

Independent Contractor or Employee: What's the Difference?

A hiring firm's intent, a written independent contractor agreement, or issuing a worker a 1099 does not automatically mean Workforce Safety & Insurance (WSI) will consider the worker to be an independent contractor. An exemption from workers' compensation requirements from another state is not a factor used in determining a worker's status in North Dakota.

North Dakota law provides that an individual who performs services for remuneration is presumed to be an employee unless it is proven the person is an independent contractor. It is the burden of the person asserting independent contractor status to prove that fact, see North Dakota Century Code § 65-01-03.

WSI uses the 20 factor "common law" test in making determinations, and all factors are considered. For a complete listing and explanation of these factors, see North Dakota Administrative Code 92-01-02-49 at www.legis.nd.gov.

The following factors are given more weight when making determinations:

Significant investment: Does the worker have an investment in the work being performed, such as trade specific tools or equipment, an office or shop, advertising, liability insurance, licenses, specially modified vehicles, inventory, etc.? Lack of investment indicates an employee relationship.

Integration: Is the worker necessary to the hiring firm's operation? More integration implies direction, control and an employee relationship.

Continuing relationship: Does the worker provide services over a continued period-of-time, even at frequently recurring, although irregular intervals? This is consistent with an employee relationship.

Works for more than one person or firm: If a person performs services under multiple contracts for more than one unrelated person or firm at a time, this generally implies an independent contractor relationship.

Realization of profit or loss: Does the worker incur expenses that are not reimbursed? Is the worker at risk for economic loss due to bona fide liability for expenses incurred to complete the work? If the worker can incur a profit or loss, this implies an independent contractor relationship.

Making services available to the general public: Does the worker make their services available to the general public? This implies an independent contractor relationship.

Right to dismiss and terminate: The right for either party to terminate services at any time implies an employer/employee relationship. The possibility of liability for breach of contract exists with an independent contractor.

Additional factors include:

Instructions: Does the person(s) for whom the services are performed have the right to require compliance with instructions?

Training: Is training provided or required by the person(s) for whom the services are performed?

Services rendered personally: Is the worker required to perform the work personally?

Hiring, supervising and paying assistants: Does the worker have the responsibility and authority to hire, supervise and pay assistants?

Set hours of work: This is a factor indicating control.

Full-time required: An independent contractor is free to work when and for whom they choose.

Doing work on the premises of the person(s) for whom the services are performed: The importance of this factor depends on the nature of the service involved.

Order or sequence set: Does the worker retain the right to set the order or sequence of work?

Oral or written reports: Does the worker submit regular written or oral reports to the hiring firm?

Payment by the hour, week, month: Payment made by the job or straight commission generally indicates an independent contractor relationship.

Payment of business and/or traveling expenses: An employer generally retains the right to regulate and direct the person's business expenses.

Furnishing of tools and materials: If the person(s) for whom the services are performed furnished significant tools, materials and other equipment, it indicates an employer relationship.

In the case of commercial motor vehicles whose gross vehicle weight rating is more than 26,000 pounds, with an individual operating a licensed truck or tractor for a motor carrier of property, the driver is considered an independent contractor if all the following factors are present:

- a. The individual owns, leases or enters a purchase agreement to purchase a truck or tractor. The lease or purchase agreement must represent reasonably the value of the lease or purchase of the truck or tractor.
- b. The individual is responsible for the maintenance and repair of the truck or tractor.
- c. The individual bears the principal burden of operating costs including fuel, supplies, vehicle insurance and personal expenses.
- d. The individual is responsible for the maintenance and repair of the truck or tractor.
- e. Income taxes are not withheld from the individual's compensation.
- f. The individual generally determines the details and means of performing the services, in conformance with statutory or regulatory requirements, operating procedures of the carrier, and specification of the shipper.
- g. The individual enters a written agreement with the motor carrier outlining the nature of the relationship.

Contact WSI to receive an official determination regarding whether an independent contractor relationship exists according to North Dakota law.