



VLCT Human Resources and Employment
Law Workshop

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Independent Contractors and Misclassification
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ABC Test

Vermont Unemployment - 21 V.S.A. § 1301(6) (B)

(B) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that:

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

(ii) 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; and

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

Right to Control Test

Vermont Workers' Compensation

- If employer controls the worker, end of inquiry; worker is an employee.
- Questions on right to control:
 - Does entity instruct worker on when, where and how?
 - Does worker make independent discretionary decisions?
 - Is worker paid by the unit for work completed?
 - Is work casual, over indefinite period without fixed hours and at the discretion of worker?

If no right to control, go to Nature of the Business test . . .

Nature of the Business

Vermont Workers' Compensation

In re Chatham Woods Holdings, LLC, 2008 VT 70, ¶ 11, 184 Vt. 163.

“. . .whether the work contracted for is a part of, or process in, the trade, business or occupation of the owner [or proprietor.]”

- Framing and roofing sub-contractors hired by real estate developer/general contractor were determined to be employees
- **Very broad:** impose WC liability on business owners who hire ind. contractors to carry out some phase of their business

Economic Realities

Federal DOL – Fair Labor Standards Act

The following factors are considered when determining whether an employment relationship exists under the FLSA:

1. The extent to which the work performed is an integral part of the employer's business.
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker's skill and initiative.
5. The permanency of the worker's relationship with the employer.
6. The nature and degree of control by the employer.

DOL Narrowed IC Definition in Guidance

- DOL issued Guidance July 15, 2015:
https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf
- Downplays reliance on “Control” factor
- DOL believes most workers are employees
- Written agreement or hiring an entity is no guarantee
- If entering into agreement, use indemnification provisions to protect against wage and hour claims
- Avoid giving IC’s rights and access (email accounts, invitation to employee function, other benefits)
- Audit on-going IC relationships to avoid economic dependency

IRS Test - federal tax purposes

1. Behavioral Control

- a. Instructions the business gives the worker
- b. Training the business gives the worker

2. Financial Control

- a. Unreimbursed business expenses
- b. The extent of the worker's investment
- c. The extent to which the worker makes services available to the relevant market
- d. How the business pays the worker
- e. The extent to which the worker can realize a profit or loss.

3. Type of Relationship

- a. Written Contracts
- b. Employee-type benefits
- c. Permanency of the relationship
- d. Extent to which services performed by the worker are a key aspect of the regular business of the company

Examples – IC or Employee?

- Contracted Municipal Administrator
- Contracted Wastewater Operator
- Contracted Recreation Program Instructors
- Contracted Plowing