

“Right-To-Control” Test

BOLI’s Civil Rights Division utilizes the “right-to-control” test to determine whether a given worker is an employee for purposes of civil rights law. **Please note that some civil rights statutes protect not only workers, but also job applicants and customers. In those situations, it would not matter whether an individual is an independent contractor or employee.

Under the “right-to-control test,” four factors are weighed to determine whether an employer has the “right to control” the work of an individual. Where an employer clearly has the “right to control” the work of an individual under this test, that individual is deemed an employee rather than an independent contractor.

The factors of the “right-to-control” test are:

- (1) Direct evidence of the right to, or the exercise of, control**
- (2) The method of payment**
- (3) The furnishing of equipment**
- (4) The right to fire**

It is not necessary that all factors coincide to determine whether a given worker is an employee. In such cases, the weight or strength of the factors which are in evidence will be considered.

Although not part of the official test, the following questions may help to illustrate whether a worker is performing work as an employee or an independent contractor:

- (1) Direct evidence of the right to, or the exercise of, control
 - Who sets the hours of work?
 - Who is responsible for quality control?
 - Does the worker have other customers?
 - Who determined the rate of pay? Was it negotiated?
 - Who determines how the work gets performed?
- (2) The method of payment
 - Do clients pay the individual worker directly or business employing that worker?
 - Does the worker set the rate of payment or the business employing that worker?
- (3) The furnishing of equipment
 - Does the worker supply his or her own tools?
 - Does the worker purchase materials necessary to do the job?

- Has the worker invested in bonds / insurance / advertising?

(4) The right to fire

- How long has the job lasted? Is an ending date contemplated (upon completion of the work)?
- Is the contract (if any) subject to periodic review or automatic renewal?
- Does the contract (if any) provide consequences for termination of the relationship?

THE LEGAL PRECEDENT....

In *Cantua v. Creager*, 169 Or.App. 82, 7 P.3d 693 (2000), the Oregon Court of Appeals examined the definitions of an employee and an employer at ORS 659A.001(3) & (4) (formerly ORS 659.010(5) & (6)) and determined that the right-to-control test incorporated in former ORS 659.010 is the common law test for employee status. The court quantified this test by identifying “[f]our factors that are material in determining whether an employer has the right to control an individual: (1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.”

BOLI and the U.S. Equal Employment Opportunity Commission (EEOC)

In its joint enforcement efforts with EEOC, BOLI’s Civil Rights Division will determine whether a worker is an employee under EEOC’s guidelines, outlined in its Directives Transmittal Number 915.003:

In most circumstances, an individual is only protected if s/he was an "employee" at the time of the alleged discrimination, rather than an independent contractor, partner, or other non-employee. An "employee" is "an individual employed by an employer." An individual may also have more than one employer. The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following:

- The employer has the right to control when, where, and how the worker performs the job.
- The work does not require a high level of skill or expertise.
- The employer furnishes the tools, materials, and equipment.
- The work is performed on the employer's premises.
- There is a continuing relationship between the worker and the employer.

- The employer has the right to assign additional projects to the worker.
- The employer sets the hours of work and the duration of the job.
- The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- The worker does not hire and pay assistants.
- The work performed by the worker is part of the regular business of the employer.
- The employer is in business.
- The worker is not engaged in his/her own distinct occupation or business.
- The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- The employer can discharge the worker.
- The worker and the employer believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.

Example 1 – A complainant (“CP”) provides computer consulting services to businesses. The Respondent contracts with CP to produce a computer database for a flat rate. CP produces the database at his own place of business, on his own equipment, and delivers the finished product to the Respondent. In these circumstances, CP is an independent contractor.

Example 2 - A staffing firm hires CP and sends her to perform a long- term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client s premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm, which pays her and bills the client. In these circumstances, despite the statement in the contract that CP is an independent contractor, she is an employee of both the staffing firm and the client.