

5200.0221 INDEPENDENT CONTRACTOR.

An independent contractor is not an employee. Parts 5224.0330 and 5224.0340 shall be used to determine whether an employment relation exists, except that control of the method and manner of performance is not the most important factor. All factors must be weighed to determine whether the worker is economically dependent upon the business to which the worker provides services.

Statutory Authority: *MS s 177.28; 181A.12*

History: *11 SR 1740*

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5224.0330 CONTROL OF METHOD AND MANNER OF PERFORMANCE.

Subpart 1. **Generally.** The most important factor in determining whether a person is an independent contractor is the degree of control which the purported employer exerts over the manner and method of performing the work contracted. The more control there is the more likely the person is an employee and not an independent contractor. Subparts 2 to 14 describe criteria for determining if there is control over the method of performing or executing services. The total circumstances, including the practices and the customs of the industry, must be considered to determine if control is present.

Subp. 2. **Authority over individual's assistants.** Control over the individual is indicated when the employing unit hires and pays the individual's assistants and supervises the details of the assistants' work.

Subp. 3. **Compliance with instructions.** Control is indicated when an individual is required to comply with detailed instructions about when, where, and how he or she is to work including the order or sequence in which the service is to be performed. Mere suggestions as to detail, or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, the control is present if the employing unit has the right to instruct or direct the methods for doing the work and the results achieved. Instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished. However, instructions required by state or federal law or regulation or general instructions passed on by the employing unit from a client or customer, do not evince control.

Subp. 4. **Oral or written reports.** Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employing unit. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job, or the reports are needed to determine compliance with the terms of a contract. Completion of receipts, invoices, and other forms customarily used in the particular type of business activity or required by law does not constitute written reports.

Subp. 5. **Place of work.** Control is indicated if work which could be done elsewhere is done on the employing units premises, especially when the work could be done elsewhere. When work is done off the premises, freedom from control is indicated except in occupations where the services are necessarily performed away from the premises of the employing unit.

Subp. 6. **Personal performance.** Control is indicated if the services must be personally rendered to the employing unit. Personal performance of a very specialized

work, when the worker is hired on the basis of professional reputation, as in the case of a consultant known in the academic and professional circles to be an authority in the field, is a less reliable indicator of control. Lack of control is indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

Subp. 7. **Existence of continuing relationship.** The existence of a continuing relationship between an individual and the person for whom he or she performs services indicates the existence of an employment relationship. Continuing services may include work performed at frequently recurring, though somewhat irregular intervals, either on call of the employing unit or whenever work is available.

Subp. 8. **Set hours of work.** The establishment of set hours of work by the employing unit indicates control. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times indicates control.

Subp. 9. **Training.** Training of an individual by an experienced employee, by required attendance at meetings, and by other methods, indicates control, especially if the training is given periodically or at frequent intervals.

Subp. 10. **Amount of time.** Control is indicated where the worker must devote full time to the activity. Full time does not necessarily mean an eight-hour day or a five- or six-day week. Its meaning may vary with the intent of the parties, the nature of the occupation, and customs in the locality. Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels the person to devote all working time to that business, or the person may not be permitted to work for anyone else.

Subp. 11. **Simultaneous contracts.** If an individual works for a number of persons or firms at the same time, lack of control is indicated.

Subp. 12. **Tools and materials.** The furnishing of tools, materials, and supplies by the employing unit indicates control over the worker. When the worker furnishes these items, lack of control is indicated. Lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

Subp. 13. **Expense reimbursement.** Payment by the employing unit of either the worker's approved business or traveling expenses, or both, indicates control over the worker. A lack of control is indicated when the worker is paid on a job basis and is responsible for all incidental expenses.

Subp. 14. **Satisfying requirements of regulatory and licensing agencies.** Control is not indicated where an employing unit is required to enforce standards or restrictions imposed by regulatory or licensing agencies.

Statutory Authority: *MS s 176.041; 176.83*

History: *10 SR 1852*

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5224.0340 INDEPENDENT CONTRACTOR OR EMPLOYEE, FACTORS TO CONSIDER.

Subpart 1. **Factors.** Among the factors to be considered, in addition to factors of control, when determining if services are those of an independent contractor or employee are those listed in subparts 2 to 9.

Subp. 2. **Right to discharge.** The right to discharge exists if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. There is no right to discharge if an independent worker produces an end result which measures up to contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to discharge. Restrictions on the right to discharge because of a contract with a labor union or with other entities are not relevant for purposes of this subpart.

Subp. 3. **Availability to public.** If an individual makes services available to the general public on a continuing basis, independent contractor status is indicated. An individual's services are offered to the public by, among other things:

- A. having an office and assistants;
- B. displaying a sign in front of a place of business;
- C. holding a business license;
- D. having a listing in a business directory or a business listing in a telephone directory; or
- E. advertising in a newspaper, trade journal, or magazine.

Subp. 4. **Compensation on job basis.** Independent contractor status is indicated by payment on a job basis rather than payment by the hour, week, or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour or periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The granting of a drawing account at stated intervals with no requirement for repayment of the excess drawn over commissions earned or the guarantee of a minimum salary indicates an employment relationship.

Subp. 5. **Realization of profit or loss.** Independent contractor status is indicated where an individual is in a position to realize a profit or suffer a loss as a result of his or her services. Opportunity for higher earnings from piecework or commissions does not indicate an opportunity for profit or loss. An opportunity for profit or loss is indicated by the following factors, among others:

- A. hire, direct, and pay assistants;

- B. provide own office, equipment, materials, or other facilities for doing the work;
- C. continuing and recurring financial liabilities or obligations, relating to the work;
- D. profit or loss in the work depends upon the relationship of receipts to expenditures;
- E. expenses incurred in connection with the work are paid by the individual;
- F. specific jobs are performed for prices agreed upon in advance; and
- G. performance of the services affects the individual's business reputation, and not the business reputation of those who purchase the services.

Subp. 6. **Termination.** The worker's right to terminate the working relationship with the purported employer at will and without incurring liability for noncompletion indicates employment. A requirement to provide notice of termination for some period in advance of the termination is not relevant for purposes of this subpart. Independent contractor status is indicated where the individual agrees to complete a specific job, is responsible for its satisfactory completion, and is liable for failure to complete the job.

Subp. 7. **Substantial investment.** A substantial investment by a person in facilities used in performing services for another indicates an independent contractor status. The furnishing of all necessary facilities by the employing unit indicates the absence of an independent contractor status. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, and similar items that are provided by individuals working in employment as a common practice in their particular trade. Substantial investment means a monetary investment representing something of considerable worth, in relation to the overall requirements of the person's chosen profession, trade, occupation, or vocation. A substantial expenditure of time or money for an individual's education is not indicative of an independent contractor status.

Subp. 8. **Responsibility.** If an employing unit is responsible for the negligence, personal behavior, and work actions of an individual in contacts with customers and the general public during times that services are performed for the employing unit, an employment relationship is indicated.

Subp. 9. **Services fundamental to business.** Employment is indicated where the services provided are necessary to the fundamental business purpose for which the organization exists.

Statutory Authority: *MS s 176.041; 176.83*

History: *10 SR 1852*

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3315.0555 DETERMINING WORKER STATUS.

Subpart 1. **Factors.** When determining whether an individual is an employee or an independent contractor, five factors must be considered and weighed within a particular set of circumstances. The five factors to be considered are:

- A. the right or the lack of the right to control the means and manner of performance;
- B. the right to discharge the worker without incurring liability for damages;
- C. the mode of payment;
- D. furnishing of materials and tools; and
- E. control over the premises where the services are performed.

The two most important factors are items A and B.

Other factors, not specifically identified in this part, may be considered if the outcome is inconclusive when applying the factors in items A to E. The degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Subp. 2. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 3. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 4. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 5. [Repealed, L 2004 c 206 s 53]

Statutory Authority: *MS s 14.386; 14.388; 116J.035; 268.021; 268.105*

History: *13 SR 1057; 17 SR 1279; L 2004 c 206 s 53; 31 SR 285; L 2012 c 201 art 3 s 16; 39 SR 151; L 2016 c 189 art 10 s 7*

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The Minnesota Supreme Court has adopted a five-factor common law test to determine whether an employment relationship exists between a worker and an employer. See *Newland v. Overland Express, Inc.*, 295 N.W.2d 615, 617-18. The factors are:

1. The right to control the means and manner of employment;
2. The mode of payment;
3. The furnishing of materials and tools;
4. Control of the premises where the work is done; and
5. Right of the employer to discharge.