

**FEDERAL AND MINNESOTA STATE EMPLOYEE CLASSIFICATION
EMPLOYEE V. INDEPENDENT CONTRACTOR**

This document is meant to serve as a guide to the various laws affected by employee classification. Every situation is evaluated on a case-by-case basis. Laws are subject to change, and up to interpretation by the judiciary. Furthermore, federal decisions from different judicial circuits are not controlling, but merely persuasive. Minnesota sits in the Eighth Circuit,

<http://ca8.uscourts.gov>

Document updated by Sarah A. Howes, J.D. in October 2015.

Many agencies have laws related to classification of staff. Below are the agencies, laws, and classification tests currently used.

MN Department of Employment and Economic Development (DEED)

Law: Unemployment Insurance

<http://mn.gov/deed>

Description

“The Minnesota Unemployment Insurance (UI) Program provides a temporary partial wage replacement to those Minnesota workers who become unemployed through no fault of their own.” Employers are only required to pay UI taxes for employees. DEED has recently been auditing theaters in Minnesota, ruling that performers and designers should be classified as employees, not contractors. Most of these audits have been overturned in favor of the theaters in appeals.

Test

1. The right to control the means and manner of performance
2. The mode of payment
3. The furnishing of material or tools
4. The control of the premises where the work is done
5. The right of the employer to discharge

MN Department of Labor and Industry (DLI)

Laws: Minnesota Fair Labor Standards Act and Workers’ Compensation

<http://www.dli.mn.gov>

Description

Employees, whether part-time or full-time, must receive a minimum wage and overtime pay that is set by law. Employees receive benefits for injuries or illnesses caused or made worse by the workplace, regardless of fault by either the employer or employee. Employers must provide their employees with Workers’ Compensation insurance. Independent Contractors must provide their own Workers’ Compensation insurance.

Test

1. The right to control the means and manner of performance
2. The mode of payment
3. The furnishing of material or tools
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MN Department of Revenue (MDOR)

Law: State Income Tax

<http://www.revenue.state.mn.us>

Description

Employers must “withhold and deposit income taxes, Social Security taxes and Medicare taxes.”

Test

1. Behavior Control
2. Financial Control
3. Relationship of the Parties

U.S. Equal Employment Opportunity Commission (EEOC)

Law: Title VII

<http://www.eeoc.gov>

Description

Title VII of the Civil Rights Act of 1964 protects against many offenses, including sexual harassment. It applies to both government agencies and private businesses who employ more than 15 employees. The law prohibits against unwelcome sexual advances that interfere with work performance, one’s employment, or that creates a hostile work environment.

Note for contractors: Despite claims under Title VII require employee classification, EEO counselors are instructed to facilitate a resolution between a worker and a government agency. *See Workbook: Independent Contractor v. Employee (2012).*

Test

Common Law Agency Test:

1. The hiring party's right to control the manner and means by which the product is accomplished
2. The skill required
3. The source of the instrumentalities and tools
4. The location of the work
5. The duration of the relationship between the parties
6. Whether the hiring party has the right to assign additional projects to the hired party
7. The extent of the hired party's discretion over when and how long to work
8. The method of payment
9. The hired party's role in hiring and paying assistants
10. Whether the work is part of the regular business of the hiring party
11. Whether the hiring party is in business
12. The provision of employee benefits
13. The tax treatment of the hired party.

Note: No one factor will prevail alone.

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U.S. Department of Labor (DOL)

Laws: Federal Minimum Wage Law and Federal Family and Medical Leave Act

<http://www.dol.gov>

Description

The Minimum Wage Law applies to government agencies, schools, and companies that engage in interstate commerce (typically \$500,000 in annual volume). Non-exempt employees must be provided a minimum wage (currently \$7.25) and be provided overtime pay.

The Family and Medical Leave Act entitles a worker to unpaid, job-protected leave for certain family and medical reasons. A worker's health insurance may not be canceled during the leave. Applies to employees whose employer employs fifty or more employees within 75 miles of the worksite.

Test

Economic Realities Factors typically include:

1. The extent to which the work performed is an integral part of the employer's business
2. The worker's opportunity for sharing or loss depending on his or her managerial skills
3. The extent of the relative investments of the employer and the worker
4. Whether the work performed requires special skills and initiative
5. The permanency of the relationship
6. The degree of control exercised or retained by the employer

Note: Some courts have considered other factors.

U.S. Copyright Office

Law: U.S. Copyright Act

<http://www.copyright.gov>

Description

Under the work made for hire doctrine, the copyrighted products of an employee are owned by his or her employer. Note: certain non-employees (aka statutory employees) may also be subject to this doctrine if their work is one of the enumerated works and an agreement is signed.

Test

All Agency Law Factors (above) that are applicable to the given facts are considered by a court for post-1978 works, but these are considered in most circumstances:

1. The hiring party's right to control the manner and means of creation
2. The skill required
3. The provision of employee benefits
4. The tax treatment of the hired party
5. Whether the hiring party has the right to assign additional projects to the hired party

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Internal Revenue Service (IRS)

Law: Federal Income Tax

<https://www.irs.gov>

Description

Both the federal government and your state government are allowed to tax income. Classification is used to determine whether Schedule C or employer tax withholding is required.

Test

1. Behavior Control
2. Financial Control
3. Relationship of the Parties

National Labor Relations Board (NLRB)

Law: Federal Labor Laws

<https://www.nlr.gov>

Description

The NLRB is the government authority that regulates collective bargaining and the formation of labor unions.

All workers are afforded certain collective bargaining rights, including section 7 rights to engage in concerted activity, but only employees are afforded the full protections of this law.

Test

Common Law Agency

1. A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - b) whether or not the one employed is engaged in a distinct occupation or
 - c) business;
 - d) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - e) the skill required in the particular occupation;
whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
the length of time for which the person is employed;
the method of payment, whether by the time or by the job;
whether or not the work is a part of the regular business of the employer;
whether or not the parties believe they are creating the relation of master and servant; and
whether the principal is or is not in business.

Restatement (Second) of Agency § 220 (1958).

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Relevant statutes and case law, by agency and law

MN Unemployment Insurance

Statute: Minn. Stat. § 268.

Cases: *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (1964) (“the most important factor considered in light of the nature of the work is the right of the employer to control the means and manner of the performance”); *St. Croix Sensory, Inc., v. DEED*, 785 N.W.2d 796 (Minn. Ct. App. 2010).

Minnesota Fair Labor Standards Act and Workers Compensation

Statute: The law exempts certain workers. *See* Minn. Stat. § 177.23, subd. 7.

Statute: Minn. Stat. § 176.011, subd. 9.

Case: *Iverson v. Independent School District*, 257 N.W.2d 573 (1977) (finding an independent contractor)

State Income Tax

Statute: Minn. Stat. § 290.92, subd. 1(3).

Agency Doc: Withholding Fact Sheet 8 (“If you are generally in control of (or have the right to control) these factors, the worker is most likely your employee.”)

Case: *Hetland v. Comm’n of Revenue*, 2011 WL 1045457 (Minn. Tax Regular Div. 2011) (finding employees)

Equal Employment Opportunity Title VII

Statute: 42 U.S.C. § 2000e(f) (Title VII)

Cases: *Farlow v. Wachovia Bk. of North Carolina*, 259 F.3d 309, 313 (4th Cir. 2001) (finding a contractor) (“We place greater weight on: 1) the financial relationship between the parties in which she was paid not a salary but only in response to her bills, for services actually rendered; 2) the financial relationship between the parties in which Wachovia did not withhold or pay any taxes that are incident to an employment relationship; 3) the financial relationship between the parties in which Farlow did not receive employee benefits such as medical and life insurance; 4) Farlow's filing of income tax returns under a self-employed status; 5) the express intent of the parties as indicated in the contract Farlow signed labeling her as an independent contractor; 6) that Farlow did not work exclusively for Wachovia during her working relationship with it; and (7) that Wachovia exercised no control over the manner of her work.”)

Federal Minimum Wage Law and Federal Family and Medical Leave Act

Statute: Fair Labor Standards Act, 29 U.S.C. § 203 (e)(1)

Cases: *See, e.g., Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (“To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”)

See DOL, Administrator’s Interpretation No. 2015-1 (2015).

Statute: 29 U.S.C. § 2611(3)

Cases: *Bonnetts v. Arctic Express, Inc.*, 7 F. Supp. 2d 977 (S.D. Ohio 1998).

U.S. Copyright Act

Statute: 17 U.S.C. § 101(1),(2)

Cases: *Community for Creative Non-Violence v. Reid v. Reid*, 490 U.S. 730 (1989) (post-1978 works) (Agency Law Test); *Marvel v. Kirby* 726 F.3d 119 (2d Cir. 2013) (pre-1978 works) (“Instance and Expense Test”).

Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992) (nothing that at the time “every case since Reid that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.)

Federal Income Tax

Agency Doc: Topic 762 – Independent Contractor v. Employee

Cases: *Robert Patrick Day v. Comm’*, 80 T.C.M. 834 (2000); *Gierek v. Commissioner*, 66 T.C.M. 1866 (1993) (finding employee) (“doubtful questions should be resolved in favor of employment in order to accomplish the remedial purposes of the legislation involved).

National Labor Relations Act

Statute: 29 U.S.C. § 152(3)

Cases: *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009)

See generally Micah Prieb Stolfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach* 68 Wash. & Lee L. Rev 311 (2011) (providing a history and illustrating various attempts to address misclassification, including Pres. Obama’s 2011 proposed budget to increase the DOL staff to identify employers who misclassify employees).