

SECTION 6

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Whether you were an “employee” or an “independent contractor” can be critical in determining whether you are eligible for unemployment benefits. If you are considered an independent contractor you will not be approved to receive benefits. However, just because you are told that you are an independent contractor and treated as one by your employer does not necessarily disqualify you from unemployment benefits.

If you believe you’ve been unfairly misclassified as an independent contractor and it is preventing you from receiving unemployment insurance benefits, you should request a hearing.

The law says that if a person performs services under the “**direction and control**” of another person, then there is an “employee-employee” relationship and the worker is covered by the law. The UIA decision-maker will apply what is called the **Economic Reality Test** to determine whether you are in fact an employee. Under this test, the judge or other decision maker will examine a number of factors to determine your employment status:

- Whether the work performed is an integral part of the employer’s business;
- Whether the worker depends upon the wages for living expenses; works almost exclusively for one company or performs professional services elsewhere;
- Whether the worker brings their own equipment, materials, etc.;
- Whether the employer will incur liability if the relationship terminates before the end date mutually agreed on;
- Whether the worker holds him/herself out to the public as able to perform the same tasks;
- Whether the work involved is customarily performed by an independent contractor;
- Whether the services are part of a larger common task; and
- The degree to which the employer exerts control over how the work is done, how the employer pays for the work performed, the degree to which the employer controls maintenance of discipline, and the right to hire and fire employees.

For example, if a painter advertises in the local newspaper in order to get jobs, maintains her own brushes, ladders, and drop cloths, and buys her own paint—as well as maintains her own business hours and is paid by the job, she’ll probably be considered an independent contractor.

But another painter, who comes to work every day at the same company, uses paint, brushes, ladders, and other materials provided by the company. The company also sets the worker’s hours, and the worker does not do any painting work for anyone else because the job is full-time. This painter is an employee of the company. This would be true even if the company and the worker consider the worker to be an independent contractor, and even if they have a written “contract.”

Remember that no one factor of this test answers the question of whether one is an employee or an independent contractor. The judge will consider the “**totality of the circumstances surrounding the work and the employer’s business operation.**”

A hospital claimed that a doctor was an independent contractor because he did not receive fringe benefits, no taxes were withheld from his paycheck, and he was not subject to any control in the manner in which he performed his professional services for any given patient. The court found that he was an employee, however, because he could only assess fees within the limits prescribed by the hospital, was obligated to work at such times as directed by the hospital, understood that he could not perform services elsewhere, and his services performed were a part of a larger common task (that is, giving care to those in need). Furthermore, the equipment, medication and instruments he used to perform his job were provided by the hospital.

Be ready to demonstrate any fact that you think helps demonstrate you were an employee and not an independent contractor. A few precedents that may apply to your situation:

- **Salespeople** have been considered not to be employees when they have no set hours, sales quotas, or specific territories to cover; are paid only on commission and bonuses; are not required to be at the office; use their own sales equipment and their own transportation; and are generally not under the control or direction of the employer as to how they do their work.
- **Truck owner-operators** have been ruled employees when they work exclusively or almost exclusively for one company. This is the case even for truck owners who consider themselves to be independent contractors.

If you believe that you have been **misclassified** as an independent contractor, but are really an employee, you should request a hearing before an Administrative Law Judge.

If you are aware of a business that misclassifies their workers as independent contractors, contact the Unemployment Insurance Agency's **Fraud Hotline at 1-800-822-1122**. You can remain anonymous.