



Worker Classification

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Under Wisconsin law, the distinction between an employee and an independent contractor is important in the application of several state employment laws. For each law in which this distinction is important, state statute or case law contains a test used to determine whether an individual is an independent contractor. The application of the test is fact-specific, meaning that whether an individual is an independent contractor will depend on the specific facts surrounding that individual's work.¹ This issue brief describes the independent contractor tests for state laws relating to unemployment insurance (UI) and worker's compensation (WC).

UNEMPLOYMENT INSURANCE

An individual is an independent contractor, and not covered under the UI law, if the employing unit demonstrates that the individual is covered under one of the two tests for independent contractors in the statute. The first test applies to an individual performing services for an employing unit other than a government unit or nonprofit organization ("private employer"), in a capacity other than as a logger or trucker. The second test applies to an individual performing services for a government unit or nonprofit organization, or for a private employer in a capacity as a logger or trucker.²

Test for Private Employers

An individual performing services for a private employer, in a capacity other than as a logger or trucker, is an independent contractor if the employing unit satisfies DWD that the individual meets parts one and two, described below, by contract and in fact.

Part One: Control or Direction

To satisfy part one of the test, the services of the individual must be performed free from control or direction by the employing unit. In determining whether services of an individual are performed free from control or direction, DWD may consider the following nonexclusive factors:

- Whether the individual is required to comply with instructions concerning how to perform the services.
- Whether the individual receives training from the employing unit with respect to the services performed.
- Whether the individual is required to personally perform the services.
- 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.
- Whether the individual is required to make oral or written reports to the employing unit on a regular basis.

Part Two: Additional Conditions

To satisfy part two of the test, the individual must meet six or more of the following conditions:

- The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
- 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.

- The individual operates under multiple contracts with one or more employing units to perform specific services.
- The individual incurs the main expenses related to the services that he or she performs under contract.
- The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
- The services performed by the individual do not directly relate to the employing unit retaining the services.
- The individual may realize a profit or suffer a loss under contracts to perform such services.
- The individual has recurring business liabilities or obligations.
- The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

Test for Government Units, Nonprofit Organizations, Loggers, and Truckers

An individual performing services for a government unit or nonprofit organization, or for a private employer in a capacity as a logger or trucker, is an independent contractor if the employing unit satisfies DWD that both of the following apply:

- The individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact.
- The services have been performed in an independently established trade, business, or profession in which the individual is customarily engaged.

WORKER'S COMPENSATION

An individual is an independent contractor, and not covered under the WC law, if the success or failure of the individual's business depends on the relationship of business receipts to expenditures, and the individual meets all of the following conditions³:

- Maintains a separate business with his or her own office, equipment, materials, and other facilities.
- Holds or has applied for a federal employer identification number with the Internal Revenue Service (IRS) or has filed business or self-employment income tax returns with the IRS based on that work or service in the previous year.
- Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
- Incurs the main expenses related to the service or work that he or she performs under contract.
- Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
- Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
- May realize a profit or suffer a loss under contracts to perform work or service.
- Has continuing or recurring business liabilities or obligations.

¹ The Department of Workforce Development (DWD) has a [webpage](#) that assists employers in determining whether their workers are employees or independent contractors for purposes of state employment laws.

² s. 108.02 (12) (bm) and (c), Stats.

³ s. 102.07 (8) (b), Stats.