

## Independent Contractor vs. Employee: What Employers Need to Know

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If you're an employer, given the daily balance of juggling business goals, budget concerns and employee harmony, it might seem that you spend most days trying to pull the proverbial rabbit out of your hat. But if your company engages independent contractors, the law requires you to be a magician of sorts to determine when to classify a hire as an employee or an independent contractor. There's no way around it—it's a tricky issue. Why? There is no one, uniform standard, and therefore, employers are required to be aware of, understand, and be able to apply the various tests under both state and federal law.

There are some common factors, for example, many of the tests generally consider the level of control an employer has over an individual. However, the specific factors vary from test to test. And that's the tricky part. You want to avoid any misunderstanding because misclassifying an employee can result in fines from the Department of Labor and unforeseen liability. The following will provide you with a brief overview of some of the tests and the differing factors used by government agencies and courts to determine employment status.

The New Jersey Wage Payment Law, the New Jersey Wage and Hour Law, and the New Jersey Unemployment Compensation Law

All three of these laws apply the "ABC" test to determine independent contractor status. The "ABC" test presumes that an individual is an employee unless the employer can show that:

- The individual has been and will continue to be free from control or direction over the performance of his service; and
- The service provided by the individual is either outside the usual course of the business, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession or business.

All three of the above elements must be satisfied or the individual will be classified as an employee.

The New Jersey Worker's Compensation Law, the New Jersey Law Against Discrimination, and the New Jersey Conscientious Employee Protection Act

These laws all apply a multi-factor test that explores the many different characteristics of an employment relationship. The factors include:

- The employer's right to control the means and manner of the worker's performance;
- The kind of occupation—supervised or unsupervised;
- The skill required;
- Who furnishes the equipment and workplace;
- The length of time in which the individual has worked;
- The method of payment;
- The manner of termination of the work relationship;
- Whether there is annual leave;
- Whether the work is an integral part of the business of the employer;

- Whether the worker accrues retirement benefits;
- Whether the employer pays social security taxes; and
- The intention of the parties.

These factors are all weighed against each other to determine whether an individual is an employee or an independent contractor.

## Title VII

Like the New Jersey Worker's Compensation Law, the New Jersey Law Against Discrimination, and the New Jersey Conscientious Employee Protection Act, Title VII weighs a series of factors to determine how an individual should be classified. These factors include:

- The hiring party's right to control the manner and means by which the product is accomplished;
- The skill required;
- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;
- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The method of payment;
- The hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business;
- The provision of employee benefits; and
- The tax treatment of the hired party.

## The Fair Labor Standards Act

The Fair Labor Standards Act applies the economic realities test, which considers:

- The extent to which the work performed is an integral part of the employer's business;
- Whether the worker's managerial skills affect his or her opportunity for profit and loss;
- The relative investments in facilities and equipment by the worker *and* the employer;
- The worker's skill and initiative;
- The permanency of the worker's relationship with the employer; and
- The nature and degree of control by the employer.

To add to the complexity, most employers are subject to several (if not all) of these laws simultaneously. For example, a New Jersey employer seeking to classify a new hire as an independent contractor must ensure that the individual meets the tests for both the New Jersey Wage and Hour Law and the federal Fair Labor Standards Act to avoid any minimum wage and overtime disputes. While the tests are similar—don't be tricked. Employers need to satisfy both tests to ensure that the potential for unforeseen consequences "disappear."

## Attorney

- Tracy Armstrong