

WHO IS AN EMPLOYEE VS. INDEPENDENT CONTRACTOR?

In Unemployment Compensation coverage the term “employee” is not defined in statute. When we refer to an individual as an “employee” that means an individual who is entitled to be covered for unemployment purposes.

Most labor and tax laws assume anyone compensated for work is an employee UNLESS the employer can demonstrate otherwise, or there is a specific exemption in the law. An “employee” for unemployment insurance purposes may include someone who is otherwise considered to be an “independent contractor.”

As an employer, you may be liable for unemployment insurance coverage regardless if the services are performed:

- Full-time
- Part-time
- Temporary
- Seasonally
- Probationary
- On or off your premise
- In the employee’s own home

If you have any questions about whether the person you hire is an employee or an independent contractor, please contact one of the Department Field Auditors. You WILL NOT be penalized for this inquiry.

For Unemployment Insurance, it’s the nature of the relationship between an employer and an individual that determines if they are an “employee” or an “independent contractor.” Because of statute and case law, the Department of Labor must presume that an employment relationship exists between an employer and an individual hired, and thus unemployment insurance coverage is required, UNLESS and UNTIL, the employer is able to demonstrate that all three parts of the “ABC Test” are met.

ABC Test

The “ABC Test” is used to determine the nature of the relationship between an employer and individual, and the three parts ALL MUST BE MET for an individual to NOT be an employee. The “B” portion of the test is in two parts.

The ABC Test includes:

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.

Examples

- Individual bids for the job and is paid by the job
- Individual completes job with no direction, supervision, or set hours

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.

Examples:

- Individual does work which none of your employees does and for which you do not advertise
- Individual does all work at their own facility

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

Examples:

- Individual has employees of their own
- Individual has liable UI account with VDOL
- Individual advertises their business services to the general public

The Vermont Supreme Court has made it clear that direction and control will exist where the employer has the “right” to provide direction and control, regardless of whether such direction and control is actually exercised.

The employer’s usual course of business is any business activity the employer chooses to engage in. Likewise, the employer’s place of business is all places where the employer conducts its business, not just the main location or office from which the employer conducts its business. Finally, being independently established means being established in a similar type of occupation or trade as the one being examined. Generally the individual must have some history of providing similar services for others in order for the “C” part of the test to be met.

The ABC Test vs. the IRS Independent Contractor Test

The Internal Revenue Service (IRS) uses a different, less inclusive test to determine if an individual is an employee or an independent contractor. Employers should understand that the department will follow Vermont law and use the “ABC Test.”

It’s possible that under Vermont law an individual may be considered an employee but under the IRS an individual contractor.

Please see also “Worker’s Compensation Best Practices When Hiring an Independent Contractor”