



Different Tests for Defining “Employee” for Different Purposes

The following chart shows the different tests used for purposes of federal and state statutes to determine an individual’s status as an employee or independent contractor.¹ References to a state statute are references to the state’s unemployment statute.²

Statute and/or State	Test to Determine an Individual’s Status
<ul style="list-style-type: none"> • Standard for the U.S. Supreme Court, EEOC and a majority of Federal Circuits • Affordable Care Act – Employer Mandate • Age Discrimination in Employment Act of 1967 • American with Disabilities Act of 1990 (majority of courts) • Title VII of the Civil Rights Act of 1964 • Copyright Act of 1976 • Employee Retirement Income Security Act of 1974 • Equal Pay Act of 1963 • Fair Credit Reporting Act • Federal Obscenity Statute • Federal Tort Claims Act • Immigration and Nationality Act • National Labor Relations Act • Social Security Act • Federal Income and Employment Taxes • When no Statute or Regulation Applies • Alabama • Arizona • California 	<p align="center"><u>Common Law Test</u></p> <p>The Restatement (Second) of Agency and the Internal Revenue Service 20-Factor Test are examples of the primary common law tests.</p> <p><u>Common Law Test (Restatement (Second) of Agency):</u></p> <p>In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:</p> <ul style="list-style-type: none"> (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 business; (c) 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; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is a part of the regular business of the employer; (i) Whether or not the parties believe they are creating the relation of master and servant; and (j) Whether the principal is or is not in business. <p>Restat. 2d of Agency, § 220(2).</p> <p><u>Internal Revenue Service 20-Factor Test:</u></p> <ul style="list-style-type: none"> (1) No instructions. An independent contractor does not receive instructions from the engaging entity as to how to accomplish a job. (2) No training. An independent contractor does not receive training from the engaging entity.

¹ Some Federal Circuit Courts disagree about which test should be applied to some of the referenced statutes.

² The summaries of the tests identified in the chart are stated generally; the specific test followed by each statute may contain slight variations.

<ul style="list-style-type: none"> • District of Columbia • Florida • Iowa • Kansas • Kentucky • Michigan³ • Minnesota • Mississippi • Missouri • New York • North Carolina⁴ • North Dakota • Ohio • Rhode Island⁵ • South Carolina • Texas • Virginia⁶ 	<p>(3) No integration. The engaging entity’s operations or ability to be successful does not depend on the service of independent contractors. By contrast, the factor weighs in favor of employee status if the workers constitute a critical and essential part of the taxpayer’s business. <i>Bartels v. Birmingham</i>, 332 U.S. 126 (1947).</p> <p>(4) Services do not have to be rendered personally. Because independent contractors are in business for themselves and are contracted with to provide a certain result, they have the right to hire others to assist them.</p> <p>(5) Control their own assistants. Independent contractors retain the right to control the work activities of their assistants.</p> <p>(6) Not a continuing relationship. Unlike employees, independent contractors generally do not have a continuing working relationship with the engaging company, although the relationship may be frequent, by means of multiple engagements.</p> <p>(7) Work hours are set by the independent contractor. An independent contractor has control over the hours worked for accomplishing the result.</p> <p>(8) Time to pursue other work. An independent contractor is free to work when and for whom the individual chooses. A requirement to work full-time indicates control by the engaging entity.</p> <p>(9) Job location. Unless the services cannot be performed elsewhere, an independent contractor has the right to choose where the work will be done.</p> <p>(10) No requirements on the order or sequence of work. Independent contractors have control over how a result is accomplished and, therefore, determine the order and sequence in which their work will be performed.</p> <p>(11) No required reports. Independent contractors are accountable for accomplishing the objective only; interim or progress reports are not required.</p> <p>(12) Payment for the result. Independent contractors are paid by the job and are not compensated based on the time spent performing the work.</p> <p>(13) Business expenses. Independent contractors are responsible for their incidental expenses.</p> <p>(14) Own tools. As business owners, independent contractors provide their own equipment and tools to do the job.</p> <p>(15) Significant investment. An independent contractor’s investment in his or her trade is bona fide, essential, and adequate.</p> <p>(16) Possible profit or loss. Independent contractors bear the risk of realizing a profit or incurring a loss.</p> <p>(17) Working for multiple firms. Independent contractors are free to work for more than one firm at a time.</p> <p>(18) Services available to the general public. Independent contractors make their services available to the general public.</p> <p>(19) Limited right to discharge. An independent contractor is not terminable at will, but may be terminated only for failure to comply</p>
--	---

³ Michigan follows the IRS 20-factor common law test.

⁴ North Carolina follows the IRS 20-factor common law test.

⁵ Rhode Island follows the IRS 20-factor common law test.

⁶ Virginia follows the IRS 20-factor common law test.

	<p>with the terms of the contract.</p> <p>(20) Liability for noncompletion. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract.</p> <p>Internal Revenue Manual, 4600 Employment Tax Procedures, Exhibit 4640-1.</p>
--	--

Statute and/or State	Test to Determine an Individual’s Status
<ul style="list-style-type: none"> • Affordable Care Act – Notice Requirement • Fair Labor Standards Act of 1938⁷ • Family and Medical Leave Act of 1993⁸ • Migrant and Seasonal Agricultural Worker Protection Act⁹ • Equal Pay Act of 1963 	<p style="text-align: center;"><u>Economic Realities Test</u></p> <p>Courts apply different versions of the economic realities test, but each version examines the “economic reality” of the relationship.</p> <p><u>Economic Realities Test Adopted by DOL:</u></p> <ol style="list-style-type: none"> (1) The extent to which the services rendered are an integral part of the principal's business. (2) The permanency of the relationship. (3) The amount of the alleged contractor's investment in facilities and equipment. (4) The nature and degree of control by the principal. (5) The alleged contractor's opportunities for profit and loss. (6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor. (7) The degree of independent business organization and operation. <p><u>Four-Factor Economic Realities Test:</u></p> <ol style="list-style-type: none"> (1) Had the power to hire and fire the employees; (2) Supervised and controlled employee work schedules or conditions of employment; (3) Determined the rate and method of payment; and (4) Maintained employment records. <p><i>E.g., Herman v. RSR Sec. Servs., 172 F.3d 132 (2nd Cir. 1999).</i></p> <p><u>Five-Factor Economic Realities Test:</u></p> <ol style="list-style-type: none"> (1) The degree of control exerted by the alleged employer over the worker; (2) The worker’s opportunity for profit or loss; (3) The worker’s investment in the business; (4) The permanence of the working relationship; and (5) The degree of skill required to perform the work. <p><i>E.g., Johnson v. Unified Gov’t of Wyandotte County/Kansas City, 371 F.3d 723 (10th Cir. 2004).</i></p>

⁷ Each Federal Circuit Court may apply a slightly different version of the economic realities test.

⁸ The FMLA adopts the FLSA’s definition of “employee.”

⁹ The AWPA adopts the FLSA’s definition of “employee.”

Statute and/or State	Test to Determine an Individual's Status
<ul style="list-style-type: none"> • Age Discrimination in Employment Act of 1967 • American with Disabilities Act of 1990 • Title VII of the Civil Rights Act of 1964 • Family and Medical Leave Act of 1993 (minority of courts) 	<p style="text-align: center;"><u>Hybrid Test</u></p> <p>Some Federal Circuit Courts apply a hybrid test for purposes of antidiscrimination statutes.</p> <p><u>Hybrid Test #1:</u></p> <p>[H]ybrid economic realities/common law control test that focuses on whether the alleged employer had:</p> <ul style="list-style-type: none"> • the right to hire and fire; • the right to supervise; • the right to set the work schedule; • paid the employee's salary; • withheld taxes; • provided benefits; and • set the terms and conditions of employment. <p><i>E.g., Hathcock v. Acme Truck Lines, Inc.</i>, 262 F.3d 522 (5th Cir. Tex. 2001).</p> <p><u>Hybrid Test #2:</u></p> <p>The court analyzes:</p> <ol style="list-style-type: none"> (1) The kind of occupation at issue, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) The skill required in the particular occupation; (3) Whether the employer or the employee furnishes the equipment used and the place of work; (4) The length of time the individual has worked; (5) The method of payment, whether by time or by job; (6) The manner in which the work relationship is terminated; (7) Whether annual leave is afforded; (8) Whether the work is an integral part of the business of the employer; (9) Whether the worker accumulates retirement benefits; (10) Whether the employer pays social security taxes; and (11) The intention of the parties. <p><i>E.g., Sizova v. Nat'l Inst. of Stds. & Tech.</i>, 282 F.3d 1320 (10th Cir. 2002).</p>

Statute and/or State	Test to Determine an Individual's Status
<ul style="list-style-type: none"> • Alaska • Connecticut • Delaware • Hawaii • Illinois 	<p style="text-align: center;"><u>ABC Test</u></p> <p><u>ABC Test #1:</u></p> <p>[U]nless the context otherwise requires, “employment” means service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that:</p> <p>(A) the individual has been and will continue to be free from control and</p>

<ul style="list-style-type: none"> • Indiana¹⁰ • Louisiana • Maryland¹¹ • Massachusetts • Nebraska • Nevada • New Hampshire • New Jersey • New Mexico • Tennessee • Vermont • Washington¹² • West Virginia 	<p>direction in connection with the performance of the service, both under the individual’s contract for the performance of service and in fact;</p> <p>(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed;</p> <p>and</p> <p>(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.</p>
<ul style="list-style-type: none"> • Arkansas 	<p><u>ABC Test #2:</u></p> <p>Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:</p> <p>(1) The individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and</p> <p>(2)</p> <p>(A) The service is performed <u>either</u> outside the usual course of the business for which the service is performed <u>or</u> is performed outside all the places of business of the enterprise for which the service is performed; <u>or</u></p> <p>(B) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.</p>
<ul style="list-style-type: none"> • Oklahoma 	<p><u>ABC Test #3:</u></p> <p>Service performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to the Employment Security Act of 1980 unless and until it is shown to the satisfaction of the Commissioner that:</p> <p>(1) Such individual has been and will continue to be free from control and direction over the performance of the services, both under the contract of hire and in fact; and</p>

¹⁰ Element C may be satisfied by establishing that the individual is customarily engaged in an independently established trade, occupation, profession or business; *or* is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual’s own time and effort. Burns Ind. Code Ann. § 22-4-8-1(b).

¹¹ Element B may be satisfied by either establishing that the individual’s work is:

- (i) outside of the usual course of business of the person for whom the work is performed; or
- (ii) performed outside of any place of business of the person for whom the work is performed. Md. LABOR AND EMPLOYMENT Code Ann. § 8-205(a)(3).

¹² As a separate alternative, an individual may satisfy a six-factor statutory test.

	<p>(2)</p> <p>(A) Such individual is customarily engaged in an independently established business; or</p> <p>(B) Such service is outside the usual course of the business for which the service is performed and that the service is performed outside of all the places of business of the enterprise for which the service is performed.</p>
<ul style="list-style-type: none"> Wyoming 	<p><u>ABC Test #4:</u></p> <p>An individual who performs services for wages is an employee for purposes of this act unless it is shown that the individual:</p> <p>(A) Is free from control or direction over the details of the performance of services by contract and by fact;</p> <p>(B) Represents his services to the public as a self-employed individual or an independent contractor; and</p> <p>(C) May substitute another individual to perform his services.</p>

Statute and/or State	Test to Determine an Individual's Status
<ul style="list-style-type: none"> Colorado Georgia Idaho Oregon¹³ Pennsylvania South Dakota Utah 	<p style="text-align: center;"><u>AB Test</u></p> <p>[S]ervice performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that:</p> <p>(A) such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and</p> <p>(B) such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.</p>

Statute and/or State	Test to Determine an Individual's Status
<ul style="list-style-type: none"> Montana 	<p style="text-align: center;"><u>Exemption Certificate</u></p> <p>“Independent contractor” means an individual working under an independent contractor exemption certificate.</p> <p>To obtain an independent contractor exemption certificate, the applicant shall swear to and acknowledge the following:</p> <p>(i) that the applicant has been and will continue to be free from control or direction over the performance of the person’s own services, both under contract and in fact; and</p> <p>(ii) that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department.</p> <p>Mont. Code Ann. § 39-71-417(1)(a)(i), (4)(a).</p>

¹³ Oregon exempts an individual from being required to satisfy the (B) prong if the individual files a schedule F as part of his or her income tax return and the individual provides farm labor or farm services. Additionally, Oregon’s test requires individuals to be licensed, only if their profession requires a license.

Statute and/or State	Test to Determine an Individual's Status
<ul style="list-style-type: none"> • Maine 	<p style="text-align: center;"><u>Statutory Test</u></p> <p><u>Statutory Test #1:</u></p> <p>(1) The following criteria must be met:</p> <ul style="list-style-type: none"> (a) The individual has the essential right to control the means and progress of the work except as to final results; (b) The individual is customarily engaged in an independently established trade, occupation, profession or business; (c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity; (d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and (e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and <p>(2) At least 3 of the following criteria must be met:</p> <ul style="list-style-type: none"> (a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work; (b) The individual is not required to work exclusively for the other individual or entity; (c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work; (d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work; (e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual; (f) The work is outside the usual course of business for which the service is performed; or (g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service. <p>26 M.R.S. § 1043(11)(E).</p>
<ul style="list-style-type: none"> • Washington¹⁴ 	<p><u>Statutory Test #2:</u></p> <p>It shall not constitute employment if it is shown that:</p> <ul style="list-style-type: none"> (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

¹⁴ As a separate alternative, an individual may satisfy an “ABC” test.

	<p>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</p> <p>(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</p> <p>(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</p> <p>(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</p> <p>(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.</p> <p>Wash. Rev. Code Ann. § 50.04.140(2).</p>
<ul style="list-style-type: none"> • Wisconsin 	<p><u>Statutory Test #3:</u></p> <p>(bm) [An individual is an independent contractor] if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact:</p> <p>(1) The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors:</p> <ul style="list-style-type: none"> (a) Whether the individual is required to comply with instructions concerning how to perform the services. (b) Whether the individual receives training from the employing unit with respect to the services performed. (c) Whether the individual is required to personally perform the services. (d) Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit. (e) Whether the individual is required to make oral or written reports to the employing unit on a regular basis. <p>(2) The individual meets 6 or more of the following conditions:</p> <ul style="list-style-type: none"> (a) The individual advertises or otherwise affirmatively holds

	<p>himself or herself out as being in business.</p> <ul style="list-style-type: none">(b) The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.(c) The individual operates under multiple contracts with one or more employing units to perform specific services.(d) The individual incurs the main expenses related to the services that he or she performs under contract.(e) The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.(f) The services performed by the individual do not directly relate to the employing unit retaining the services.(g) The individual may realize a profit or suffer a loss under contracts to perform such services.(h) The individual has recurring business liabilities or obligations.(i) The individual is not economically dependent upon a particular employing unit with respect to the services being performed. <p>Wis. Stat. § 108.02(12)(bm).</p>
--	--