Texas Independent Contractors

An employer may hire individuals as independent contractors or employees. The determination of whether a worker is an “employee” or an “independent contractor” is crucial when it comes to things like unemployment insurance, workers’ compensation, and wage and hour laws. The failure of an employer to properly classify a worker under each law may have significant consequences.

**Unemployment Insurance**

The Texas Unemployment Compensation Act does not directly define “independent contractor.” Instead, it sets forth a broadly inclusive test, known as the “direction or control test” or “common law test,” for who is an employee. ***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 Texas Workforce Commission (TWC) 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.

Under the common law test, a worker is an employee if the purchaser of that worker’s service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done. Control need not actually be exercised; rather, if the service recipient has the right to control, employment may be shown. The TWC and Texas courts weigh the following 20 factors in making their determination:

* **Instructions.** An employee receives instructions about when, where, and how the work is to be performed. An independent contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.
* **Training.** Employees are often trained by a more experienced employee or are required to attend meetings or take training courses. An independent contractor uses his or her own methods and thus need not receive training from the purchaser of those services.
* **Integration.** Services of an employee are usually merged into the firm’s overall operation; the firm’s success depends on those employee services. An independent contractor’s services are usually separate from the client’s business and are not integrated or merged into it.
* **Services Rendered Personally.** An employee’s services must be rendered personally; employees do not hire their own substitutes or delegate work to them. A true independent contractor is able to assign another to do the job in his or her place and need not perform services personally.
* **Hiring, Supervising, and Paying Helper.** An employee may act as a foreman for the employer; in such an arrangement, helpers are paid with the employer’s funds. Independent contractors select, hire, pay, and supervise any helpers used and are responsible for the results of the helpers’ labor.
* **Continuing Relationship.** An employee often continues to work for the same employer month after month or year after year. An independent contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.
* **Set Hours of Work.** An employee may work “on call” or during hours and days as set by the employer. A true independent contractor is the master of his or her own time and works the days and hours he or she chooses.
* **Full Time Required.** An employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the employee’s time. A true independent contractor cannot be required to devote full-time service to one firm exclusively.
* **Location Where Service Is Performed.** Employment is indicated if the employer has the right to mandate where services are performed. Independent contractors ordinarily work where they choose. The workplace may be away from the client’s premises.
* **Order or Sequence Set.** An employee performs services in the order or sequence set by the employer. This shows control by the employer. A true independent contractor is concerned only with the finished product and sets his or her own order or sequence of work.
* **Oral or Written Reports.** An employee may be required to submit regular oral or written reports about the work in progress. An independent contractor is usually not required to submit regular oral or written reports about the work in progress.
* **Payments by the Hour, Week, or Month.** An employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week. An independent contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.
* **Payment of Business and Travel Expense.** An employee’s business and travel expenses are either paid directly or reimbursed by the employer. Independent contractors normally pay all of their own business and travel expenses without reimbursement.
* **Furnishing of Tools and Equipment.** Employees are furnished all necessary tools, materials, and equipment by their employer. An independent contractor ordinarily provides all of the tools and equipment necessary to complete the job.
* **Significant Investment.** An employee generally has little or no investment in the business. Instead, an employee is economically dependent on the employer. True independent contractors usually have a substantial financial investment in their independent business.
* **Realize Profit or Loss.** An employee does not ordinarily realize a profit or loss in the business. Rather, employees are paid for services rendered. An independent contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.
* **Working for More Than One Firm at a Time.** An employee ordinarily works for one employer at a time and may be prohibited from joining a competitor. An independent contractor often works for more than one client or firm at the same time and is not subject to a noncompetition rule.
* **Making Service Available to the Public.** An employee does not make his or her services available to the public except through the employer’s company. An independent contractor may advertise, carry business cards, hang out a shingle, or hold a separate business license.
* **Right to Discharge Without Liability.** An employee can be discharged at any time without liability on the employer’s part. If the work meets the contract terms, an independent contractor cannot be fired without liability for breach of contract.
* **Right to Quit Without Liability.** An employee may quit work at any time without liability on the employee’s part. An independent contractor is legally responsible for job completion and, upon quitting, becomes liable for breach of contract.

Depending upon the type of business and the services performed, not all of the 20 common law factors may apply. In addition, the weight assigned to a specific factor may vary depending upon the facts of the case.

**Workers’ Compensation**

Under the Texas Workers’ Compensation Act, an ***employee*** is each person in the service of another under a contract of hire, whether express or implied, oral or written. The term employee includes an employee employed in the usual course and scope of the employer’s business, but **does not** include an independent contractor or a person whose employment is not in the usual course and scope of the employer’s business.

Under the act, an ***independent contractor*** is a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

* Acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship.
* Is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee.
* Is required to furnish or to have employees — if any — furnish necessary tools, supplies, or materials to perform the work or service.
* Possesses the skills required for the specific work or service.

While the above definition is useful in assisting employers to determine who is an independent contractor for purposes of workers’ compensation, the Texas Supreme Court has stated that the test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operation of the employee’s work. The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment. Examples of the type of control normally exercised by an employer include:

* When and where to begin and stop work.
* The regularity of hours.
* The amount of time spent on particular aspects of the work.
* The tools and appliances used to perform the work.
* The physical method or manner of accomplishing the end result.

**Helpful Insights**

When trying to determine whether an individual is an employee or independent contractor, keep these characteristics of independent contractor arrangements in mind:

* The employer generally seeks the independent contractor out, not vice versa.
* The employer has to negotiate terms with the independent contractor.
* Training is not an issue – contractors are experts and should not need training.
* The employer is buying a finished project or completed service, rather than hours of work on an ongoing basis.
* Is there a noncompetition agreement? A noncompetition agreement is strong proof that the worker’s services are directly integrated into the primary service provided by the employer.
* Is there a nonsolicitation agreement? A worker may be made to sign a nonsolicitation agreement, but such agreement must be narrowly tailored to protect the company’s relations with the clients served by the contractor – anything stronger than that will resemble a noncompetition agreement.
* Is there a nondisclosure agreement? A worker may be made to sign a nondisclosure agreement, but it should be narrowly tailored to protect the confidential information to which the contractor will have access during the project.

The Texas Workforce Commission tax examiners often look for certain “red flags” to point to an individual’s status as an independent contractor. Some of these include:

* Using terms such as “1099 employees” or “contract labor.”
* Having contractors wear company badges or uniforms indicating their affiliation with the company.
* Giving contractors a company email address or cc’ing them on company emails.
* Inviting contractors to company parties and other events using the same invitation that goes to regular employees.
* Giving contractors company benefits or wage advances.
* Having contractors sign company policy handbooks.
* Having contractors sign noncompetition agreements.

If an employer finds itself in an audit situation, the employer should try to show things such as the following to assist in establishing that the worker is an independent contractor:

* Contractors’ business cards indicating how the contractors are in business for themselves.
* Contractors’ invoices to your company on their own stationery.
* Copies of any advertisements they use for their own businesses.
* Links to the contractors’ websites.
* Written contracts for provision of services or performance of a project, one of the provisions of which covers recourse for premature termination of the contract and noncompletion of the work (that is to help show that there is not an at-will employment relationship).
* Emails, letters, or other documentation relating to negotiating the parameters of the work.