

That's not our employee...

Independent Contractors and Workers' Compensation

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A rectangular warning sign with a yellow background and a black border. The word "WARNING" is written in large, bold, black capital letters inside a black-bordered trapezoidal shape at the top. Below this, the words "MASS", "CONFUSION", and "AHEAD" are stacked vertically in bold, black capital letters.

WARNING

**MASS
CONFUSION
AHEAD**

What Is An Employer?

The Workers' Compensation Act defines "employer" quite broadly.

21 V.S.A. §601(3) defines the term as follows: "Employer includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed."

The definition "creates a statutory employer/employee relationship where no such relationship existed at common law." *In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶ 10.

Workers' compensation statutes are "nearly universal" in their intent to make the general contractor the employer for purposes of extending coverage to its subcontractor's employees.

Why are they doing this?

The legislative intent was to impose liability for workers' compensation benefits "upon business owners who hire independent contractors to carry out some phase of their business." The idea was to prevent business owners or general contractors from attempting to avoid liability for workers' compensation benefits by hiring independent contractors to do what they would otherwise have done themselves through their direct employees. *Edson v. State*, 2003 VT 32

The existence of an employer-employee relationship for purposes of workers' compensation has been analyzed by the "right to control" test and the "nature of the business" test, applied to the totality of the circumstances pertinent to the particular employment relationship.

In the workers' compensation context, if the work performed pertains to the business, trade, or occupation of the putative employer, carried on by it for gain, the fact that it is done through the medium of an independent contractor does not relieve the employer from workers' compensation liability.

Right To Control

Commissioner is asked to evaluate “the nature and extent of control exercised” by the business so that it is fair to conclude the worker was an employee of the business.

Falconer v. Cameron, 151 Vt. 530.

“Right to Control” Test

1. Who controls the means and methods of the work performance?
2. Does the worker hold his services out to the general public?
3. Does the worker perform the task without supervision?
4. Does the worker possess the required permits, licenses and certificates?
5. Is the worker doing business as a corporation or under an assumed business name?
6. Does the work require extensive skill, education or experience?
7. Who establishes the routine or schedule?
8. What is the duration of the relationship?
9. What is the method of payment, whether by time or by job?
10. Are taxes deducted or withheld from the workers' check?
11. Who determines the hours of work?
12. Does the worker receive fringe benefits or bonuses?
13. Who provides the equipment necessary for completion of the work task?

“The following list of sample questions can assist in the determination of an employer-employee relationship. This list of questions is not exclusive. In addition, no one question is determinative.” –Department of Labor Website

Nature of the Business

The crucial test is the nature of the business.

[T]he question is whether the work that the owner contracted for is a part of, or process in, the trade, business or occupation of the owner.

This test involves determining how closely the claimant's work correlates to the employer's business. The commissioner is required to determine the nature of both the claimant's work and the employer's work, and then assess how closely the two relate to each other.

Problem- what is the nature of a city or town's business?

Examples

- The owner of a creamery business was not the statutory employer of an employee of a contractor hired to build on the creamery site. *Packett v. Moretown Creamery Co.*, 91 Vt. 97 (1917).
- An employee of a roofer was not the statutory employer of a Condominium Association. *Chandler v. Continental Loss Adjusting Services, et al.*, Op. No. 59-94WC (1995).
- A manufacturer of wood products who hired an independent contractor to haul its lumber and load it on railroad cars was the statutory employer because hauling and loading the lumber was an integral part of the business. *O'Boyle v. Parker-Young Co.*, 95 Vt. 58, 112 A. 385 (1921).
- Department of Liquor Control was the statutory employer of its contractor trucking firm's employee. State advocated for this to avoid third-party liability. *Edson*

ABC Test

From the Department of Labor Website for Unemployment Compensation:

ABC Test

The “ABC Test” is used to determine the nature of the relationship between an employer and individual, and the three parts ALL MUST BE MET for an individual to NOT be an employee. The “B” portion of the test is in two parts.

The ABC Test includes:

A. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact.

Examples

Individual bids for the job and is paid by the job

Individual completes job with no direction, supervision, or set hours

B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed.

Examples:

Individual does work which none of your employees does and for which you do not advertise

Individual does all work at their own facility

C. Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Examples:

Individual has employees of their own

Individual has liable UI account with VDOL

Individual advertises their business services to the general public

Generally the individual must have some history of providing similar services for others in order for the “C” part of the test to be met.

H.867



Under existing law, if a person works within the “nature” of a general contractor’s business, he or she is considered to be an employee of that business. H.867 would repeal that standard but retain a rigorous test which requires that an independent contractor:

- Is free from the direction and control of the employing unit;
- Controls the means and manner of the work performed;
- Operates a separate and distinct business;
- Holds itself out as in business for itself; and
- Offers its services to the general public.

Proposed/Rejected Definition

(A) “Independent contractor” means a person who meets all of the following:

(i) is free from the direction and control of the employing unit, both under the person’s contract of service and in fact;

(ii) controls the means and manner of the work performed;

(iii) operates a separate and distinct business from that of the person with whom it contracts;

(iv) holds itself out as in business for itself;

(v) offers its services to the general public; and

(vi) is not treated as an employee for purposes of income or employment taxation with regard to the work performed.

(B) An independent contractor shall purchase workers’ compensation coverage for its employees as provided in this chapter.