

WISCONSIN



DWD

Independent Contractor Tests

UNEMPLOYMENT INSURANCE

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Unemployment Insurance Worker Classification

Benefits of Proper Worker Classification for UI Purposes:

- Eliminates unfair competition among employers bidding for work
- Ensures employers are paying their fair share of tax contributions
 - Contributes to a healthy UI Trust Fund – lowering taxes overall for all employers
- Results in proper and timely claims charging
- WI has proportional claims charging
 - Failure to properly classify workers results in possibly one employer being charged for all benefits even though worker worked for multiple employers
- Results in proper application of UI's partial wage formula when the worker is receiving UI benefits
- Worker receives UI benefits when unemployed and meeting all other eligibility requirements



Variations of Worker Classification Tests

- “ABC” Test
 - A.) Worker is free from direction or control, B.) The work performed is outside the usual course of the business operations or is performed outside of the usual location of the business enterprise, and C.) The worker is engaged in an independent trade or business.
- Common Law Test
 - Previously, the IRS used 20 factors to determine whether an employer-employee relationship existed. Currently, the IRS uses common law rules that provide evidence of degree of control and independence which fall into three categories:
 - 1.) Behavioral, 2.) Financial, and 3.) Type of relationship.
- California Revised Test (AB-5)
 - Codifies the recent CA court decision (*Dynamex*), requiring that employers prove that their workers can meet the three-part ABC test to be classified as independent contractors and exempts from the test certain specific occupations.



History of Wisconsin's Unemployment Insurance Worker Classification Test

- **2007 UIAC agreed bill (2007 Wis. Act 59)** required that the UIAC appoint a committee to study the definition of "employee" under UI law.
- The Report of the Study Committee to Review the Unemployment Insurance Statutory Definition of "Employee" can be found at the link below:

<https://dwd.wisconsin.gov/uibola/uiac/reports/2009eedefinition.pdf>



Unemployment Insurance Worker Classification UI Test - Before Jan. 1, 2011

- **Seven of Ten Conditions** - Prior law determined that individuals were independent contractors when the individual met any 7 of the following 10 conditions:
- **Condition 1:** The individual holds or has applied for an identification number with the IRS.
- **Condition 2:** The individual has filed business or self-employment income tax returns with the IRS based on such services in the previous year or, in the case of a new business, in the year in which the services were first performed.
- **Condition 3:** The individual maintains a separate business with his or her own office, equipment materials or other facilities.
- **Condition 4:** The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing services.



Unemployment Insurance Worker Classification UI Test - Before Jan. 1, 2011

- **Seven of Ten Conditions (cont.):**
- **Condition 5:** The individual incurs the main expenses related to the services that he or she performs under contract.
- **Condition 6:** The individual is responsible for satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.
- **Condition 7:** The individual receives compensation for services performed under a contract on a commission or per-job basis and not on any other basis.
- **Condition 8:** The individual may realize a profit or suffer a loss under contracts to perform such services.
- **Condition 9:** The individual has recurring business liabilities or obligations.
- **Condition 10:** The success or failure of the individual's business depends on the relationship of business receipts to expenditures.



History of Wisconsin's Unemployment Insurance Worker Classification Test

The UIAC study committee recognized that the test for “employee” status for UI purposes has historically centered around two fundamental factors:

1. Freedom from direction & control
2. Existence of an independently established trade or business



History of Wisconsin's Unemployment Insurance Worker Classification Test

- UIAC approved the study committee's recommendations and included the proposed changes in the **2009 UIAC agreed bill (2009 Wis. Act 287)**.
 - 2009 Wis. Act 287 changed the test for determining employee status for general private employers under UI law.
 - A worker must meet the criteria of a **two-part test to be considered an independent contractor for UI purposes under Wis. Stat. § 108.02(12)(bm)**.
 1. The worker must perform services free from direction or control of the employing unit, and
 2. Be engaged in an independently established trade, business or profession (meets 6 of 9 conditions).



History of Wisconsin's Unemployment Insurance Worker Classification Test

- The study committee recommended Wisconsin's UI Worker Classification test could be improved by:
 - Eliminating former Conditions #1 and #2
 - Improving clarity, predictability and fairness by using simpler language to establish the criteria of an independently established business – Amended Conditions #3, #4, #6, #7 and #10
 - Retaining in tact the factors that have been observed to be working well – Retained Conditions #5, #8 and #9



History of Wisconsin's Unemployment Insurance Worker Classification Test

- The committee recommended improving the test by specifying direction and control as a separate, stand-alone condition essential for determining whether an individual is an employee.
- The committee's recommendation did not limit the range of factors that could be considered but clearly indicates five essential factors that should be the focus when determining whether an individual performs services free from direction and control.
- The committee recommended that, in addition to being free from direction or control, a worker must satisfy six of nine conditions to be considered an independent contractor.



UI Definition of Employee - Current Law (For-Profit Businesses)

Wis. Stat. § 108.02(12)(a) – **“Employee’ means any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit...”** unless an exception applies.

The exceptions include:

- Independent contractors for general private employers;
- Independent contractors for government units, nonprofit organizations, loggers, or truckers;
- A sole proprietor; and,
- A partner in a partnership



Two-Part Independent Contractor Test (For-Profit Businesses)

The exception to the definition of “employee” for general private employers:

Wis. Stat. § 108.02(12)(bm) – “An individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than a logger or trucker, if the employing unit satisfies the department that the individual meets the conditions specified in subs. 1 and 2 by contract and in fact”

- Two areas to be assessed:
 1. Free from Direction and Control, **and**
 2. Independently Established Business



Part 1: Free from Direction and Control: (Five Factors to Assess)

1. Comply with instructions concerning how to perform the services
2. Receives training from the employing unit with respect to the services performed
3. Personally performs the services
4. Services are required to be performed at times or in a particular order or sequence established the employing unit
5. Required to make oral or written reports to the employing unit on a regular basis



Part 2: Independently Established Business (6 of 9 Conditions Must Be Met)

1. Advertises or otherwise affirmatively holds out as being in business
2. Maintains own office or performs most of the services in a facility or location chosen by the individual or uses own equipment or materials in performing the services
3. Operates under multiple contracts with one or more employing unit to perform specific services
4. Incurs the main expenses related to the services performed under contract



Part 2: Independently Established Business (6 of 9 Conditions Must Be Met)

5. Obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work
6. Services performed do not directly relate to the employing unit retaining the services
7. May realize a profit or suffer a loss under contracts to perform such services
8. Recurring business liabilities or obligations
9. Not economically dependent upon a particular unit with respect to the services being performed



Summary - Current Law (For-Profit Businesses)

- To be considered as an independent contractor, the worker must meet both parts of the two part test
- If the worker meets one part but not the other, the worker is an employee



Unemployment Insurance Worker Classification Tests

In addition to general private employers, Wisconsin UI law has tests for determining independent contractors status for the following categories of employer:

- **Nonprofit employers** - services performed for an organization that is described in § 501(c)(3) and exempt from federal income tax under § 501(a) of the Internal Revenue Code
- **State and local government employers** - service performed for a unit of state or local government
- **Trucking employers** - services performed as a truck driver for a licensed motor carrier that leases a vehicle from the contract operator
- **Logging employers** - services performed as a piece cutter or skidding operator for a forest products manufacturer or logging contractor
- **Indian tribal government employers** - services performed for an Indian tribe that is federally recognized under 25 USC § 450B(e) – utilize the test found under Wis. Stat. § 108.02(12)(bm).



Independent Contractor Test (Nonprofit Employers & Government Units)

The exception to the definition of “employee” for nonprofit employers and state and local government units:

Wis. Stat. § 108.02(12)(c) – “An individual performing services for a **government unit** or **nonprofit organization**, or for any other employing unit in a capacity as a logger or trucker if the employing unit satisfies the department...”

1. Freedom from Direction and Control, and
2. Independently Established Business (5 *Keeler* Factors)
 - These five interrelated factors are described in *Keeler v. LIRC*, 154 Wis. 2d 626 (Ct. of App. 1990).



Independent Business - Five 'Keeler' Factors

- The purpose of this part of the test is to determine if the worker is operating an independent business separate from that of the employer.
- In determining whether the services of the worker were performed as an independently established trade or business in which the individual was customarily engaged, five interrelated factors must be examined. These five interrelated factors are described in Keeler v. LIRC, 154 Wis. 2d 626 (Ct. of App. 1990).
- The five factors should be applied in a manner consistent with the purpose of the unemployment compensation statute: -- "to effect unemployment compensation coverage for workers who are economically dependent on others in respect to their wage-earning status." Larson v. LIRC, 184 Wis.2d 378, 391 (Ct. App. 1994).



Independent Business - Five 'Keeler' Factors (continued)

- **Factor One: Integration** – The services performed directly relate to the activities conducted by the company retaining those services
- **Factor Two: Advertising or holding out** – The individual must make the public aware that he/she is engaged in a business endeavor
- **Factor Three: Entrepreneurial risk** – The individual assumed the financial risk of the business undertaking
- **Factor Four: Economic dependence** - The individual is independent of the alleged employer, performs services and then moves on to perform similar services for another
- **Factor Five: Proprietary interest** – The individual owns tools, equipment, or machinery necessary to perform the services, and has the ability to sell or give away parts of the business enterprise



Independent Contractor Test Truckers (Motor Carriers and Contract Operators)

The exception to the definition of “employee” for truckers:

- The two-part test is found in Wis. Stat. §§ 108.02 (12)(c)1 and 108.02 (12)(c)2.
 1. Freedom from Direction and Control, and
 2. Independently Established Business
- Each of the two parts of the test is interpreted in detail in **Wis. Admin. Code DWD ch. 105**
- If the employer's and driver's circumstances do not fit the definitions of "carrier" and "contract operator" under Wis. Admin. Code DWD § 100.02, then the test for general private employers under Wis. Stat. § 108.02(12)(bm) should be applied



Independent Contractor Test Loggers (Piece Cutter or a Skidding Operator)

The exception to the definition of “employee” for piece cutter or a skidding operator (both occupations known generically as "loggers"):

- The two-part test is found in Wis. Stat. §§ 108.02 (12)(c)1 and 108.02 (12)(c)2.
 1. Freedom from Direction and Control, and
 2. Independently Established Business
- Each of the two parts of the test is interpreted in detail in **Wis. Admin. Code DWD ch. 107** (Employment Relationships in the Logging Industry).
- If the employer's and logger's circumstances do not fit the definitions of "piece cutter" and "skidding operator" under Wis. Admin. Code DWD § 100.02, then the test for general private employers under Wis. Stat. § 108.02(12)(bm) should be applied



Questions?

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