*\*\*\*\*

(q) Service performed for a motor carrier, as defined in 49 U.S.C. 13102, as such section existed on September 1, 2001, or section 75-302, as amended, by a lessor leasing one or more motor vehicles driven by the lessor or one or more drivers provided by the lessor under a lease, with the motor carrier as lessee, executed pursuant to 49 C.F.R. part 376, as such part existed on September 1, 2001, Title 291, Chapter 3, as amended, of the rules and regulations of the Public Service Commission, or the rules and regulations of the Division of Motor Carrier Services. This shall not preclude the determination of an employment relationship between the lessor and any personnel provided by the lessor in the conduct of the service performed for the lessee. The existence of such a lease either prior to, on the date of, or after August 26, 1983, shall preclude a determination of liability as defined by the Employment Security Law after September 1, 1982;

## **COURT DECISION**

*Northern Messenger, Inc. v. Sorensen*, 359 N.W. 2d 787 (Neb. 1984) (Court decided jurisdictional issue; in the underlying case, the Commissioner of Labor determined that a courier-driver was an employee).

**NEVADA**

**LAW**

**Nevada Revised Statutes**

**Title 53 – Labor and Industrial Relations  
Chapter 612 – Unemployment Compensation**

**NRS § 612.065 “Employment” defined.**

Subject to the provisions of NRS 612.070 to 612.145, inclusive, “employment” means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

## NEW HAMPSHIRE

### LAW

#### New Hampshire Revised Statutes

##### **Title 23 - Labor**

##### **Chapter 282A – Unemployment Compensation**

##### **§ 282-A:9 Employment**

I. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied, together with service performed within the state which constitutes "employment" under the provisions of the Federal Unemployment Tax Act.

\*\*\*\*\*

III. 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.

### REGULATIONS

#### N.H. Code Admin. R. Emp. § 503.04

##### **Emp 503.04 Self-Employment.**

(a) For purposes of [RSA 282-A:32](#), III [re disqualification for benefits due to leaving self-employment or closing a business], an individual shall be considered to have been previously self-employed or to have had a business if, as to an entity or activity 3 or more of the following are true:

(1) The individual was a sole proprietor, partner, officer or director, both in name and in fact;

- (2) The individual had an investment or was a stockholder;
- (3) The individual formed the entity or became involved in the activity in order to create profits, which for purposes of this clause shall include wages, capital gains, dividends, salaries, commissions, bonuses, board, rent, housing, payment in kind, insurance, disability plans, retirement and similar advantages, and benefits;
- (4) The individual controlled or had the right to control;
- (5) The individual had a spouse, parent, child, brother, sister or step family member of the same relationship who was either an officer, manager, director, investor, stockholder or partner, who controlled or who had the express or implied right to control, and said family member either acceded to the decisions of the individual or delegated rights or authority to the individual; or
- (6) The individual performed services not required to be done by an officer or director.

**NEW JERSEY**

**LAW**

**New Jersey Statutes**

**Title 43 – Pensions and Retirement and Unemployment Compensation**

**Section 43:21-19 – Definitions**

(i) (1) "Employment" means:

(A) Any service performed prior to January 1, 1972, which was employment as defined in the "unemployment compensation law" (R.S. 43:21-1 et seq.) prior to such date, and, subject to the other provisions of this subsection, service performed on or after January 1, 1972, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

\* \* \* \* \*

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, 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.

**NEW MEXICO**

**LAW**

**New Mexico Statutes**

**§ 51-1-42 - Definitions**

\* \* \* \* \*

F. "Employment":

(1) means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

\*\*\*\*\*

(5) means services performed by an individual for an employer for wages or other remuneration unless and until it is established by a preponderance of evidence that:

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

(b) the service is either outside the usual course of business for which the 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) 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;

## **NEW YORK**

### **LAW**

#### **New York Labor Law**

##### **Chapter 31 - Labor**

##### **Article 18 – Unemployment Insurance Law**

##### **Title 2 - Definitions**

##### **§ 511. Employment.**

1. General definition. "Employment" means (a) any service under any contract of employment for hire, express or implied, written, or oral...

### **ADMINISTRATIVE PUBLICATION**

#### **Independent Contractors**

Understanding the distinction between independent contractors and employees could be vital for you and your business. You may genuinely believe that you have engaged individuals to perform services for you as *independent contractors*, only to discover that they are considered *employees* under the law and that you are liable for additional unemployment taxes and interest. To define your relationship with the individuals you engaged, you must assess the degree of direction and control you have over their services.

### **THE EMPLOYEE RELATIONSHIP**

The courts have ruled that no single factor or group of factors conclusively define an employer-employee relationship, and that you are an employer *if you control what will be done and how it will be done.*

Indicators of control over an individual's activities may include:

- requiring full-time services
- requiring attendance at meetings and/or training sessions
- requiring oral or written reports
- requiring prior permission for absences
- stipulating the hours of work
- setting the rate of pay
- reserving the right to terminate the individual's services
- employee working is integral to the conduct of your business's operation

If you engage in any of these practices, you are exercising the rights of an employer and consequently may be considered liable under the U.I. law.

The courts have also ruled that an employment relationship may exist if you provide the individual with the *means of performing services* for you. Examples may include providing facilities, equipment, tools, and/or supplies. Also, control over important aspects of services performed other than results and means can create an employment relationship. For example, an employment relationship can be created when a temporary employment referral agency has direction and control of client contact, the individual's wages, and billing and collection from clients.

The *manner of compensation* for the individual's services is also a factor. Employment relationships may provide compensation in the form of a salary, an hourly rate of pay or drawing account against future commissions with no requirement for repayment of unearned commissions. Other forms of compensation indicative of employment making reimbursement or allowance for business or travel expenses, and fringe benefits.

The *nature of the services* performed is also used to determine an employer-employee relationship. Unskilled or casual labor is usually regarded as employment because it typically is subject to supervision. However, even professionals, such as doctors and lawyers, can be considered employees under certain circumstances. Even when you give the individuals considerable freedom of action, you are their employer as long as you have the legal right to control the method or results of the services.

### **THE INDEPENDENT CONTRACTOR RELATIONSHIP**

An independent contractor relationship is often indicated when the individual you engage to perform services is in an established business offering those services to the public.

Indicators of independent contractor status may include:

- advertising in electronic and/or print media

- listing in the commercial pages of telephone directories

- using business cards, business stationery, and billheads

- carrying independent insurance

- maintaining an establishment, or making significant

- investment in facilities

- assuming risk for profit or loss in providing services

- freedom to provide services concurrently for other businesses, competitive or non-competitive

If an employer-employee relationship exists, it does not matter what it is called by the person engaging the services. For example, if you issue individuals a 1099 form rather than a W-2 form, they may still be employees. Even if you have individuals sign a statement claiming independent contractor status and waiving any rights as employees, those individuals may still be considered employees under the law.

Remember that the real distinction between the employer-employee relationship and the independent contractor relationship depends primarily on the level of direction and exercised by the person engaging the services. It is not defined by what the relationship called by the participants. In addition, there are certain types of services which are excluded or covered by statute regardless of the common law tests of direction and control.

The distinction between independent contractors and employees can be vital for you and your business. Protect yourself by obtaining a determination in advance from our Liability and Determination Section. You can also direct questions regarding independent contractors to the Liability and Determination Section by (518) 457-2635.

[www.labor.state.ny.us/business\\_ny/unemployment\\_insurance/uiemplr/indcont.htm](http://www.labor.state.ny.us/business_ny/unemployment_insurance/uiemplr/indcont.htm).

### **COURT DECISIONS**

The New York Unemployment Insurance Appeal Board routinely conclude that couriers and delivery persons are employees, and is usually upheld by the courts:

1. *Wells*, 451 N.Y.S. 2d 213 (App. Div. 1982), *affirmed sub nom. Di Martino*, 463 N.Y.S. 2d 189 (N.Y. 1983).
2. *Field Delivery Service, Inc.*, 498 N.Y.S. 2d 111 (N.Y. 1985) (couriers for medical laboratory specimens), *reversing* 491 N.Y.S. 2d 601 (App. Div. 1985).
3. *Fox*, 500 N.Y.S. 2d 212 (App. Div. 1986) (driver for photo courier service was not an employee), *reversed*, 512 N.Y.S. 2d 14 (N.Y. 1986).
4. *Ross*, 500 N.Y.S. 2d 232 (App. Div. 1986) (decided the same day as *Fox*, ruling that messengers were employees), *affirmed*, 512 N.Y.S. 2d 14 (N.Y. 1986).
5. *Mid-Hudson Publications, Inc.*, 501 N.Y.S. 2d 490 (App. Div. 1986) (newspaper carrier is an independent contractor).
6. *Webley*, 520 N.Y.S. 2d 78 (App. Div. 1987).
7. *Alfisi*, 540 N.Y.S. 2d 571 (App. Div. 1989).
8. *CDK Delivery Service*, 543 N.Y.S. 2d 537 (App. Div. 1989).
9. *Davila*, 564 N.Y.S. 2d 220 (App. Div. 1990).

10. *Caballero*, 585 N.Y.S. 2d 605 (App. Div. 1992).
11. *McKenna*, 649 N.Y.S. 2d 953 (App. Div. 1993).
12. *Short*, 649 N.Y.S. 2d 955 (App. Div. 1993) (tractor-trailer owner-driver).
13. *Ganapathy*, 663 N.Y.S. 2d 680 (App. Div. 1997).
14. *Medical Transcription Plus, Inc.*, 755 N.Y.S. 2d 496 (App. Div. 2003).

**NORTH CAROLINA**

**LAW**

**Chapter 96 – Employment Security  
Article 2 – Unemployment Insurance Division  
N.C.G.S. § 96.8 Definitions**

\* \* \* \* \*

(6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

**NORTH DAKOTA**

**LAW**

**North Dakota Century Code**

**TITLE 52**

**SOCIAL SECURITY**

**CHAPTER 52-01  
DEFINITIONS AND GENERAL PROVISIONS**

**52-01-01. Definitions.** In the North Dakota Unemployment Compensation Law, unless the context or subject matter otherwise requires:

17. "Employment" means:

a. Any service performed prior to January 1, 1972, which was employment as defined in this subsection prior to such date, and subject to the other provisions of this subsection, service performed after December 31, 1971, including service in interstate commerce, by:

\*\*\*\*\*

(3) Any individual who, under the provisions of subdivision e, has the status of an employee.

\*\*\*\*\*

e. Services performed by an individual for wages or under any contract of hire must be deemed to be employment subject to the North Dakota Unemployment Compensation Law unless it is shown that the individual is an independent contractor as determined by the "common law" test.

**REGULATIONS**

**N.D. Admin. Code § 27-02-14-01**

**27-02-14-01. Employment defined.**

\* \* \* \* \*

5. Any service performed for another for wages or under any contract of hire is deemed to be employment unless it is shown that the individual performing the service is an independent contractor as determined by the "common law" test.  
a. Generally, an employment relationship 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. That is, an employee is subject to the will and control of the employer not only as to what must be done but how it must be done. In this connection, 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. The right to discharge is also an important factor indicating that the person possessing that right is an employer. However, the right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, suggest an **employment** relationship. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. The fact that the contract must be performed at a specific location, such as a building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. In general, if an 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, the individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

b. As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer- employee relationship. These twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. These twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying these twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement; that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee. These twenty factors are described below:

(1) Instructions. A person who is required to comply with other persons' instructions about when, where, and how the person is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

(2) Training. Training a person by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

(3) Integration. Integration of the person's services into the business operations generally shows that the person is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the persons who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

(4) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

(5) Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the persons on the job. However, if one person hires, supervises, and pays the other assistants pursuant to a contract under which the person agrees to provide materials and labor and under which the person is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(6) Continuing relationship. A continuing relationship between the person and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

(7) Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

(8) Full time required. If the person must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the person spends working and impliedly restrict the person from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

(9) Doing work on the premises of the person or persons for whom the services are performed. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the person, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the person is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(10) Order or sequence set. If a person must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the person is not free to follow the person's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

(11) Oral or written reports. A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. By contract, however, parties can agree that services are to be performed by certain dates and the persons performing those services can be required to report as to the status of the services being performed so that the person for whom the services are being performed can coordinate other contracts that person may have which are required in the successful total completion of a particular project.

(12) Payment by hour, week, month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

(13) Payment of business or traveling expenses, or both. If the person or persons for whom the services are performed ordinarily pay the person's business or traveling expenses, or both, the person is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the person's business activities.

(14) Furnishing of tools and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

(15) Significant investment. If the person invests in facilities that are used by the person in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the person is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.

(16) Realization of profit or loss. A person who can realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by

employees) is generally an independent contractor, but the person who cannot is an employee. For example, if the person is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the person is an independent contractor. The risk that a person will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

(17) Working for more than one firm at a time. If a person performs services under multiple contracts for unrelated persons or firms at the same time, that factor generally indicates that the person is an independent contractor. However, a person who performs services for more than one person may be an employee for each of the persons, especially where such persons are part of the same service arrangement.

(18) Making service available to general public. The fact that a person makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

(19) Right to discharge. The right to discharge a person is a factor indicating that the person is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the person to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

(20) Right to terminate. If the person has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. A contract can be terminated by the mutual agreement of the parties before its completion or by one of the parties to the contract before its completion to prevent a further breach of the contract or to minimize damages. This situation indicates an independent contractor relationship.

...

## **OHIO**

### **LAW**

#### **Ohio Rev. Code §4141.01(B)**

(B)(1) "Employment" means service performed by an individual for remuneration under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact. The director shall adopt rules to define "direction or control."

### **REGULATIONS**

#### **Admin. Code §4141-3-05 - Definition of employment.**

(A) Except as specifically provided in sections 4141.01(B)(2)(K) and 4141.39 of the Revised Code, a worker is in employment when an "employer-employee" relationship exists between the worker and the person for whom the individual performs services and the director determines that:

- (1) The person for whom services are performed has the right to direct or control the performance of such services; and
- (2) Remuneration is received by the worker for services performed.

(B) As an aid to determining whether there is sufficient direction or control present, the common law rules identify twenty factors or elements. When present, each of these factors serves to indicate some degree of direction or control. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors set forth below are designed only as guides for determining whether sufficient direction or control exists and must be considered in totality:

- (1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services;
- (2) The person for whom services are being performed requires particular training for the worker performing services;

- (3) The services provided are part of the regular business of the person for whom services are being performed;
- (4) The person for whom services are being performed requires that services be provided by a particular worker;
- (5) The person for whom services are being performed are being performed hires, supervises or pays the wages of the worker performing services;
- (6) A continuing relationship exists between the person for whom services are being performed and the worker performing services which contemplates continuing or recurring work, even if not full time;
- (7) The person for whom services are being performed requires set hours during which services are to be performed;
- (8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;
- (9) The person for whom services are being performed requires that work be performed on its premises;
- (10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;
- (11) The person for whom services are being performed requires the worker to make oral or written progress reports;
- (12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly, or monthly;
- (13) The person for whom services are being performed pays expenses for the worker performing services;
- (14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;
- (15) There is a lack of investment by the worker in the facilities used to perform services;

- (16) There is lack of profit or loss to the worker performing services as a result of the performance of such services;
- (17) The worker performing services is not performing services for a number of persons at the same time;
- (18) The worker performing services does not make such services available to the general public;
- (19) The person for whom services are being performed has a right to discharge the worker performing services;
- (20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

The director shall make a determination, based on the factors listed in this rule as to whether or not an employment relationship exists purposes of Chapter 4141 of the Revised Code.

**OKLAHOMA**

**LAW**

**O.S. §40-1-210**

“Employment” means:

(1) Any service, including service in interstate commerce, performed by:

...

(b) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee.

**OS - §40-1-208A**

In no event will a motor carrier be determined to be the employer of a lessor as defined in Section 166a or 230.29 of Title 47 of the Oklahoma Statutes, or of a driver receiving compensation from a lessor. [In these sections, a “lessor” is the “party granting the use of equipment, with or without driver, to another.”]

## OREGON

### LAW

**657.030 Employment generally; educational, hospital, nursing, student service exclusions.** (1) As used in this chapter, unless the context requires otherwise, and subject to ORS 657.035, 657.040 and 657.045 to 657.094, or any other section which excludes services from the term "employment," "employment" means service for an employer, including service in interstate commerce, within or outside of the United States, performed for remuneration or under any contract of hire, written or oral, express or implied.

**657.040 Employment; when service for pay excluded.** (1) Services performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that:

- (a) Such individual is an independent contractor, as that term is defined in ORS 670.600; or
- (b) Such individual has been and will continue to be free from control or direction over the performance of such services, both under a contract of service and in fact; and
- (c) Such individual customarily is engaged in an independently established business of the same nature as that involved in the contract of service.

**670.600 Independent contractor; standards.** As used in various provisions of ORS chapters 316, 448, 656, 657, 671 and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met:

- (1) The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;
- (2) The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business;
- (3) The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services;
- (4) The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services;

(5) Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer;

(6) The individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required;

(7) Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and

(8) The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of the personal income tax returns and the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist:

(a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;

(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;

(c) Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;

(d) Labor or services are performed only pursuant to written contracts;

(e) Labor or services are performed for two or more different persons within a period of one year; or

(f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

## PENNSYLVANIA

### LAW

#### **43 P.S. §753**

\* \* \* \* \*

(l) (1) “Employment” means all personal service performed for remuneration by an individual under any contract of hire, express or implied, written or oral, including service in interstate commerce, and service as an officer of a corporation.

Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department 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) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

### COURT DECISIONS

Newspaper carriers were not employees.

*Venango Newspapers v. Unempl. Comp. Bd of Rev.*, 631 A.2d 1384 (Pa. Commw. 1993).

*York Newspapers Co. v. Unempl. Comp. Bd. of Rev.*, 635 A.2d 251 (Pa. Commw. 1993).

*Johnson v. Workmen’s Comp. App. Bd.*, 631 A.2d 693 (Pa. Commw. 1993).

## RHODE ISLAND

### LAW

#### Rhode Island Gen. Laws

**§ 28-42-3 Definitions.** – The following words and phrases, as used in chapters 42 – 44 of this title, have the following meanings unless the context clearly requires otherwise:

\* \* \* \* \*

(17) "Employment", subject to §§ 28-42-4 – 28-42-10, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

**§ 28-42-7 Independent contractor and employee distinguished.** – 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.

**SOUTH CAROLINA**

**LAW**

**South Carolina Code**

**Chapter 29 - Employment Security – Employment Security Commission  
Section 41-27-230. Employment**

**"Employment" means:**

(1) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, for wages under a contract of hire, written or oral, expressed or implied, including service in interstate commerce by:

\* \* \* \* \*

(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

**SOUTH DAKOTA**

**LAW**

**South Dakota Codified Laws**

**61-1-10.** Employment generally subject to coverage -- Corporate officers and interstate commerce included. "Employment" means any service performed prior to January 1, 1972, which was employment as defined in this section prior to such date and, subject to the provisions of §§ 61-1-10.2 to 61-1-10.9, inclusive, service performed after December 31, 1971, including service in interstate commerce, by:

\* \* \* \* \*

(2) Any individual who, under the usual common-law rules applicable in determining the employer-employee relationship has the status of an employee.

**61-1-11.** Employee and independent contractor distinguished. Service performed by an individual for wages is employment subject to this title unless and until it is shown to the satisfaction of the Department of Labor that:

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

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

**TENNESSEE**

**LAW**

**Tenn. Code Ann. §50-7-207 - Definitions**

(a) Definition of “Employment.” For purposes of this chapter and subject to the special rules contained in subsection (e), and the definitions contained in subsection (f), “employment” means service that meets all of the following conditions:

(1) It is within any category of “included service” as listed in subsection (b);

\*\*\*\*\*

(b) “Included Service.” For purposes of this section, “included service” means any of the following:

\*\*\*\*\*

(2) Subject to the other provisions of this section, service performed after December 31, 1977, including service in interstate commerce, by:

\*\*\*\*\*

(B) Any individual who, under the usual common-law rules applicable in determining the employer/employee relationship, has the status of an employee; and

\*\*\*\*\*

(e) *Special Rules.* The following rules shall govern for purposes of this section:

(1) Service performed by an individual shall be deemed to be included service for purposes of this section irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that:

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

(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.

**TEXAS**

**LAW**

**Texas Labor Code**

**Title 4 – Employment Services and Unemployment**

**Chapter 201 – Unemployment Compensation Act – General Provisions**

**Section 201.041 - General Definition of Employment**

In this subtitle, "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.

## UTAH

### LAW

#### Utah Laws

##### **Title 35A - Utah Workforce Services Code Chapter 4 - Employment Security Act Section 35A-4-204 - Definition of employment**

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

\*\*\*\*\*

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, 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.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

### REGULATIONS

#### R994-204-301. Independent Contractor--General Definition.

In order for a personal service to be excluded under Section 35A-4-204(3) of the Act, the service must be performed by an individual who is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the services performed, and the individual providing the services must be free from the control and direction of the employer with respect to that service. Those individuals who wish to be classified as independent contractors must clearly establish their status as

independent contractors by taking affirmative steps that indicate an informed business decision has been made.

R994-204-302. Procedure.

(1) Section 35A-4-204(3) of the Act requires the employer to establish the excluded nature of the services "to the satisfaction of the Division".

(2) If the issue of an individual's status arises out of a claim for benefits, and there has been no prior status determination or declaratory order, a determination will be made on the basis of the best information available.

(3) If the issue of the status of an individual or class of workers arises out of an audit or request for declaratory order and there is no claim for benefits, the Department shall determine the status on the basis of the information presented by the employer, the individual, or such other information as the Department may gather through audit or investigation. An individual who is found to be an independent contractor by reason of an audit or declaratory order is not permitted to waive any right to unemployment benefits by filing a written consent to the determination pursuant to Section 63-46b-21(3)(b) while the service relationship with the employer continues. Such written consent is in violation of Section 35A-4-103(1)(c)(ii) of the **Employment** Security Act.

(4) If the issue of an individual's status arises out of a claim for benefits and there has been a prior audit determination or declaratory order determining that the individual or class of workers to which the individual belongs to be independent contractors, the Department will issue a monetary determination excluding the claimant's earnings as an independent contractor. The claimant has ten (10) days to protest the determination.

R994-204-303. Factors for Determining Independent Contractor Status.

(1) Services will be excluded under Section 35A-4-312 if the service arrangement meets the requirements of that section of the Act and this rule. Special scrutiny of the facts is required to assure that the form of a service arrangement does not obscure the substance of the arrangement; that is, whether the individual is independently established in a like trade, occupation, profession or business and is free from control and direction. The factors listed in subsections 303(2)(b) and 303(3)(b) of this section are exclusive, but are intended only as aids in the analysis of the facts of each case. The degree of importance of each factor varies depending on the occupation and the factual context in which the service is performed. Some factors do not apply to certain occupations and, therefore, should not be given any weight.

(2) Independently Established.

- (a) An individual will be considered customarily engaged in an independently established trade, occupation, profession, or business if the individual is, at the time the service is performed, regularly engaged in a trade, occupation, profession, or business of the same nature as the service performed, and the trade, occupation, profession, or business is established independently of the alleged employer. In other words, an independently established trade, occupation, profession, or business 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.
- (b) The following factors, if applicable, will be used as aids in determining whether an individual is customarily engaged in an independently established trade or business:
- (i) Separate Place of Business. The individual has his own place of business separate from that of the employer.
  - (ii) Tools and Equipment. The individual has a substantial investment in the tools, equipment, or facilities customarily required to perform the services. "Tools of the trade" such as those used by carpenters, mechanics, and other trades or crafts, do not necessarily demonstrate independence.
  - (iii) Other Clients. The individual regularly performs services of the same nature for other customers or clients and is not required to work full time for the employer.
  - (iv) PROFIT OR LOSS. The individual is in a position to realize a profit or loss through his independently established business activity.
  - (v) Advertising. The individual advertises his services in telephone directories, newspapers, magazines, or by other methods clearly demonstrating that he holds himself out to the public to perform the services.
  - (vi) Licenses. The individual has obtained any required and customary business and trade or professional licenses.
  - (vii) Business Tax Forms. The individual files **self-employment** and other business tax forms required by the Internal Revenue Service and other tax agencies.
- (c) If an employer proves to the satisfaction of the department that the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service in question, there will be a rebuttable

presumption that the employer did not have the right of or exercise direction or control over the service.

(3) Control and Direction.

(a) When an employer retains the **right to control** and direct the performance of a service, or actually exercises control and direction over the individual who performs the service, not only as to the result to be accomplished by the work but also as to the manner and means by which that result is to be accomplished, the individual is an employee of the employer for the purposes of the Act.

(b) The following factors, if applicable, will be used as aids in determining whether an employer has the right of or exercises control and direction over the service of an individual:

(i) Instructions. An individual who is required to comply with other persons' instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

(ii) Training. Training an individual by requiring an experienced person to work with the individual, by corresponding with the individual, by requiring the individual to attend meetings, or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner.

(iii) Pace or Sequence. A requirement that the service must be provided at a pace or ordered sequence of duties imposed by the employer indicates control or direction, but the coordinating and scheduling of the services of more than one service provider does not.

(iv) Work on Employer's Premises. A requirement that the service be performed on the employer's premises generally indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere.

(v) Personal Service. A requirement that the service must be performed personally and may not be assigned to others generally indicates the **right to control** or direct the manner in which the work is performed.

(vi) Continuous Relationship. A continuous service relationship between the individual and the employer indicates that an employer-employee relationship

exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship generally does not exist where the individual is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

(vii) Set Hours of Work. The establishment of set hours of work by the employer, or a requirement that the individual must work full-time, indicates control.

(viii) Method of Payment. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed upon as the cost of a job.

#### R994-204-401. Safe Haven--General Definition.

The Administrative Procedures Act, Section 63-46B-21, permits any person to request that the Department issue a declaratory order determining the applicability of the Employment Security Act, a Commission rule, or order, to specific circumstances. Specifically, an employer may request a declaratory order determining the status of workers; that is, are they employees or independent contractors. Declaratory orders and audit findings determine only whether the employer is liable to pay contributions on wages paid to the workers in question. The "safe haven" provision provides a means by which the employer may rely on official determination of the Department pertaining to the applicability of Section 35A-4-204(3) of the Act. The provision allows the employer to obtain an official determination for contributions purposes, while preserving the worker's right to challenge that determination at a more appropriate time, when the work relationship has ended and a claim for benefits has been filed.

#### R994-204-402. Procedure.

(1) If the issue of the status of an individual or class of workers arises out of an audit or request for declaratory order and there is no claim for benefits pending at the time, the Department shall determine the status on the basis of the information presented by the employer, the individual, or such other information as the Department may gather through audit or investigation.

(2) (2) An individual whose status is determined as a result of an audit or declaratory order shall not be permitted to file a written consent to the determination pursuant to Section 63-46B-21(3)(b) while the service relationship with the employer continues, and the Department will consider such a consent to be in violation of Section 35A-4-103(1)(c)(ii) of the Employment Security Act.

(3) (3)(i) If the issue of an individual's status arises out of a claim for benefits and there has been a prior audit determination or declaratory order determining the status of the individual or a class of workers to which the individual belonged, the Department will issue a notice as part of the monetary determination, denying use of the individual's independent contractor earnings as wage credits for the base period, on the basis of the prior status determination. The individual may file a written protest of the determination within 10 days after the local office has notified him of the determination. Any protest will be referred to Central Office Claims for review.

(ii) Upon receipt of a protest filed under Section 402(3)(i), the Department will review the status of the individual. On the basis of its review, the Department may affirm the original determination or issue a new determination if there has been a change of facts in the work relationship. Either the individual or the employer may appeal the Department's decision.

R994-204-403. Employer Reliance on Official Determination.

When an employer receives a declaratory order or other official determination concluding that a worker or class of workers appears to be customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of hire, and is free from the control and direction of the employer, the employer shall have no liability to pay unemployment contributions on compensation paid to the worker, except as provided in Section 404 of this rule.

R994-204-404. Effect of New Determination on Employer.

If a new determination by the Department, an Administrative Law Judge, or the Workforce Appeals Board holds that the status of an individual or class of workers to which the individual belonged is that of employee for purposes of the **Employment Security Act**, the employer shall be liable to pay unemployment contributions on all wages paid to workers in the class to which the individual belonged, from the beginning of the calendar quarter in which the new determination is made. In addition, the employer shall also be liable to pay contributions on any wages used by a claimant for purposes of establishing any claim for benefits affected by the new determination.

## VERMONT

### LAW

#### Vermont Statutes

##### **Title 211 – Labor**

##### **Chapter 17 – Unemployment Compensation**

##### **Section 1301 – Definitions**

**(6)(A) "Employment,"** subject to the other provisions of this subdivision (6), means service within the jurisdiction of this state, performed prior to January 1, 1978, which was employment as defined in this subdivision prior to such date and, subject to the other provisions of this subdivision, service performed after December 31, 1977, by an employee, as defined in subsections (i) and (o) of section 3306 of the Federal Unemployment Tax Act, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied.

(B) 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 that:

(i) 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

(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.

## **VIRGINIA**

### **LAW**

#### **Virginia Code**

##### **§ 60.2-212 - Employment**

A. "Employment" means:

1. Any service including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied; and

C. Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless:

1. 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

2. 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; or such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession or business.

##### **§ 60.2-212.1. Employment; special exclusion.**

A. In the trucking industry, an owner-operator or lessee of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of his truck, if each of the following factors is substantially present:

1. The individual owns the equipment or holds it under a bona fide lease arrangement;

2. The individual is responsible for the maintenance of the equipment;

3. The individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;

4. The individual is responsible for supplying the necessary personal services to operate the equipment;

5. The individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;

6. The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier and specifications of the shipper; and

7. The individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

**§ 60.2-219. Services not included in term "employment."**

The term "employment" shall not include:

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22. Services performed by an individual as a "contract carrier courier driver" provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

**COURT DECISIONS**

*Central Delivery Svc. of Washington, Inc. v. Va. Empl. Comm'n*, 2001 WL 1356507 (Va. App. 2001): Courier drivers were independent contractors, because company provided evidence that IRS had audited treatment of couriers and made no change.

## WASHINGTON

### LAW

#### **R.C.W. §50.04.100 - Employment**

**"Employment"**, subject only to the other provisions of this title, means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

**WEST VIRGINIA**

**LAW**

**W. Va. Code §21A-1A-16**

"Employment", subject to the other provisions of this article, means:

(1) Service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

(2) Any service performed by an employee, as defined in Section 3306(i) of the federal Unemployment Tax Act [common law rule], including service in interstate commerce;

\*\*\*\*\*

(7) Services performed by an individual for wages are employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that:

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

(B) the service is either outside the usual course of the business for which the 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) the individual is customarily engaged in an independently established trade, occupation, profession or business;

**WISCONSIN**

**LAW**

**Wisconsin Statutes**

**Chapter 108 – Unemployment Insurance and Reserves**

**Section 108-02 – Definitions**

\* \* \* \* \*

**12) Employee.**

(a) "Employee" means any individual who is or has been performing services for an employing unit, in an employment, whether or not the individual is paid directly by such employing unit; except as provided in [par. \(b\)](#), [\(bm\)](#), [\(c\)](#) or [\(d\)](#).

(b) During the period beginning on January 1, 1996, and ending on December 31, 1999, and during the period beginning on January 1, 2004, with respect to contribution requirements, and during the period beginning on January 1, 1996, and ending on April 1, 2000, and during the period beginning on April 4, 2004, with respect to benefit eligibility, [par. \(a\)](#) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that:

1. The individual:

a. Holds or has applied for an employer identification number with the federal internal revenue service; or

b. Has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year; and

2. The individual meets 6 or more of the following conditions:

a. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.

b. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and method of performing the services.

c. The individual incurs the main expenses related to the services that he or she performs under contract.

d. The individual is responsible for the satisfactory completion of the services that he or

she contracts to perform and is liable for a failure to satisfactorily complete the services.

- e. The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.
- f. The individual may realize a profit or suffer a loss under contracts to perform services.
- g. The individual has recurring business liabilities or obligations.
- h. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

(bm) During the 4-year period beginning on January 1, 2000, with respect to contribution requirements, and during the period beginning on April 2, 2000, and ending on April 3, 2004, with respect to benefit eligibility, par. (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that the individual meets 7 or more of the following conditions by contract and in fact:

1. The individual holds or has applied for an identification number with the federal internal revenue service.
2. The individual has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.
3. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.
4. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services.
5. The individual incurs the main expenses related to the services that he or she performs under contract.
6. The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.
7. The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.
8. The individual may realize a profit or suffer a loss under contracts to perform such services.

9. The individual has recurring business liabilities or obligations.

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

(c) Paragraph (a) does not apply to an individual performing services for a government unit or nonprofit organization, or for any other employing unit in a capacity as a logger or trucker if the employing unit satisfies the department:

1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; ...

\* \* \* \* \*

**(15) Employment.**

(a) "Employment", subject to the other provisions of this subsection means any service, including service in interstate commerce, performed by an individual for pay.

## **WYOMING**

### **LAW**

#### **Wyoming Statutes**

§ 27.3-104. "Employment" defined; generally; exceptions.

(a) As used in this act, "employment" means service:

(i) Performed by an employee defined under 26 U.S.C. § 3306(i) including service in interstate commerce, except 26 U.S.C. § 3121(d)(2) does not apply;

(b) An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual:

(i) Is free from control or direction over the details of the performance of services by contract and by fact;

(ii) Repealed by Laws 1991, ch. 153, § 1.

(iii) Repealed by Laws 1995, ch. 121, § 3.

(iv) Repealed by Laws 1995, ch. 121, § 3.

(v) Represents his services to the public as a self-employed individual or an independent contractor; and

(vi) May substitute another individual to perform his services.