

Independent Contractor Definition Used by ESD **Extract from the Employment Security Status Manual**

Two sets of exception tests found in [RCW 50.04.140\(1\)\(a-c\) or \(2\)\(a-f\)](#), have been written to provide exemption for independent contractors, **other than** those in the building and electrical trades (See [RCW 50.04.145](#) and [Section 301](#) of this manual concerning building and electrical trades contractors).

In applying this section of the law, keep in mind the two sets of tests have been stated conjunctively which means that either **all** three of the first set or **all** six of the second set of tests **must** be met in order for the exemption to be met.

RCW 50.04.100 defines employment. Whether someone is an employee or contractor, you must first determine whether the individual is in employment. "Service" or "services," as used in the law, generally includes any act performed for the benefit of a business under an arrangement or agreement whereby such act was to have been performed.

First Exception Test

The first three sections of the law, [RCW 50.04.140\(1\)\(a-c\)](#), should be applied first to prove independence of the subcontractor.

Employee Control

"(1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service; both under his or her contract of service and in fact;

The matter of "control" rests almost exclusively within the power of the employer. The employer can decide to retain the right of control or not.

If the right to supervise and direct services is available, even though not exercised, the fact that it may have been contractually agreed upon is sufficient to rule out exemption. Even the right to hire and fire is a basic element of control.

The "right to control" concerns the control and direction over the manner, method, and means by which the service is performed and not control insofar as the able manner in which the job should be performed. The right to inspect, etc., would not be "control" in the sense the statute uses the word.

Factors to look for in determining if "control" exists (no one particular factor is more important than any other):

How an individual acquires work:

- Bid
- Advertising
- Who contacted whom

The contract:

- Written or oral
- Work to be performed
- Terms of payment
- Termination of the relationship, with or without cause
- Continuing liability upon termination
- Standard required for performance of contract
- Reservation of right to inspect and correct work

Furnishing of materials:

- How do materials get to the job site?
- Does individual provide his or her own materials; if so, are they charged back to the person/company that hired the individual?

Necessary equipment:

- Who provides equipment?
- What equipment is required?
- Does employer have the necessary equipment or does he/she rent it out or sell it to the individual hired to do the job?

Terms of contract:

- Can the contract be delegated to someone else?
- Can other individuals be employed by the individual to assist?
- Who sets the wages?
- Who sets the hours of work?
- Can the individual do other jobs for other individuals/companies at the same time?
- Have any instructions been given as to when the job must be completed?
- Are specific instructions given as to how the job must be performed or as to movement to various jobs? (Can the person be pulled from one job and sent to another?)
- Are there any company rules regarding the handling of the materials, or their storage or removal, etc.?
- Is detailed accounting required regarding the work performed? (If so, upon whose forms?)
- How is the individual performing the service(s) paid?

Factors that establish **freedom from control include:**

- Furnish own tools
- Power to delegate responsibilities for actual performance of work
- Right to employ individuals to do the job or help with same
- Set own hours of work; beginning and ending, lunch periods, etc.
- Contract cannot be terminated without cause (continuing liability for performance)

- Determine wage scale of helpers
- Complete job on own time schedule
- Free to perform work for others at the same time
- Not necessary to follow specific instructions in the performance of the work
- Has a degree of skill which the employer probably does not have; **and**
- Employs helpers, pays their wages and makes deductions on his/her own.

Factors that establish a **lack of freedom from control** include:

- Performance of services at a required locality
- May be dismissed at any time with or without cause
- Direct performance of necessary labor or designated jobs
- Paid on an hourly basis
- Individual does not have own tools outside of a few basic items
- Required to observe employer's rules governing access to materials or removal of same
- Acquired materials from employer, upon his/her approval and at his/her direction (perhaps uses employer's forms)
- Directed as to hours, time off, lunch hour, etc.
- Required to observe employer's accounting practices; **and**
- Not allowed to do work for others at the same time.

Outside the Usual Course or Places of Business

"...(1)(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and..."

The second test contains two parts separated by the word "**or**." Only one of the two parts must be met to pass the entire (second) test.

"Outside the usual course of business" means that services performed by an individual must be of a different nature than the services normally performed by the employer. Employers are very often involved in more than one specific activity. For instance, a tavern may provide music, at least on a semi-regular basis, as well as alcoholic beverages. The serving of the beverages may be the principal activity, but providing music more than once or twice a year for special occasions is also considered part of the usual course of business.

"Place of business" normally refers to the actual physical place of business as it is usually thought of. However, there are cases where job sites have been ruled places of business, generally for the prime contractor, but sometimes for the subcontractor.

The need to perform all service outside of all places of business of the enterprise does not include such things as attendance at training or management meetings; or the receiving and delivering of sales orders. The necessity for the individual to perform additional services, such

as loading or unloading a truck on the business premises of the employer, could constitute employment.

If the service performed is outside of the usual course of the business, it would seem to go a long way toward establishing that the individual is in fact an independent contractor. If the services are performed on the actual premises of the employer, it is indicative that the individual may be under direction and control, and not independently established.

Independently Established

"...(1)(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service."

The service rendered by an individual must be of the same nature as that person customarily pursues as an independently established business. The business should have an existence independent of the services under consideration, even though it comprises the whole of which such services are a part. The independently established business should be identifiable so the business could continue to operate should the relationship between the employer and the individual cease.

Evidence of independence may include:

- Possesses a valid business license
- Advertises services to the public
- Has other customers or clients
- Has an established office or place of business; **and**
- Stands to gain or lose from the completion of the contract.

The following is a list of other factors to examine to determine if an individual is independently established:

Physical possessions of the individual and expenses involved:

- Does the individual have a separate shop or office?
- Does the individual possess all necessary equipment?
- Does the individual own his/her own trucks, etc.?
- Does the individual invest his or her own capital?
- Does the individual advertise through any media?

Employment of others, ability to work for others:

- Does the individual have the right to employ helpers?
- Does the individual pay helpers at a preset scale (union, etc.)?
- Does the individual withhold necessary taxes?
- Does the individual provide L & I coverage, if applicable?
- Can the individual contract with or work for others at the same time?
- Does the individual normally do many different jobs during the period in question or has the individual worked for only one individual or company?

The contract:

- Does the individual incur a financial risk?
- Is there a legal, binding contract requiring performance on the part of the contractor?
- Can the contract be terminated?
- Are specific instructions for actual work given in fact or required in the contract?
- Does the contract provide for a right of inspection?
- How is payment to be made — lump sum or and under what other conditions?

Alternate Exception Test

The next three sections of the law, [RCW 50.04.140\(2\)\(d-f\)](#), allows a closer examination of the relationship and are provided as an alternative to the first three sections.

The first three sections of the definition are the same as those in the first test.

Filing with the IRS

“(2)(d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and...a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and...”

Factors that determine if the individual meets the requirements are:

- Does the individual pay Social Security on self and those employed?
- Does the individual pay federal income tax as a self-employed individual in the type of business the individual operates?

Has a UBI Number

“(2)(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and...”

The independent contractor must have an established account with the Department of Revenue (and other appropriate state agencies) for operating the type of business. The requirements of registration by each state agency may allow business operations for a limited length of time before all registrations are completed. The individual must apply as required by each agency's statutes.

Maintaining Own Books and Records

"...(2)(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting."

This is related to test (2)(d) in that an individual should maintain separate records and books to enable the proper filing a schedule of expenses with the Internal Revenue Service (IRS). Separate records and books show the two businesses to be totally separate ventures, completely unrelated except for the contract between them.

RCW 50.04.100

Employment.

"Employment", subject only to the other provisions of this title, means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

Except as provided by RCW [50.04.145](#), personal services performed for an employing unit by one or more contractors or subcontractors acting individually or as a partnership, which do not meet the provisions of RCW [50.04.140](#), shall be considered employment of the employing unit: PROVIDED, HOWEVER, That such contractor or subcontractor shall be an employer under the provisions of this title in respect to personal services performed by individuals for such contractor or subcontractor.

RCW 50.04.140

Employment — Exception tests.

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

(1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

(2) Or as a separate alternative, it shall not constitute employment subject to this title if it is shown that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation,

profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.