

WISCONSIN



DWD

Worker Misclassification Task Force: W C Statutes & Case Law

EMPLOYEES & INDEPENDENT CONTRACTORS

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Employees & Independent Contractors

General definition of employee is included in s. 102.07 (4) (a), Wis. Stats.

*“Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or , if employed with the knowledge , actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, **but does not include the following:***

- 1. Domestic servants.*
- 2. Any person whose employment is not in the trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them.”*



Employees & Independent Contractors

- Domestic servants and people whose employment is not in the course of the trade, business, profession or occupation of the employer are not covered by the ch. 102, Wis. Stats., unless the employer voluntarily elects to cover them.
- Partners, members of limited liability companies and sole proprietors are not covered under ch. 102, Wis. Stats., unless they voluntarily elect to cover themselves.
- Worker's compensation coverage is elected by an employer obtaining an endorsement on a current worker's compensation insurance policy or obtaining a new policy.



Employees & Independent Contractors

- **Every independent contractor is, for purpose of ch. 102, Wis. Stats., an employee of any employer under ch. 102, Wis. Stats.,** for whom he or she is performing services in the course of the trade, business, profession or occupation of such employer at the time of injury **unless the independent contractor meets all nine (9) conditions in s. 102.07 (8) (b), Wis. Stats.**
 - The nine (9) element test in s. 102.07 (8) (b), Wis. Stats., has been in effect since January 1, 1990. The nine (9) element test was developed by a Study Commission created by the Worker's Compensation Advisory Council.
 - To be an independent contractor and not an employee under ch. 102, Wis. Stats., an individual **must meet and maintain all nine (9) of the elements** in s. 102.07 (8) (b), Wis. Stats.



Nine-Part Test: Condition #1

s. 102.07 (8) (b) 1, Wis. Stats: “Maintains a separate business with his or her own office, equipment, materials and other facilities.”

- The separate business requirement is a common factor for the determination of independent contractors. This satisfies the requirement the individual is not dependent on others to do his or her work.
- This condition is evidence the individual has the facilities necessary to do the job and is providing more than just labor. This condition is designed to determine whether the individual makes a significant investment in or incurs a significant obligation related to facilities (equipment or premises), tools or materials used in performing services for others and which are not typically furnished by an employer.



Nine-Part Test: Condition #2

s. 102.07 (8) (b) 2, Wis. Stats: “Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment tax returns with the federal internal revenue service based on the work or service in the previous year.”

- True independent contractors are in business and should represent this to the federal government.
- They should have a FEIN, have applied for a FEIN or filed business or self-employment tax returns.
- This is a good test of the individual’s intention or decision to be independent.



Nine-Part Test: Condition #3

s. 102.07 (8) (b) 3, Wis. Stats: “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.”

- This condition adopts the traditional right of direction and control test and clarifies there can be no direction and control over the means by which the work is to be accomplished.
- The good business practice and certainty afforded by the use of contracts is emphasized.
- The means by which the work is completed contributes to the competitive nature of bidding for projects and may cause the work to be profitable or nonprofitable.



Nine-Part Test: Condition #4

s. 102.07 (8) (b) 4, Wis. Stats: “Incurs the main expenses related to the service or work that he or she performs under contract.”

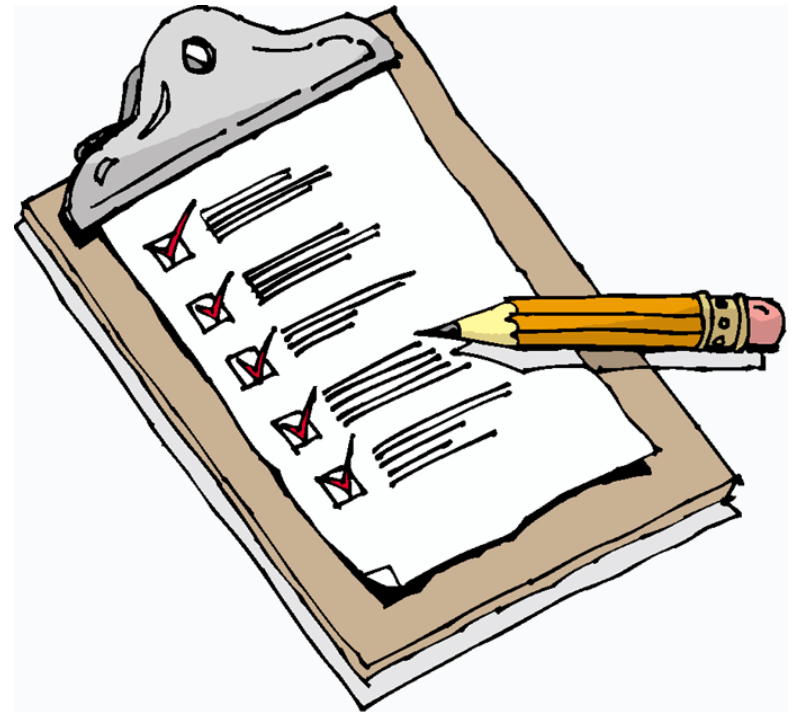
- The key point in this subdivision is the requirement the independent contractor has the principle burden for expenses incurred in connection with the work. This reflects the variable of profitability and to the autonomy and self-reliance of the independent contractor.
- Independent contractors do not perform work the employer assigns with the expectation of pay raises. The details of the activity and the compensation are agreed to in advance.



Nine-Part Test: Condition #5

s. 102.07 (8) (b) 5, Wis. Stats: “Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for the failure to complete the work or service.”

- The obligation of an independent contractor is contractual with potential sanctions if the work is not completed.



Nine-Part Test: Condition #6

s. 102.07 (8) (b) 6, Wis. Stats: “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.”

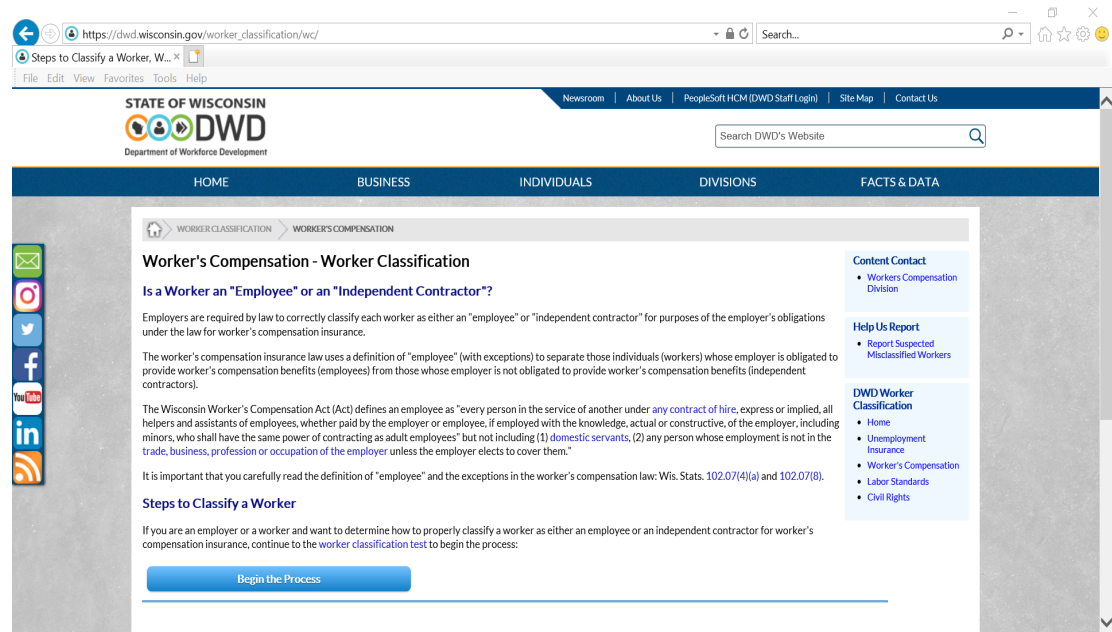
- This subdivision is intended to show that payment is made on factors related to the work performed and not solely on the basis of hours or time expended. It removes the certainty of profitability or outcome for independent contractors.
- Method of payment should be based on the amount of work completed rather than on a simple time factor.



Nine-Part Test: Condition # 7

s. 102.07 (8) (b) 7, Wis. Stats: “May realize a profit or suffer a loss under contracts to perform work or services.”

- This subdivision covers a major distinction of an individual being in business rather than being an employee.



The screenshot shows a web browser displaying the State of Wisconsin Department of Workforce Development (DWD) website. The page is titled "Worker's Compensation - Worker Classification" and is part of the "Worker's Compensation" section. The main heading is "Is a Worker an 'Employee' or an 'Independent Contractor?'". The text explains that employers are required by law to correctly classify each worker as either an "employee" or "independent contractor" for purposes of the employer's obligations under the law for worker's compensation insurance. It further states that the worker's compensation insurance law uses a definition of "employee" (with exceptions) to separate those individuals (workers) whose employer is obligated to provide worker's compensation benefits (employees) from those whose employer is not obligated to provide worker's compensation benefits (independent contractors). The Wisconsin Worker's Compensation Act (Act) defines an employee as "every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees" but not including (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer unless the employer elects to cover them." It is important that you carefully read the definition of "employee" and the exceptions in the worker's compensation law: Wis. Stats. 102.07(4)(a) and 102.07(8). Below this text, there is a section titled "Steps to Classify a Worker" with a button labeled "Begin the Process". The page also features a navigation menu with links for HOME, BUSINESS, INDIVIDUALS, DIVISIONS, and FACTS & DATA. On the right side, there are sections for "Content Contact" (Workers Compensation Division), "Help Us Report" (Report Suspected Misclassified Workers), and "DWD Worker Classification" (Home, Unemployment Insurance, Worker's Compensation, Labor Standards, Civil Rights). The browser address bar shows the URL: https://dwd.wisconsin.gov/worker_classification/wc/.



Nine-Part Test: Condition # 8

s. 102. 07 (8) (b) 8, Wis. Stats: “Has continuing or recurring business liabilities or obligations.”



- Business receipts and expenditures separate legitimate independent contractors from employees.
- True independent contractors have continuing or recurring business liabilities and obligations. The liabilities and obligations occur in a steady succession, time after time.

Nine-Part Test: Condition # 9

- **s. 102.07 (8) (b) 9, Wis. Stats: “The success or failure of the independent contractor’s business depends on the relationship of business receipts to expenditures.”**
- An independent contractor will need to make a profit from the work or services performed to remain in business.
- Business receipts and expenditures separate independent contractors from workers who simply furnish services for a wage or fixed payment with no risk of loss, and whose only investment is the time it takes to do the work.



Employees & Independent Contractors

s. 102.17 (8) (c), Wis. Stats: “The division may not admit into evidence any state or federal law, regulation, or document granting operating authority , or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.”

- Government requirements mandating certain elements of control such as safety and recordkeeping are not fair determinants of whether an employer actually has the right of direction and control over an independent contractor.



Employees & Independent Contractors: Case Law



- There has been very little litigation on the issue of whether workers are employees or independent contractors for purposes of worker's compensation since s. 102.07 (8) (b), Wis. Stats., went into effect on January 1, 1990.
- We are aware of **three (3) published opinions from appellate courts on the issue of whether a worker was an independent contractor or employee** under s. 102.07 (8) (b), Wis. Stats.

Employees & Independent Contractors: Case Law

Jarrett v. LIRC, 233 Wis. 2d 174 (Wis. Ct. App. 2000)

- A trucker was found to be an independent contractor since all nine requirements under s. 102.07 (8) (b), Wis. Stats., were satisfied.
- The Wisconsin Court of Appeals held that s. 102.07 (8) (b), Wis. Stats., supplants the common law and provides the sole test for determining whether a worker is an independent contractor for purposes of ch. 102, Wis. Stats.



Employees & Independent Contractors: Case Law

Acuity Ins. Co. v. Olivas, 298 Wis. 2d 640 (2007)

- The Wisconsin Supreme Court held workers were employees and not independent contractors because they did not satisfy each of the nine (9) requirements under s. 102.07 (8) (b), Wis. Stats.
- The workers incurred no risk of suffering a loss on the job because they supplied only their labor and simple tools and the success or failure of the worker's business did not depend on the relationship between business receipts and expenditures.



Employees & Independent Contractors: Case Law

Lloyd Frank Logging v. Healy, 306 Wis. 2d 385 (Ct. App. 2007)

- An individual hired by the employer to cut trees, who purchased a worker's compensation insurance policy for his sole proprietorship, who did not have any employees, was an employee of the employer for worker's compensation purposes.



Employees & Independent Contractors: Case Study

Nikola Petrovic v. Labor and Industry Review Commission ***345 Wis. 2d 847 (Ct. App. 2012) (Unpublished)***

- Individual owned a truck and hauled cargo for other motor transport companies.
- Trucker had a FEIN and filed a Schedule C for several years.
- He was paid only for freight hauling assignments he accepted and he could refuse assignments.
- Trucker paid for all costs of maintaining the truck including license fees, registration and repairs.
- He chose his own route for each hauling assignment he accepted.



Nikola Petrovic v. LIRC Case Study (cont'd.)

- Trucker received 90% of gross receipts for each load that was delivered.
- Trucker was responsible for the expenses, including fuel and tolls, associated with hauling each load of cargo.
- He reported a profit and deducted business expenses including insurance.
- All records necessary for the business were kept at his home or in the truck.
- He spent a period of time driving for another trucking company.
- **Bottom Line: WC Appeals Court affirmed lower court's ruling (which affirmed LIRC's ruling siding with ALJ decision: Trucker was an independent contractor, not an employee, for WC purposes.**



Questions?

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Independent Contractor Definition under s. 102.07 (8), Wis. Stats.

Under section 102.07 (8)¹ of the Wisconsin Statutes, a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so. The nine-part statutory test set forth under s. 102.07 (8) of the Act, must be met before a person working under another person is considered not to be an employee. To be considered an independent contractor and not an employee, an individual must meet and maintain all nine of the following requirements:

1. Maintain a separate business.
2. Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (See note below.)
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

Note: When requesting a Federal Employer Identification Number (FEIN) from the IRS, you must inform the IRS that you are **required by Wisconsin Worker's Compensation law** to obtain a FEIN. A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07 (8).

¹ Except as provided in pars. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. 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.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. 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.
6. 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.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(bm) A real estate broker or salesperson who is excluded under s. 452.38 is not an employee of a firm, as defined in s. 452.01 (4w), for whom the real estate broker or salesperson performs services unless the firm elects under s. 102.078 to name the real estate broker or salesperson as its employee.

(c) The division may not admit in evidence any state or federal law, regulation, or document granting operating authority, or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.

DWD is an equal opportunity employer and service provider. If you have a disability and need assistance with this information, please dial 7-1-1 for Wisconsin Relay Service. Please contact the Worker's Compensation Division at (608) 266-1340 to request information in an alternate format, including translated to another language.