

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
GOV. W. AVERELL HARRIMAN STATE OFFICE BUILDING CAMPUS  
ALBANY, N.Y. 12240

INDEPENDENT CONTRACTORS

Independent contractors are excluded from coverage under the Unemployment Insurance Law. These are persons who are actually in business for themselves and hold themselves available to the general public to perform services. A person is an independent contractor only when free from control and direction in the performance of 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 a determination of whether services rendered by an individual are in the capacity of an employee or an independent contractor. Under the common law tests, all factors concerning the relationship between the two parties must be taken into consideration to determine if the party contracting for the services exercises, or has the right to exercise, supervision, direction or control over the person performing the services.

The mere designation by the employer of an independent contractor status, even if accepted by the individual, is not conclusive. A written agreement does not preclude an examination of the facts to determine whether the performance of the services is subject to supervision, direction or control. However, contract provisions reserving the right of control may establish the existence of an employment relationship even though the employer allows the individual significant freedom of action. If the circumstances demonstrate either the exercise of, or the right to exercise, such supervision, direction or control, an employer-employee relationship exists. It is immaterial if the services are performed on a full-time, part-time, or casual basis.

Generally, an officer of a corporation is an employee and cannot be considered an independent contractor while performing either the usual management activities, or services for which the corporation was formed.

While there is no single factor, or group of factors, which is conclusive in deciding if an employer-employee relationship exists, the courts have held the following to be some of the more significant indicators of an employment relationship:

1. Control over the individual's activities by such means as requiring full-time services, stipulating the hours of work, requiring attendance at meetings, and requiring prior permission for absence from work.
2. Requiring the individual to comply with instruction as to when, where, and how to do the job.
3. Direct supervision over the services performed.
4. Providing facilities, equipment, tools, or supplies for the performance of the services.
5. Setting the rate of pay for service performed.
6. Providing compensation in the form of a salary, an hourly rate of pay, or a drawing account against future commissions with no requirement for repayment of unearned commissions.
7. Providing reimbursement or allowance for business or travel expenses.
8. Providing fringe benefits.
9. Providing training, particularly if attendance at training sessions is required.
10. Establishment of limits within which the individual must operate: territorial, monetary, or time limits.
11. Requiring services to be rendered personally.
12. Requiring oral or written reports.
13. Services performed are an integral part of the business, particularly when performed on a continuing basis.
14. Furnishing business cards, or other means of identification of the individual as a representative of the employer.

15. Restricting the individual from performing services for competitive businesses.
16. Reservation of the right to terminate the services on short notice.
17. Nature of services: unskilled labor is usually supervised, or considered to be subject to supervision.

Conversely, some of the factors the courts have found to be significant in establishing the existence of an independent contractor relationship include:

1. The individual is established in an independent business offering services to the public. An independent business is usually marked by such elements as media advertising, commercial telephone listing, business cards, business stationery and billheads, carrying business insurance, maintaining own establishment.
2. The individual has a significant investment in facilities. Such items as hand tools and personal transportation are not considered significant.
3. Assumption of the risk for profit or loss in providing services.
4. Freedom to establish own hours of work and to schedule own activities.
5. No required attendance at meetings or training sessions; no required oral or written reports.
6. Freedom to provide services concurrently for other businesses, competitive or non-competitive.

The following persons are employees by Law even though the circumstances under which they work may not meet the common law tests of an employer-employee relationship:

1. An agent or commission-driver engaged in distributing meat, vegetables, fruit or bakery products; beverages (other than milk); laundry or dry cleaning services.
2. A traveling or city salesperson who works full-time soliciting orders for merchandise for resale or supplies for use in the purchaser's business operations. The salesperson must work in a continuing relationship with an employer and personally perform substantially all of the work. The salesperson must have no substantial investment in the facilities used in the performance of the services, except the facilities for transportation.
3. Professional musicians or persons otherwise engaged in the performing arts, who perform services as such for a television or radio station or network, a film production, a theater, hotel, restaurant, night club or similar establishment unless, by written contract, such musicians or persons are stipulated to be employees of another employer. "Engaged in the Performing Arts" means performing services in connection with the production of, or performance in, any artistic endeavor that requires artistic or technical skill or expertise.
4. Professional models who perform modeling services for, or who consent in writing to transfer use of their name or likeness for purposes of advertising or trade to, a person or entity that dictates assignments, hours of work or performance location and that compensates them, in return for a waiver of their privacy rights, unless the services are performed under a written contract that states the model is an employee of another covered employer.

Employers with any question concerning the status of individuals performing services for them should write to the Liability and Determination Section furnishing complete details of the relationship and request a determination. Failure to report the earnings and pay the tax due on the earnings of persons on the assumption that they are independent contractors may result in additional assessments and interest if they are later determined to be employees.