

# **WORKERS' COMPENSATION POLICY AND THE CHANGING WORKFORCE**

## **ABSTRACT**

This paper explores changes in work, the evolving landscape of legal employment classification, and future policy considerations to ensure individuals are protected now and in the future against occupational injuries, illnesses, and fatalities. Policymakers and regulators need to understand how these changes may create gaps in coverage for workers and leave employers vulnerable to uncertain liability for injuries and deaths on the job.

## **INTRODUCTION**

The workforce and workplace of today looks very different than the workforce and workplace when the first workers' compensation laws were passed. The cumulative impact of these changes has made it important to consider the role public policy plays in protecting workers from the health and economic consequences of an occupational injury, illness, or fatality. For most of the past century, a significant portion of the U.S. labor force was protected through state workers' compensation laws. As work relationships have grown increasingly complex, there is uncertainty in workers' compensation protections for some in the labor force. The changes and discussions in this paper are a part of a broader series of discussions on how employment benefits and protections might be revised, redesigned, or reimagined to more accurately reflect the contemporary work environment.

The twenty-first century workforce is more diverse, more de-centralized, and more mobile than ever before. This is often at tension with employment classification law which was adopted when workers were predominately male, and work was conducted in centralized facilities with a rigidly defined management hierarchy. Increasing work fluidity and the application of often conflicting state and federal law is resulting in business uncertainty and legislative proposals across the country. This paper presents an overview of the existing employment classification models and describes the latest legislation aimed at clarifying employment status.

Finally, the paper raises important policy questions that must be considered in light of the new work environment. Policymakers, in addition to business and labor leaders, will also appreciate the description of models and pilot programs that seek to deliver health and economic benefits to injured workers beyond the traditional workers' compensation system. Discussion and development of solutions is essential for continued economic prosperity and social stability.

# Part I: Changing Relationships with Work

## Background

An individual's connection to work shapes his or her life in visible and invisible ways – from lifestyle habits to self-esteem to social benefits. Throughout the last two centuries, those connections to work have become more formal and enshrined in local, state, and federal law. This work, or employment relationship, is important to individuals and their families as benefits and social protections are frequently gained through employment. [Sidebar: Employment benefits can include health, disability, and/or life insurance, retirement contributions, paid time off, flexible spending accounts, and/or tuition reimbursement. Social protections can include unemployment, workers' compensation, accommodations, equal opportunity, etc.]

The first workers' compensation laws in the United States arose out of changes in the nature and connection to work. The Industrial Revolution saw workers move from farms and villages to cities, transitioning from farm and community-based work to manufacturing and industrial jobs. These changes resulted in more workers in employee/employer relationships with defined wages, hours, and job requirements.

Industrial work was dangerous and work injuries and fatalities rose, reaching more than 61,000 deaths in 1914.<sup>1</sup> Recognizing the economic and social cost of these injuries and deaths, state policymakers successfully passed workers' compensation laws in the majority of states by 1920. Workers' compensation was no-fault, providing guaranteed wage replacement and medical benefits for employees injured or killed at work.

Workers' compensation is generally compulsory for employers<sup>2</sup> and each state has rules that define employees for the purpose of workers' compensation coverage. Securing workers' compensation coverage for each of its employees is a direct business cost. In contrast, independent contractors are generally not required to have workers' compensation coverage.

Defining an employee or independent contractor has been a challenge within state workers' compensation systems, but classification has become more difficult as employment relationships have increased in complexity. These changes have important implications for workers' compensation including which workers should be covered under workers' compensation and who should bear the costs of coverage. Additionally, policymakers need to explore how coverage requirements align incentives for businesses and workers.

## A Century of Change

The past century has witnessed a transformation across the workforce and the workplace. The number of women in the labor force has steadily increased since the 1950s. Women represented 46% of the US labor force in 2016. [Illustration that shows % labor force that are women rose from 29.6% in 1950 to 46.8% in 2016.]<sup>3</sup> The labor force has increased in ethnic diversity. Hispanics represented 17% of the US labor force in 2016 and all minorities (African Americans, Asian-

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<sup>1</sup> Bureau of Labor Statistics.

<sup>2</sup> All states, except Texas and South Dakota, have compulsory workers' compensation requirements for employers. Exclusions for certain employers or kinds of employees exist in most states. The IAIABC/WCRI Inventory of Workers' Compensation laws describes coverage exclusions for each of the states.

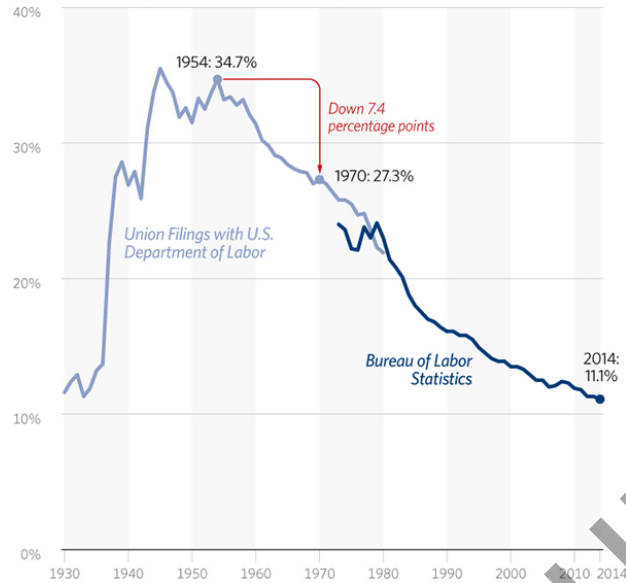
<sup>3</sup> The % of women who participate in the labor force has also increased from 37% in 1962 to 57% in 2016.

Americans, Hispanics/Latinos, and Native Americans) are projected to make up 37% of the working-age population by 2020<sup>4</sup>. The labor force is steadily getting older. Workers 55 and older are projected to be 24.7% of the labor force by 2024. Union participation has been in decline, 10.7% of wage and salary workers were union members in 2017.<sup>5</sup> [Illustration that shows union participation peaked in the 1950s at 34.7% and has declined steadily since that time.] The labor force is also more educated with 33% of workers having a bachelors or graduate degree in 2016<sup>6</sup>.

CHART 2

**Union Membership Rates Began Falling in Mid-1950s**

PERCENTAGE OF PRIVATE-SECTOR WORKERS IN A UNION



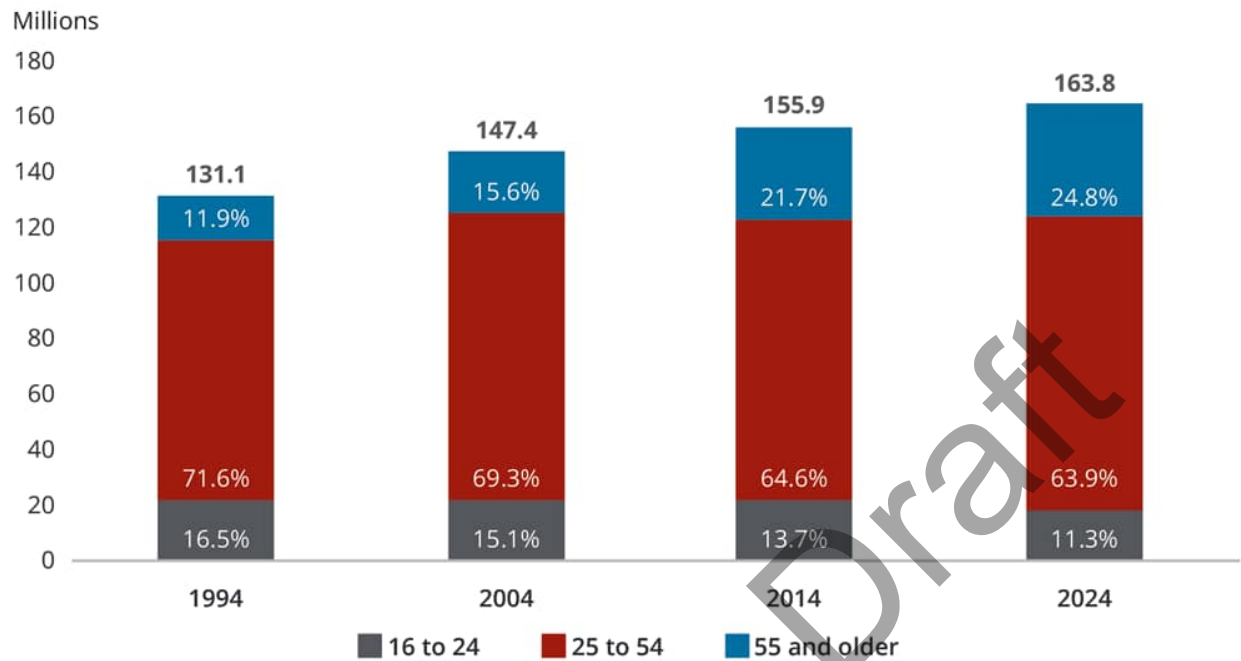
Sources: Data for 1930-1980: U.S. Department of Labor, assorted labor union reports, Haver Analytics. Note these figures exclude employee associations. Data for 1977-2014: Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey," Unionstats.com, <http://www.unionstats.com> (accessed February 23, 2015), and U.S. Department of Labor, Bureau of Labor Statistics. Data was interpolated for 1982.

Exposure Draft

<sup>4</sup> The National Center for Public Policy and Higher Education, figure 1. See: [https://www.google.com/url?sa=i&source=images&cd=&ved=2ahUKEwi7iJymr9jIAhWOqp4KHcycDgUQjRx6BAgBEAQ&url=http%3A%2F%2Fwww.highereducation.org%2Freports%2Fpa\\_decline%2Fdecline-f1.shtml&psig=AOvVaw3uOJhMnZZkdRllmJCFoRP\\_&ust=1573225338643184](https://www.google.com/url?sa=i&source=images&cd=&ved=2ahUKEwi7iJymr9jIAhWOqp4KHcycDgUQjRx6BAgBEAQ&url=http%3A%2F%2Fwww.highereducation.org%2Freports%2Fpa_decline%2Fdecline-f1.shtml&psig=AOvVaw3uOJhMnZZkdRllmJCFoRP_&ust=1573225338643184)

<sup>5</sup> Union Rates: <https://www.bls.gov/news.release/union2.nr0.htm>  
<sup>6</sup> U.S. Bureau of Labor Statistics, Profile of the Labor Force by Educational Attainment, August 2017. See: [https://www.google.com/url?sa=i&source=images&cd=&ved=2ahUKEwi7iJymr9jIAhWOqp4KHcycDgUQjRx6BAgBEAQ&url=http%3A%2F%2Fwww.highereducation.org%2Freports%2Fpa\\_decline%2Fdecline-f1.shtml&psig=AOvVaw3uOJhMnZZkdRllmJCFoRP\\_&ust=1573225338643184](https://www.google.com/url?sa=i&source=images&cd=&ved=2ahUKEwi7iJymr9jIAhWOqp4KHcycDgUQjRx6BAgBEAQ&url=http%3A%2F%2Fwww.highereducation.org%2Freports%2Fpa_decline%2Fdecline-f1.shtml&psig=AOvVaw3uOJhMnZZkdRllmJCFoRP_&ust=1573225338643184)

**Figure 1. US labor force, by age**



Source: Bureau of Labor Statistics.

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The workplace is physically different. Offices that had rows of desks with telephones and typewriters have been replaced by flex workstations and collaboration rooms. It is estimated that 4.3 million employees, close to 3% of the U.S. labor force, worked at home at least half the time in 2016; and regular work-at-home by employees have grown 140% over the last decade.<sup>7</sup> Manufacturing facilities have moved from manually operated heavy equipment to technology-run, highly automated processing. *(Side note: possibly include images to illustrate these concepts)*

The kind of work is changing. The last century saw steady decline in agricultural work, manufacturing has remained steady, and service work has dramatically increased. The Bureau of Labor Statistics projects that 9 out of 10 new jobs in the next decade will be in the service-providing sector.<sup>8</sup> Healthcare, personal care, community and social services, and computer and mathematical employment are some of the expected fastest-growing occupations.

The overall impact of these changes has dramatically impacted the way people work and live across the United States. The cumulative impact of these changes is an expansion of the U.S. economy. Real gross domestic product (GDP) has grown from \$1 trillion in 1929 to \$17 trillion in 2017. *[Illustration with chart of real GDP growth over that time period.]*<sup>9</sup> Labor productivity was 3.8 times higher in 2016 than in 1950.<sup>10</sup>

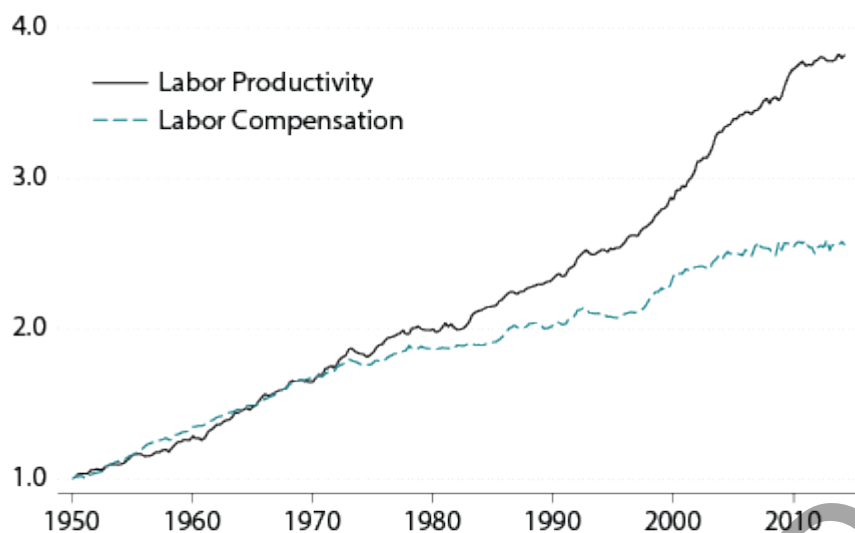
<sup>7</sup> Work at home: <http://globalworkplaceanalytics.com/telecommuting-statistics>

<sup>8</sup> <https://www.bls.gov/news.release/pdf/ecopro.pdf>

<sup>9</sup> Data source found at: <https://www.thebalance.com/us-gdp-by-year-3305543>

<sup>10</sup> Data source found at: <https://research.stlouisfed.org/publications/economic-synopses/2016/08/12/labor-compensation-and-labor-productivity-recent-recoveries-and-the-long-term-trend/>

Figure 3  
**Compensation and Productivity: Long-Term Trend**



NOTE: Both lines are normalized to 1 at 1950:Q1. Labor productivity equals real total output divided by total hours worked. Labor compensation equals real total labor compensation divided by total hours worked.  
SOURCE: BLS Labor Productivity and Costs dataset for the nonfarm business sector.

Over the century, work has also gotten safer. Workplace injuries and fatalities have declined dramatically. Fatalities at work have declined 500%. The workplace fatality rate was 3.3 workers per 100,000 in 2014 contrasted with 61 workers per 100,000 in 1914. The rate of injuries/illnesses requiring time away from work was less than 2 per 100 workers in 2014 contrasted with 5 per 100 workers in 1914.<sup>11</sup>

The decrease in occupational injuries, illnesses, and fatalities is especially good news for workers' compensation. These declines are keeping more employees engaged in the labor force and making it more affordable for businesses to obtain coverage. However, demographic and work changes have raised other challenges for the workers' compensation system. The kinds of injuries and illnesses are different, compensability questions are different, and treatment options are different. These, taken with the evolving employment relationship landscape, should raise important questions about the central principles of workers' compensation and if and how they should evolve for the future.

## **Connections to Work**

### ***Employee or Independent Contractor***

Another significant change happening within the US labor force is how individuals are connected to work. From the legal perspective, there are two classifications of workers - employees and independent contractors. The common picture of an independent contractor is a person with specialized skills, talents, or expertise who works on a project basis. Independent contractors would typically have multiple clients and conduct their work with a fair degree of autonomy.

<sup>11</sup> Bureau of Labor Statistics.

Businesses would use independent contractors to supplement knowledge or experience of their existing workforce on a temporary basis to meet demand or deadlines.

While many businesses use independent contractors in this way, many organizations have made contract labor a more permanent part of their workforce. July 2018 headlines noted that the number of contractors now exceeds the number of employees at Google.<sup>12</sup> Countless large businesses, including Apple, Facebook, and Amazon, have noted the same trend. Contract labor is used by businesses for everything from security and food service to coding and sales.

The decision by a business in how to classify its workers is significant as many protections and benefits for workers are tied to employment, including workers' compensation coverage requirements. Businesses weigh many factors when considering utilizing employees or independent contractors but the direct cost to businesses for employees is estimated at 20-30% higher than independent contractors.

Employee vs. Independent Contractor Status

	<b>Business Considerations</b>		<b>Worker Considerations</b>	
	Pros	Consequences	Pros	Consequences
Employees	<ul style="list-style-type: none"> <li>- Control over how, when, and where work is conducted.</li> <li>- Less turnover</li> <li>- Reduced litigation from employment classification disputes</li> </ul>	<ul style="list-style-type: none"> <li>- Higher cost (contributions to Medicare, SS, UI, WC, other payroll contributions)</li> <li>- Compliance and enforcement with employment protections (ADA, minimum wage, FMLA, anti-discrimination, etc.)</li> </ul>	<ul style="list-style-type: none"> <li>- Employer contributions to Medicare, SS, UI, WC, other payroll contributions</li> <li>- Employment protections (ADA, minimum wage, FMLA, anti-discrimination, etc.)</li> <li>- Stability and security</li> </ul>	<ul style="list-style-type: none"> <li>- Diminished flexibility in how, when, and where work is conducted</li> <li>- Limited ability to work for multiple businesses</li> </ul>
Independent Contractors	<ul style="list-style-type: none"> <li>- Reduced cost</li> <li>- More flexibility (on-demand labor)</li> <li>- Gain specialized skills or experience</li> </ul>	<ul style="list-style-type: none"> <li>- Less control over how, when, and where work is conducted.</li> <li>- Increased turnover</li> <li>- Potential liability for injuries/illnesses/deaths by contractor</li> <li>- Increased exposure to employment classification lawsuits</li> </ul>	<ul style="list-style-type: none"> <li>- Flexibility in how, when, and where work is conducted</li> <li>- Ability to work with multiple businesses/clients</li> </ul>	<ul style="list-style-type: none"> <li>- Responsible for all required payroll contributions</li> <li>- Not covered by many employment protections</li> </ul>

<sup>12</sup> <https://www.bloomberg.com/amp/news/articles/2018-07-25/inside-google-s-shadow-workforce>

Part II reviews how state laws have distinguished between employees and independent contractors.

### **Alternative Work Arrangements**

Whether a worker benefits from the protection of a workers' compensation policy depends on whether they are classified as an employee or an independent contractor. However, a number of alternative work relationships exist which fall along the spectrum of employee or independent contractor. These alternative work arrangements create additional complexity in determining employment classification. The following alternative work arrangements are defined and tracked by the US Bureau of Labor Statistics:

**Independent contractors:** Workers identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers.

**On-call workers:** Workers called to work only as needed, although they can be scheduled to work for several days or weeks in a row.

**Temporary help agency workers:** Workers paid by a temporary help agency, whether or not their job is temporary.

**Workers provided by contract firms:** Workers employed by a company that provides them or their services to others under contract, are usually assigned to only one customer, and usually work at the customer's worksite.

### **Platform Work**

Alternative work arrangements are not new; however, the rise of online platforms has created additional complexity in defining the legal work relationship. Synonymous with the sharing or "gig" economy, online platforms give workers the ability to connect with clients and customers virtually.

The term "gig" economy refers to any type of independent contractor that performs short-term or project-based work for some corporation; i.e. these are not permanent jobs.<sup>13</sup>

Some platform workers may use this type of work as supplemental income while having a full-time job. Others work for multiple platforms at one time, piecing together a living wage<sup>14</sup>. Platform work has expanded broadly across industries, with many types of work and services offered.

#### Examples of Online Platforms

<b>Industry</b>	<b>Companies</b>
Human Intelligence Tasks	Amazon Mechanical Turk
Service (cleaning, installation, etc)	Taskrabbit, Handy, Shiftgig
Transportation	Uber, Lyft Sidecar
Shipping/Logistics	Postmates, airmule
Legal	Upcounsel, PowerUp Legal,
Design/Communications	Upwork, 99designs, freelancer

<sup>13</sup> <https://www.cnn.com/2019/09/11/business/gig-economy-explainer-trnd/index.html>

<sup>14</sup> It is estimated that 40% of platform workers work for multiple platforms at one time. *2015 1099 Economy Report* by Requests for Startups published May 2015.

## By the Numbers

Quantifying the number of individuals within these various work arrangements is important to understanding how well workers are covered for occupational injuries, illnesses, and fatalities. A rising number of individuals in alternative work arrangements could necessitate the need for new private or public solutions to address coverage gaps. Design and implementation of new programs will be influenced by who and how many workers they will serve.

Numerous public and private research efforts have attempted to quantify individuals in various work arrangements. Estimates range from less than 3% to more than 40% of the workforce. There are many reasons for the significant difference in estimates including data sources, survey methodology, definitions of work arrangements, and counting primary or supplemental income. Cornell University’s School of Industrial and Labor Relations and the Aspen Institute’s Future of Work Initiative maintain the Gig Economy Data Hub which catalogues public and private research efforts to quantify various alternative work arrangements.

### Estimates of Alternative or Independent Work

Date	Publication	Description	Estimate
May 2019	MBO Partners: The State of Independence in America	Report by MBO Partners measures independent workers in the U.S. economy.	12.3% of workforce engages in “full-time independent work.”
June 2018	BLS Contingent Worker Supplement	Published by the Bureau of Labor Statistics, the supplement measures workers in contingent (short-term or temporary) or alternative arrangements (independent contractors, temporary, on-call, or contract) as their primary source of income.	10.1% workforce in alternative arrangements for “primary income source”
May 2018	Report on Economic Well-Being of U.S. Households in 2017	Released by the Federal Reserve System, the survey measures adults engaged in “gig work” including both offline and online services and sales. <sup>15</sup>	31% adults engaged in “gig work”
2018	State of Independence in America 2018	Longitudinal study by MBO Income that quantifies workers with independent work arrangements including consultants, freelancers, contractors, temporary and on-call workers.	26.9% of employed population in independent work
October 2017	Freelancing in America, 2017	Published by the Freelancers Union and Upwork, the publication estimates the number of workers in supplemental, temporary, project or contract-based work.	36% of the workforce in alternative work

<sup>15</sup> Offline services could include caregiving or house-cleaning and offline sales could include flea markets or thrift sales; online services could include platform or app work and online sales could include selling items online.



This broad range and lack of research consensus has resulted in inconsistent focus and no clear mandate for policy change.

Beyond measuring the number of individuals in different types of work arrangements, it is also useful to examine multi-year trends. Besides the 2017 BLS Contingent Workforce Supplement, most studies have charted an increase over the last decade in the percentage of individuals engaged in independent or alternative work for primary or supplemental income. If this trend continues it may have important implications for labor and employment policy, including workers' compensation programs.

### **Impact of Change**

These changes and continued technological advancement will influence the U.S. workforce and workplace in the years to come. These changes have a direct impact on workers' compensation systems shaping the insurance market and influencing how care is delivered and return to work opportunities for those displaced from work. Many of the changes have been positive for the workers' compensation system, but none greater than the long-term trend of declining injuries and illnesses. Fewer injuries and fatalities have translated to stable or reduced premiums for employers and robust private insurance markets in most states.

Other changes, including labor force demographics and the new work environments, could influence workers' compensation both directly and indirectly. The ability to engage and perform services in new ways, virtual and remote, blurs lines between control and the direction of work. Additionally, demographic changes are influencing who, how, and where individuals are connecting to work. The differing needs (flexibility, portability, supplemental income, debt repayment, etc.) of these diverse workers may result in accelerating growth in alternative work arrangements.

While some organizations are taking advantage of the alternative workforce, the BLS states the share of contingent workers is not increasing. Part of this could be attributed to dissimilar definitions used by various researchers. It is important to continue researching the number of gig economy workers over time for purposes of economic measurement.<sup>16</sup>

These changes combined are increasing the need to examine existing labor law and how social benefits and protections are structured in the future. The workers' compensation system does not exist in a vacuum. How coverage exists for an occupational injury, illness, or fatality must be considered in the context of the large-scale changes within the economy. At the heart of this discussion is how workers are connecting to work and who will bear responsibility for any occupational injury, illness, or fatality that occurs.

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<sup>16</sup> <https://www.cnn.com/2019/01/07/economy/gig-economy-katz-krueger/index.html>

## Part II: Determining Employment Status

Employment status is essential for understanding the benefits and protections to which a worker is entitled and the financial obligations a business must pay. The rules for this determination are found in federal and state statute. This a complex and nuanced area of the law, with determinations of employment status dependent on the application of various tests and characteristics.<sup>17</sup> There is no coordination of employment determination between federal and state law.

### Federal Standard

Federal statutes define **employee** in many ways. Employment related tests are considered by the Internal Revenue Service (IRS), US Social Security System, Federal Insurance Contributions Act (FICA), Fair Labor Standards Act (FLSA), Civil Rights Act, Age Discrimination in Employment Act, Americans with Disabilities Act (ADA), Federal Unemployment Tax Act (FUTA), and many others.

Three tests have been used in employment determination under federal law. Depending on the law, test used, and case-specific facts a worker could be considered an employee under one law and an independent contractor under another. Employee determination under federal law does not influence workers' compensation coverage obligations under state law. However, there are similarities in the various characteristics considered at the state and federal level. In addition, continued changes in how workers connect to work may result in pressure to clarify and/or align certain areas of the law.

#### *Tests for Employment Determination under Federal Law<sup>18</sup>*

**Common law (Control):** The common law test hinges on control of the means and methods of work. This can include a variety of different factors including direction and supervision of work activities, tools and materials, payment, and intent of the relationship. The IRS uses the common law test and advises three broad categories of consideration – behavioral control, financial control, and relationship of the parties.<sup>19</sup>

**Economic realities:** The economic realities test looks at the financial dependence of a worker on services performed for a specific business. This can include a variety of different factors including the level of financial risk, are services integral to the business operation, and investment in facilities and equipment. The economic realities test is commonly applied under the Fair Labor Standards Act (FLSA) which governs minimum wage and overtime requirements. The economic realities test is broader than the control test and generally favors employee status.

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<sup>17</sup> Even the courts have expressed frustration in the lack of clarity in employment determinations. The Supreme Court, for example, has referred to the definition of an employee under the Americans with Disabilities Act as a “mere ‘nominal definition,’” *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444 (2003), and has stated that the definition of an employee under the Employee Retirement Income Security Act is “completely circular and explains nothing,” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)

<sup>18</sup> See [https://www.law.upenn.edu/journals/jbl/articles/volume14/issue3/Rubinstein14U.Pa.J.Bus.L.605\(2012\).pdf](https://www.law.upenn.edu/journals/jbl/articles/volume14/issue3/Rubinstein14U.Pa.J.Bus.L.605(2012).pdf)

<sup>19</sup> See IRS at <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

**Hybrid:** The hybrid test looks at both economic and common law factors. Under the hybrid test, economic realities are more heavily weighted than common law characteristics. The hybrid test has been applied in employment determinations under Title VII of the Civil Rights Act. (see <https://www.bls.gov/opub/mlr/2002/01/art1full.pdf>)

Numerous cases have tested the interpretation of federal law in determining employment status. A series of FedEx cases across 20 states<sup>20</sup> found the company improperly classified ground delivery drivers as independent contractors. The decisions hinged largely on the direction and control of drivers. Factors considered included requirements by FedEx drivers to wear uniforms, adhere to appearance standards, drive approved vehicles, and deliver packages on specific days and within certain times.

Decisions of the National Labor Relations Board (NLRB) have also been influential in the interpretation of federal law in this area. Most recently, a January 2019 ruling overturned a 2014 decision<sup>21</sup> in favor of employee status based on the application of factors related to entrepreneurial opportunity. The NLRB decision in *SuperShuttle DFW* noted the independence of drivers in setting hours, ownership/lease of vans, and control of payment methods results in significant entrepreneurial opportunity. The greater the entrepreneurial opportunity the more likely it is an independent business which would favor independent contractor status (see *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*).

This decision was influential in shaping the NLRB Advice Memorandum related to Uber and Uber drivers' ability to unionize. The memo finds drivers for Uber are independent contractors based on the factors discussed in *SuperShuttle DFW*; with significance placed on control over manner and means and how the driver is compensated. Both decisions cite entrepreneurial independence as a key consideration in independent contractor status.

The NLRB notes, "Whether to take advantage of these opportunities were among the many entrepreneurial judgments UberX drivers made due to their freedom to set their work schedules, choose log-in locations, and pursue earnings opportunities outside the Uber system." The ability to work for competitors beyond Uber outweighed other factors of control asserted by the platform, including baseline fares, inability to subcontract work, or repeated rejection of trips. Additionally, they noted minimum service standards and driver ratings had little impact on the driver's earning potential (see *Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*).

In considering platform workers, the U.S. Department of Labor issued an opinion letter in April 2019 which clarified the service providers of one platform as independent contractors under Fair Labor Standards Act (FLSA). In applying the "economic realities" test the US Department of Labor considered six factors<sup>22</sup> of service providers who secured jobs through the virtual platform. The opinion letter described the platform as a referral service not an employer.

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<sup>20</sup> Numerous lawsuits against FedEx were filed beginning in 2004. Two class action lawsuits were heard and decided by the Seventh Circuit Court of Appeals and the Ninth Circuit Court. The decisions resulted in mediated settlements with FedEx of more than \$400 million.

<sup>21</sup> NLRB in a 2014 FedEx case found in favor of employee status for drivers based on application of the common law test emphasizing direction and control.

<sup>22</sup> The six factors included control; permanency of relation; investment in facilities, equipment, and helpers; skill, initiative, judgment, or foresight required; opportunity for profit and loss; and integrality.

These recent opinions have been interpreted by many as a signal of the current administration's leaning toward liberal application of independent contractor status. It should be noted these interpretations have no bearing in employment classification status under state workers' compensation laws. It remains to be seen if state courts will evaluate control or economic realities tests in similar ways.

## State Standards

State law defines workers' compensation coverage requirements for most workers in the United States. In all states but Texas and South Dakota,<sup>23</sup> coverage is compulsory for all employees. In 2017 more than 140 million U.S. jobs were covered under state workers' compensation systems. (NASI, Workers' Compensation Benefits, Cost, and Coverage, 2019) However, coverage exemptions are common. Many states do not require that workers' compensation coverage be purchased for domestic and agricultural workers<sup>24</sup> and small employers.<sup>25</sup>

The general trend over the past century has been expansion of coverage to increase the number of workers protected under the workers' compensation system. The rise of alternative employment relationships may signal a reversal of this trend. As more workers find themselves in alternative work arrangements, the more likely they will fall outside the protection of workers' compensation.

Much like Federal law, there may be multiple definitions of "employee" within a state that apply to different areas of the law. This can include intra-state variation across the department of revenue, unemployment insurance, and/or workers' compensation. [State will insert their own example here]

In an effort to simplify and reduce confusion from differing "employment" determinations across state agencies some states have looked to develop a statewide definition of employee. One such effort was in Maine, when the Governor created a cross-agency task force comprised of the Maine Department of Labor, Maine Workers' Compensation Board, and the Maine Attorney General's Office, to develop a single definition of employee. The result was the following:

*Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau, that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, the employing unit proves that the individual meets all of the criteria in Number 1 and three (3) of the criteria in Number 2 as listed below. (See [https://www.maine.gov/labor/misclass/employment\\_standard.shtml](https://www.maine.gov/labor/misclass/employment_standard.shtml))*

A similar effort is underway in Alaska in response to the adoption of a new eight-part independent contractor test as a part of HB 79 passed in 2018.

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<sup>23</sup> Workers' compensation is voluntary in both Texas and South Dakota. In both states, employers lose the right to the exclusive remedy if they fail to purchase coverage.

<sup>24</sup> Recently, exemptions for agricultural workers have been challenged. The New Mexico Supreme Court ruled in 2016 that the agricultural exemption was unconstitutional

<sup>25</sup> A list of state-by-state exemptions can be found in Table 2 of the WCRI/IAABC Workers' Compensation Laws as of January 1, 2019.

## **State Employment Classification**

Classification of a worker as an employee or independent contractor is essential for the workers' compensation system as it determines the coverage obligation. From the legal perspective, states are varied in their approach to employment classification. In general, states fall into the following categories:

**“Employee” Presumption:** Twenty-five states presume a worker is an employee unless they meet the requirements of an independent contractor. A worker may be found to be an independent contractor by meeting certain criteria as defined by law (i.e. they meet all nine provisions set forth in statute) or as determined by an opinion of a judicial body (i.e. determination by a commissioner or judge based on case specific facts).

**“Independent Contractor” Presumption:** Two states presume independent contractor status for those workers who have completed necessary requirements before beginning work. These requirements generally include a written contract/form filed with the state confirming independent contractor status. The presumption of independent contractor status can be overcome.

**Silent:** Twenty-three states have no presumption of status for a worker. The criteria for determining employment status may be described but are applied to cases individually.

Appendix A compiles the state standards used to determine employment classification status for purposes of workers' compensation coverage.

## **State Employment Tests**

Similar to federal law, states have developed a variety of tests and/or criteria that are used in the decision of employment status. There are numerous factors considered in state law but generally states evaluate based on:

**Control of the means, manner, and methods of work:** Rooted in common-law, decisions about *what work must be accomplished* and *how it should be done* are central to considering control in the employment relationship. Factors of control vary across states but include who sets days/hours of work, manner in how work is conducted, service standards, appearance requirements, quality specifications, or other factors interpreted as giving direction to a worker.

**Relative nature of work:** Considers the type of work and how it relates to core business functions. Examines how fundamental the work is to what the business does or how it operates.

**Hybrid:** Weights factors of both control and relative nature of work.

Each state has a body of case law that interprets statutes and rules based on various case-specific facts. A decision may result in more or less workers considered employees for purposes of workers' compensation coverage. The opinion of the California Supreme Court in *Dynamex* demonstrates the time, cost, complexities, and impact a case can have with respect to employment classification.

In 2004, *Dynamex* converted its delivery drivers to independent contractors. They were sued and the final ruling was issued in 2018 which found the delivery drivers were in fact employees of the company. In the decision, the California Supreme Court applied the ABC test which

requires **all** three factors be met to be considered an independent contractor. The three factors include:

1. Freedom from control or direction in the performance of work under the contract or engagement;
2. Work is outside the work of the hiring entities normal business;
3. Worker is engaged in an independently established trade, occupation, or business of which they are performing the work.

Some have interpreted the application of the ABC test as significantly expanding those workers considered employees<sup>26</sup> in California.

In contrast, courts in several other states did not find an employee-employer relationship based on similar factors. In 2018, the New York Appellate Division held there was no employer-employee relationship in *Vega vs. Postmates Inc.* because couriers failed to provide sufficient proof of Postmates' control over the way work was performed. *Sebago vs. Boston Cab Dispatch* in 2015 found taxicab drivers were independent contractors because they were free from control and direction of the cap companies.

### **Marketplace Contractors**

The state-by-state nature of employment law, uncertainty, cost, and time to confirm employment status creates a volatile business environment. In the past several years, platform companies have worked to change laws to clarify the status of platform service providers as independent contractors. A new term of art, Marketplace Contractors, was defined which applies to service providers who are connecting to work through a virtual platform.

Between 2016 and 2018, eight states successfully passed legislation or rule related to marketplace contractors. The eight states are Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, Texas,<sup>27</sup> and Utah. Under these new laws, platform service providers are independent contractors if they meet certain requirements. Common marketplace contractor criteria include:

- Written agreement between the platform and the marketplace contractor which says the marketplace contractor is providing services as an independent contractor and not an employee. Most of the legislation granted retroactive status if these agreements were in place previously.
- Marketplace platform must be virtual; a web, mobile application, or software program. Some legislative language specifically excludes phone or fax services or prohibits services being carried out in a physical location within the state.
- Payment for services performed must be paid on a contract or rate basis. The marketplace contractor is responsible for all tax obligations.
- Marketplace contractor is responsible for providing their own tools or materials to complete the work.

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<sup>26</sup> Legislation has been signed by the Governor of California that makes the ABC test standard for employment classification in California. It takes effect on January 1, 2020.

<sup>27</sup> The Texas Workforce Commission adopted a rule (40 T.A.C. § 815.134) which defines a "Marketplace Contractor" as an independent contractor and makes those individuals ineligible for unemployment benefits. Since workers' compensation is optional in Texas it has no impact on workers' compensation coverage.

- Marketplace contractor can set their own hours.
- Common exclusions include Transportation Networking Companies (TNCs), freight transportation, political subdivisions, religious/charitable/educational organizations, and Indian tribes.

### **Impact of Legal Uncertainty of Employment Classification**

It is unlikely the legislative landscape for employment classification will be significantly simplified in the near future. Changes in the workforce noted in Part I raise questions about the application and applicability of current methods of determining employment status, especially as related to control of means and methods of work. The continued evolution of workers connecting and performing work in new ways may require revision or a redesigned framework for employment classification.

### **Part III: Alternative Coverage Models**

Changes in work relationships raise important public policy questions about the protections and benefits currently linked to employment. A continued increase in alternative work arrangements may necessitate new models and programs for social protections including wage replacement and medical care for occupational injuries, illnesses, and fatalities. New programs might exist within the current workers' compensation system or outside of it. Regardless, consideration of the human, economic and social costs of injuries, illnesses, and fatalities at work is an important element to be included in future policy conversations.

Several ideas have emerged that consider benefits and protections in new forms.

#### **Independent Contractor Coverage**

One way to extend coverage is to amend the state workers' compensation statute to allow a business to optionally provide workers' compensation coverage to designated independent contractors. Elective coverage for an independent contractor would extend exclusive remedy for the business and be considered a benefit for the contractor. If properly structured, this would not affect the individual's independent contractor status for unemployment insurance and wage purposes. Texas allows this option for hiring contractors in Texas Labor Code, Section 406.144.

#### **Black Car Fund**

The **Black Car Fund** is a mechanism that provides workers' compensation coverage for more than 70,000 black car drivers in New York State. The Fund was created in statute in 1999 and is funded by a surcharge paid by the customer on each ride provided by an eligible driver<sup>28</sup>. Drivers obtain coverage through their dispatch organizations, which are members of the Fund. The unique statutory nature of the Black Car Fund designates drivers as "employees" so they are eligible for workers' compensation benefits under New York state law. They retain independent contractor status for all other purposes.

More generically, this concept could be considered a "guild model" where workers providing services in a specific industry (transportation, hairdressing, engineering, etc) could access workers' compensation coverage collectively. This is could be an attractive

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<sup>28</sup> The current surcharge is 2.5%; The Fund

alternative for platform companies because the statutory nature of the fund gets around paying “benefits” that could be interpreted as “employee status.”

### **Occupational Accident Insurance**

The private insurance market offers **Occupational Accident Insurance** policies for those workers not eligible for workers’ compensation. These policies are often associated with high risk industries with a significant number of independent operators/contractors (i.e. long-haul trucking.) An occupational accident insurance policy is purchased by an operator/independent contractor and offers defined coverage for a work-related injury or fatality by the policyholder.

As a general matter, Occupational Accident Insurance typically includes coverages and benefits associated with workers’ compensation insurance including medical, wage replacement and death benefits. However, there are important differences in a workers’ compensation policy and an occupational accident policy. Occupational accident policies generally have a total benefits cap; a cap on medical benefits, and a cap on wage replacement. In addition, there may be no compensation for permanent impairment or consideration of vocational rehabilitation. There are often exclusions for kinds of injuries/illnesses covered, and abbreviated injury or claim reporting requirements. While there is limited access to an external dispute resolution system, Occupational Accident Insurance is subject to the standard insurance claim dispute processes (e.g., a claimant is permitted to file a complaint with his/her state insurance department, and the insurer is subject to fair claims handling and bad faith laws).

One example is the **Driver Injury Protection** policy offered to Uber drivers by AON and Atlantic Specialty Insurance. Uber drivers pay \$.03 per mile and coverage includes medical benefits, wage replacement benefits, and death benefits if they suffer a covered injury while on the app is on. Likewise, as of June 2019, DoorDash now maintains occupational accident insurance on behalf of all U.S. “Dashers” while on a delivery.

Occupational Accident Insurance policies are regulated by the state insurance department. However, workers’ compensation is considered a property & casualty line of business where occupational accident insurance is in personal lines. This may create a disconnect or confusion about the kind and access to benefits across the two policy types. It may also create confusion for consumers or businesses who do not understand the differences in coverage provided.

### **Disability Insurance**

Another mechanism for providing coverage would be expanded use of Disability Insurance. Disability Insurance provides wage replacement benefits for an individual who suffers a sickness or injury. Disability insurance has both private and public insurance options – five states - California, Hawaii, New Jersey, New York, and Rhode Island have mandatory disability insurance programs.

There are key differences in disability insurance and workers’ compensation – disability insurance does not pay medical benefits, wage replacement is capped, and there is no consideration of either permanent partial or total disability or fatalities.



## **Portable Benefits**<sup>29</sup>

Portable Benefit accounts de-couple benefits from the employer and instead offer coverage to an individual worker. An account is funded<sup>30</sup> and can then be used to obtain various coverages including healthcare, disability or occupational accident insurance, and/or workers' compensation. Funding of the account could be designed in many ways but could include contributions from an employer(s), platform(s), contract organization(s), client(s), and/ or the worker.

There are currently two models – one for caregivers through Care.com and one for domestic workers at myalia.com that are piloting portable benefit accounts for underserved worker populations.

Portable benefit accounts have been conceptually supported by policymakers, businesses, labor leaders, and think tank organizations but have not been widely piloted. Key policy, administrative, and design considerations which would shape the implementation of portable benefit accounts and their effectiveness in delivering benefits for work-related injuries, illnesses, and fatalities.

Each of these mechanisms could serve as a model for extending work-related injury, illness and fatality coverage for workers in alternative work arrangements.

### ***Policy Questions and Considerations***

**Exclusive remedy:** One of the central principles of workers' compensation is exclusive remedy. Employees who have a work-related injury, illness, or fatality receive the medical and wage replacement benefits afforded to them by state-law. Once those have been received, employers have no further liabilities. If alternative coverage mechanisms are developed should exclusive remedy be afforded to those business? What provisions or standards must be met to have exclusive remedy?

**Universal coverage:** Workers' compensation started off as a voluntary program but trended toward universal coverage (with some exceptions). Coverage had clear benefit for both employers and employees. If universal coverage is desirable, you must decouple the mandate from the employment relationship (i.e. employee only) and determine how coverage can be delivered in different environments (i.e. do IC have to purchase a work comp policy?)

**Standard benefits:** Workers' compensation benefits (wage replacement and medical) are defined in state statute and applied in the same way for all employees in a state. The advantage of a statutory benefit scheme is that it creates equity across all employees/employers and promotes societal stability (given adequacy of benefits). The disadvantage of this scheme is that benefits may not always be "fair" (i.e. account for pain/suffering; maximums penalize high income earners, etc.)

**Funding/Delivery:** Workers' compensation policies are funded by employers who pay premiums or self-fund. In nonstandard work arrangements the financial responsibility for an occupational injury is ambiguous and therefore who funds coverage bears discussion. Is it the contracting firm's

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<sup>29</sup> <https://www.lexology.com/library/detail.aspx?g=23c3701c-0fcc-4dd4-8de7-de35b81e17d3> Philly passed the country's first portable benefits program.

responsibility (i.e. for all workers regardless of employment status) or is there a cost-sharing obligation by classification or work type?

**Market access:** Workers' compensation has developed market solutions for businesses who are unable to purchase coverage in the voluntary market (residual market or insurer of last resort). Is a solution like this required for workers in alternative work arrangements? Does the cost of coverage be a consideration in developing or determining solutions (i.e. if you are making \$1,000 a year in additional income should you have to buy a policy that costs you some fraction of that ?)

**Safe Harbor:** There are likewise international examples of insurance programs available to gig economy workers that provide many benefits like traditional workers' compensation. A specific example is the Partner Protection insurance program provided to Uber driver-partners by Axa Corporate Solutions in twenty-one countries across Europe. In that instance, insurance coverage is purchased by Uber to apply to all Uber driver-partners for covered events. The policy provides benefits including sickness, injury and maternity/paternity payments for drivers when they are on and off the Uber app. However, in light of various U.S. state laws identified above, it would currently be challenging to implement a similar program in the U.S. absent a safe-harbor provision to preclude a finding of employment status.

## Appendix A: State Standards Used to Determine Independent Contractor Status (2019)

State	Presumption on employee status	Special Rules Specific Occupations	General Description of Criteria
AL	No provision	ALA. CODE § 25-5-50 (2017)	<p>If the employer's right of control over the individual extends no further than directing what is to be ultimately accomplished, the individual is an independent contractor. The employer must not retain the right to dictate the manner of operation or how the work should be done. The factors to be considered in determining whether an individual or an entity has retained the right of control include:</p> <ol style="list-style-type: none"> <li>(1) Direct evidence demonstrating a right or an exercise of control;</li> <li>(2) The method of payment for services;</li> <li>(3) Whether equipment is furnished;</li> <li>(4) Whether the other party has the right to terminate the employment.</li> </ol> <p>ALA. CODE § 25-5-1 (2017); <i>Atchison v. Boone Newspapers, Inc.</i>, 981 So.2d 427 (Ala. Civ. App. 2007).</p>
AK	<p>No</p> <p><i>Alaska Pulp Corp. v. United Paperworkers Int'l Union</i>, 791 P.2d 1008 (Alaska 1990)</p>	ALASKA STAT. § 23.30.230 (2017)	<p>The Alaska Supreme Court has adopted the "relative nature of the work" test for distinguishing between employees and independent contractors. The test first considers the character of the individual's work or business, which is determined by considering three factors:</p> <ol style="list-style-type: none"> <li>(1) The degree of skill involved;</li> <li>(2) Whether the individual holds himself out to the public as a separate business; and</li> <li>(3) Whether the individual bears the accident burden.</li> </ol> <p>The test then considers the relationship of the individual's work or business to the purported employer's business, which is also broken into three factors:</p> <ol style="list-style-type: none"> <li>(1) The extent to which the individual's work is a regular part of the employer's regular work;</li> <li>(2) Whether the individual's work is continuous or intermittent; and</li> <li>(3) Whether the duration of the work is such that it amounts to hiring of continuous services rather than a contract for a specific job.</li> </ol> <p><i>Odsather v. Richardson</i>, 96 P.3d 521 (Alaska 2004).; ALASKA STAT. § 23.30.055 (2017).</p> <p>The Alaska Workers' Compensation Board applies a similar "relative nature of the work" test. The test weighs six factors,</p>

			<p>the first two being the most important—at least one of these two factors must be resolved in favor of an “employee” status for the board to find that a person is an employee. The six factors are whether the work:</p> <ul style="list-style-type: none"> <li>(1) Is a separate calling or business. If the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee. If the employer <ul style="list-style-type: none"> <li>(a) Has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;</li> <li>(b) And the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;</li> <li>(c) Has the right to extensive supervision of the work then there is a strong inference of employee status;</li> <li>(d) Provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;</li> <li>(e) Pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and</li> <li>(f) And person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;</li> </ul> </li> <li>(2) Is a regular part of the employer’s business or service. If it is a regular part of the employer’s business, there is an inference of employee status;</li> <li>(3) Can be expected to carry its own accident burden. This element is more important than factors (4)-(6). If the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;</li> </ul>
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			<p>(4) Involves little or no skill or experience. If so, there is an inference of employee status;</p> <p>(5) Is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job. If the work amounts to hiring of continuous services, there is an inference of employee status; and</p> <p>(6) Is intermittent, as opposed to continuous. If the work is intermittent, there is a weak inference of no employee status.</p> <p>ALASKA ADMIN. CODE tit. 8, § 45.890 (2017); ALASKA STAT. § 23.30.395 (2017).</p>
AZ	<p>Rebuttable presumption of independent contractor status created upon the execution of a written agreement compliant with ARIZ. REV. STAT. ANN. § 23-902 (2017).</p>	<p>ARIZ. REV. STAT. ANN. § 23-909-910 (2017)</p>	<p>An independent contractor is a person engaged in work for a business who is:</p> <ol style="list-style-type: none"> <li>(1) Independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done;</li> <li>(2) Engaged only in the performance of a definite job or piece of work; and</li> <li>(3) Subordinate to that business only in effecting a result in accordance with that business design.</li> </ol> <p>As for the first element, Arizona courts have adopted the “right to control” test, which examines the following factors:</p> <ol style="list-style-type: none"> <li>(1) The duration of the employment;</li> <li>(2) The method of payment;</li> <li>(3) Who furnishes necessary equipment;</li> <li>(4) The right to hire and fire;</li> <li>(5) The extent to which the employer may exercise control over the details of the work; and</li> <li>(6) Whether the work was performed in the usual and regular course of the employer’s business.</li> </ol> <p><i>Home Ins. Co. v. Indus. Comm’n</i>, 599 P.2d 801 (Ariz. 1979).</p> <p>A business or independent contractor may prove the existence of an independent contractor relationship by executing a written agreement stating that the business:</p> <ol style="list-style-type: none"> <li>(1) Does not require the independent contractor to perform work exclusively for the business;</li> <li>(2) Does not provide the independent contractor with any business registrations or licenses required to perform the specific services set forth in the contract;</li> <li>(3) Does not pay the independent contractor a salary or hourly rate instead of an amount fixed by contract;</li> </ol>

			<p>(4) Will not terminate the independent contractor before the expiration of the contract period, unless the independent contractor breaches the contract or violates the Arizona law;</p> <p>(5) Does not provide tools for the independent contractor;</p> <p>(6) Does not dictate the time of performance;</p> <p>(7) Pays the independent contractor in the name appearing on the written agreement; and</p> <p>(8) Will not combine business operations with the person performing the services rather than maintaining these operations separately</p> <p>ARIZ. REV. STAT. ANN. § 23-902 (2017).</p>
AR	<p>Yes</p> <p><i>Silvicraft, Inc. v. Lambert</i>, 661 S.W.2d 403 (Ark. Ct. App. 1983)</p>	<p>ARK. CODE ANN. § 11-9-102 (2017)</p>	<p>Various factors are considered to determine the status of a worker:</p> <p>(1) The right to control the means and the method by which the work is done;</p> <p>(2) The right to terminate the employment without liability;</p> <p>(3) The method of payment;</p> <p>(4) The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;</p> <p>(5) Whether the person employed is engaged in a distinct occupation or business;</p> <p>(6) The skill required in a particular occupation;</p> <p>(7) Whether the employer is a business;</p> <p>(8) Whether the work is an integral part of the regular business of the employer; and</p> <p>(9) The length of time for which the person is employed.</p> <p>However, the “right to control” test is usually sufficient to decide most disputes. The ultimate question in these cases is whether the employer has the right to control over the doing of the work, not whether the employer actually exercises such control.</p> <p>ARK. CODE ANN. § 11-9-102 (2017); <i>Riddell Flying Service v. Callahan</i>, 206 S.W.3d 284 (Ark. Ct. App. 2005).</p>
CA	<p>Yes</p> <p>CAL. LAB. CODE § 2750.5 (2017)</p>	<p>CAL. LAB. CODE § 3352 (2017)</p>	<p>California courts have adopted a number of factors used to determine a worker’s status. The “control of work” test, which analyzes whether the alleged employer had the right to control the manner and means of accomplishing the result desired from the services rendered, is the primary consideration. However, this test is not entirely determinative as the courts consider a number of other factors, including:</p> <p>(1) Whether there exists a right to discharge, at will, without cause;</p>

			<p>(2) Whether the worker is engaged in a distinct occupation;</p> <p>(3) Whether the occupation is the kind that is performed at a locale where the work is usually done under the direction of the principal or by a specialist without supervision;</p> <p>(4) The nature and level of skill required in the particular occupation;</p> <p>(5) Whether the principal or the worker supplied the tools and the place of work for the worker;</p> <p>(6) The length of time the services were to be performed;</p> <p>(7) Whether the method of payment was based on the amount of time worked or on completion of the job;</p> <p>(8) Whether the work was part of the principal's regular business; and</p> <p>(9) Whether the parties intended to create an employment relationship.</p> <p>CAL. LAB. CODE § 3353 (West 2017); <i>S. G. Borello &amp; Sons, Inc. v. Dep't of Indus. Relations</i>, 769 P.2d 399 (Cal. 1989).</p>
CO	<p>Yes</p> <p>COLO. REV. STAT. ANN. § 8-40-202 (West 2017)</p>	<p>COLO. REV. STAT. ANN. § 8-40-202 (West 2017)</p>	<p>Colorado courts have adopted both the "control" test and the "relative nature of the work" test for purposes for determining a worker's status. If either test is met, the worker is considered an employee for workers' compensation purposes.</p> <p>The "control" test primarily considers whether the alleged employer exercises control over the means and methods of accomplishing the contracted service. Other factors include:</p> <p>(1) Whether compensation is measured by time or lump sum; and</p> <p>(2) Which party furnishes the necessary tools and equipment to perform the work.</p> <p>The "relative nature of the work" test considers the following factors:</p> <p>(1) The character of the individual's work; and</p> <p>(2) The relationship of the individual's work to the alleged employer's business.</p> <p>COLO. REV. STAT. ANN. § 8-40-202 (West 2017); <i>Brighton Sch. Dist. v. Lyons</i>, 873 P.2d 26 (Colo. App. 1993); <i>Frank C. Klein &amp; Co. v. Colo. Comp. Ins. Auth.</i>, 859 P.2d 323 (Colo. App. 1993).</p>
CT	No provision	<p>CONN. GEN. STAT. § 31-275 (2017)</p>	<p>Connecticut courts have adopted the "right to control" test to determine a worker's status. The test asks whether the employer has "the right to control the means and methods" used by the worker in the performance of his or her job. As such, an independent contractor is defined as one who,</p>

			<p>exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work.</p> <p><i>Hanson v. Transp. Gen. Inc.</i>, 716 A.2d 857 (Conn. 1998); <i>Chute v. Mobil Shipping &amp; Transportation Co.</i>, 627 A.2d 956 (Conn. App. Ct. 1993); CONN. GEN. STAT. § 31-275 (2017).</p>
DE	No provision	DEL. CODE. ANN. tit. 19, §§ 2301; 2307; 2308; 2316 (2017)	<p>Delaware courts have adopted § 220 of the Restatement (Second) of Agency in determining a worker's status. The Restatement requires consideration of the following factors:</p> <ol style="list-style-type: none"> <li>(1) The extent of control, which, by the agreement, the master may exercise over the details of the work;</li> <li>(2) Whether or not the one employed is engaged in a distinct occupation or business;</li> <li>(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the discretion of the employer or by a specialist without supervision;</li> <li>(4) The skill required in the particular occupation;</li> <li>(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;</li> <li>(6) The length of time for which the person is employed;</li> <li>(7) The method of payment, whether by the time or by the job;</li> <li>(8) Whether or not the work is a part of the regular business of the employer;</li> <li>(9) Whether or not the parties believe they are creating the relation of master and servant; and</li> <li>(10) Whether the principal is or is not in business.</li> </ol> <p><i>Falconi v. Coombs &amp; Coombs, Inc.</i>, 902 A.2d 1094 (Del. 2006); Restatement (Second) of Agency § 220 (1958); DEL. CODE. ANN. tit. 19, § 2301 (2017).</p>
DC	No provision	D.C. CODE § 32-1501 (2017)	<p>The Department of Employment Services applies the "relative nature of the work" test to determine a worker's status, which focuses on whether the individual is hired to do work in which the company specializes. There are 2 prongs to the test. First, the nature and character of the individual's work or business is considered by analyzing 3 factors:</p> <ol style="list-style-type: none"> <li>(1) The degree of skill involved;</li> <li>(2) The degree to which it is a separate calling or business; and</li> <li>(3) The extent to which it can be expected to carry its own accident burden.</li> </ol>



			<p>The second prong analyzes the relationship of the individual's work to the purported employer's business. 3 factors are considered:</p> <ul style="list-style-type: none"> <li>(1) The extent to which the individual's work is a regular part of the employer's regular work;</li> <li>(2) Whether individual's work is continuous or intermittent; and</li> <li>(3) Whether the duration is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job.</li> </ul> <p>D.C. CODE § 32-1501 (2017); <i>Gross v. D.C. Dept. of Emp't Serv.</i>, 826 A.2d 393 (D.C. 2003).</p>
FL	No provision	FLA. STAT. § 440.02 (2017)	<p>A worker is considered an independent contractor provided at least 4 of the following criteria are met:</p> <ul style="list-style-type: none"> <li>(1) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;</li> <li>(2) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;</li> <li>(3) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;</li> <li>(4) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;</li> <li>(5) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or</li> <li>(6) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.</li> </ul> <p>If 4 of the criteria above do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the</p>

			<p>individual situation with regard to satisfying any of the following conditions:</p> <ol style="list-style-type: none"> <li>(1) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;</li> <li>(2) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;</li> <li>(3) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;</li> <li>(4) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;</li> <li>(5) The independent contractor may realize a profit or suffer a loss in connection with performing work or services;</li> <li>(6) The independent contractor has continuing or recurring business liabilities or obligations; or</li> <li>(7) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.</li> </ol> <p>FLA. STAT. § 440.02 (2017).</p>
GA	No provision	GA. CODE ANN. § 34-9-2 (2017)	<p>An individual is an independent contractor if such person meets all of the following criteria:</p> <ol style="list-style-type: none"> <li>(1) Is a party to a contract which intends to create an independent contractor relationship;</li> <li>(2) Has the right to exercise control over the time, manner, and method of the work to be performed; and</li> <li>(3) Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.</li> </ol> <p>GA. CODE ANN. § 34-9-2 (2017).</p>
HI	No provision	HAW. REV. STAT. § 386-1 (2017)	<p>Both the "control" and "relative nature of the work" tests are used to determine an individual's status.</p> <p>Under the "control" test, an employment relationship exists when the person in whose behalf the work is done has the power to dictate the means and methods by which the work is to be accomplished. Conversely, "[o]ne who contracts with another to do a specific piece of work for him [or her], and who furnishes and has the absolute control of his [or her] assistants, and who executes the work entirely in accord with his [or her] ideas, or with a plan previously given him [or her] by the person for whom the work is done, without being subject to the latter's orders in respect of the details of the</p>

			<p>work, with absolute control thereof...is an independent contractor.”</p> <p>The “relative nature of the work test” involves a balancing of factors regarding the general relationships which the employee has with regard to the work performed for each of his employers. Relevant factors include:</p> <ul style="list-style-type: none"> <li>(1) Whether the work done is an integral part of the employer’s regular business; and</li> <li>(2) Whether the worker, in relation to the employer’s business, is in a business or profession of his own.</li> </ul> <p>HAW. REV. STAT. §§ 386-73.5; 386-1 (2017); <i>Locations, Inc. v. Haw. Dept. of Labor</i>, 900 P.2d 784 (Haw. 1995).</p>
ID	<p>Yes</p> <p><i>Moore v. Moore</i>, 269 P.3d 802 (Idaho 2011)</p>	<p>IDAHO CODE ANN. §§ 72-102; 72-212 (2017)</p>	<p>The test to determine an individual’s status is whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results. The Idaho courts use a 4 factor test to determine an individual’s status:</p> <ul style="list-style-type: none"> <li>(1) There must be evidence of the employer’s right to control the employee;</li> <li>(2) The method of payment;</li> <li>(3) Whether the employer or individual furnishes major items of equipment; and</li> <li>(4) Whether either party has the right to terminate the relationship at will, or whether one is liable to the other in the event of a preemptory termination.</li> </ul> <p>IDAHO CODE ANN. § 72-102 (2017); <i>Shriner v. Rausch</i>, 108 P.3d 375 (Idaho 2005); <i>Kiele v. Steve Henderson Logging</i>, 905 P.2d 82 (Idaho 1995).</p>
IL	<p>No provision</p>	<p>820 ILL. COMP. STAT. 305/1 (2017)</p>	<p>A number of factors are considered in determining an individual’s status. The most important factor is whether the purported employer has a right to control the actions of the individual, followed by the nature of the work performed by the individual in relation to the general business of the employer. Additional relevant, albeit less important, factors include:</p> <ul style="list-style-type: none"> <li>(1) The method of payment;</li> <li>(2) The right to discharge;</li> <li>(3) The skill the work requires;</li> <li>(4) Which party provides the needed instrumentalities;</li> <li>(5) Whether income tax has been withheld; and</li> <li>(6) The label the parties place upon their relationship.</li> </ul> <p>820 ILL. COMP. STAT. 305/1 (2017); <i>Esquinca v. Ill. Workers’ Comp. Comm’n</i>, 51 N.E.3d 5 (Ill. App. Ct. 2016).</p>

IN	<p>Yes</p> <p><i>Walker v. State</i>, 694 N.E.2d 258 (Ind. 1998)</p>	<p>IND. CODE §§ 22-3-2-9; 22-3-6-1 (2017)</p>	<p>The Indiana Supreme Court has adopted the test articulated in § 220 of the Restatement (Second) of Agency in determining a worker's status. The Restatement requires consideration of the following factors:</p> <ol style="list-style-type: none"> <li>(1) The extent of control which, by the agreement, the master may exercise over the details of the work;</li> <li>(2) Whether or not the one employed is engaged in a distinct occupation or business;</li> <li>(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;</li> <li>(4) The skill required in the particular occupation;</li> <li>(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;</li> <li>(6) The length of time for which the person is employed;</li> <li>(7) The method of payment, whether by the time or by the job;</li> <li>(8) Whether or not the work is a part of the regular business of the employer;</li> <li>(9) Whether or not the parties believe they are creating the relation of master and servant; and</li> <li>(10) Whether the principal is or is not in business.</li> </ol> <p><i>Moberly v. Day</i>, 757 N.E.2d 1007 (Ind. 2001); Restatement (Second) of Agency § 220 (1958); IND. CODE § 22-3-6-1 (2015).</p>
IA	<p>Yes</p> <p><i>Daggett v. Nebraska-Eastern Exp., Inc.</i>, 107 N.W.2d 102 (Iowa 1961)</p>	<p>IOWA CODE § 85.61 (2016)</p>	<p>Iowa courts have adopted two tests for determining a worker's status. First, in determining the existence of an employer-employee relationship, the courts analyze the following five factors:</p> <ol style="list-style-type: none"> <li>(1) The right of selection, or to employ at will;</li> <li>(2) Responsibility for payment of wages by the employer;</li> <li>(3) The right to discharge or terminate the relationship;</li> <li>(4) The right to control the work; and</li> <li>(5) The identity of the employer as the authority in charge of the work or for whose benefit it is performed.</li> </ol> <p>Second, in determining whether a worker qualifies as an independent contractor, the courts consider the following eight factors:</p> <ol style="list-style-type: none"> <li>(1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;</li> </ol>

			<ul style="list-style-type: none"> <li>(2) The independent nature of the business or of a distinct calling;</li> <li>(3) The employment of assistants, with the right to supervise their activities;</li> <li>(4) The obligation to furnish necessary tools, supplies and materials;</li> <li>(5) The right to control the progress of the work, except as to final result;</li> <li>(6) The time for which the worker is employed;</li> <li>(7) The method of payment, whether by time or by job; and</li> <li>(8) Whether the work is part of the regular business of the employer.</li> </ul> <p>Above all, the “right to control” is the most important consideration.</p> <p>The parties’ intent may also be considered as a factor in the analysis, although the courts have warned that this analysis should not be determinative and should only be considered if the “right to control” factor is debatable.</p> <p>IOWA CODE § 85.61 (2016); <i>Stark Constr. v. Lauterwasser</i>, 847 N.W.2d 612 (Iowa Ct. App. 2014).</p>
KS	No provision	KAN. STAT. ANN. § 44-508 (2014)	<p>Kansas courts have adopted the Restatement factors in determining a worker’s status. However, the single most important factor is whether the employer controls, or has the right to control, the manner and methods of the worker in doing the particular task. Additional considerations include:</p> <ul style="list-style-type: none"> <li>(1) Whether or not the one employed is engaged in a distinct occupation or business;</li> <li>(2) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;</li> <li>(3) The skill required in the particular occupation;</li> <li>(4) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;</li> <li>(5) The length of time for which the person is employed;</li> <li>(6) The method of payment, whether by the time or by the job;</li> <li>(7) Whether or not the work is part of the regular business of the employer;</li> <li>(8) Whether or not the parties believe they are creating the relation of master and servant; and</li> <li>(9) Whether the principal is or is not in business.</li> </ul>

			<i>Travelers Indem. Co. of Ill. v. Challenger Fence Co., Inc.</i> , 119 P.3d 666 (Kan. Ct. App. 2005); Restatement (Second) of Agency § 220 (1958); KAN. STAT. ANN. § 44-508 (2014).
KY	Yes  KY. REV. STAT. ANN. § 342.640 (2014)	KY. REV. STAT. ANN. § 342.640 (2014)	<p>Kentucky courts analyze four predominant factors to determine a worker's status:</p> <ol style="list-style-type: none"> <li>(1) The alleged employer's right to control the details of the work;</li> <li>(2) The nature of the work as related to the business generally carried on by the alleged employer;</li> <li>(3) The professional skill of the individual; and</li> <li>(4) The true intent of the parties.</li> </ol> <p>The "right to control" factor is the most important in the analysis, which is determined by analyzing the following factors:</p> <ol style="list-style-type: none"> <li>(1) Method of payment;</li> <li>(2) Which party furnishes the equipment; and</li> <li>(3) Whether the alleged employer has the right to discharge the individual performing the work.</li> </ol> <p><i>Steinrock v. Cook</i>, No. 2011-SC-000032-WC (Ky. Aug. 25, 2011); <i>Uninsured Emp'rs' Fund v. Garland</i>, 805 S.W.2d 116 (Ky. 1991).</p>
LA	Yes  LA. REV. STAT. ANN. § 23:1021 (2013)	LA. REV. STAT. ANN. § 23:1021 (2013)	<p>Louisiana courts consider the following factors in determining a worker's status:</p> <ol style="list-style-type: none"> <li>(1) Whether there is a valid contract between the parties;</li> <li>(2) Whether the work being done is of an independent nature such that the individual may employ non-exclusive means in accomplishing it;</li> <li>(3) Whether the contract calls for specific piecework as a unit to be done according to the individual's own methods without being subject to the control and direction of the principal, except as to the result of the services to be rendered;</li> <li>(4) Whether there is a specific price for the overall undertaking; and</li> <li>(5) Whether the specific time or duration is agreed upon and not subject to termination at the will of either side without liability for breach.</li> </ol> <p><i>Steinfelds v. Villarubia</i>, 53 So.3d 1275 (La. Ct. App. 2010); LA. REV. STAT. ANN. § 23:1021 (2013).</p>
ME	Yes  ME. REV. STAT. tit. 39-	ME. REV. STAT. tit. 39-A, § 102 (2013)	<p>An individual is presumed to be an employee unless the employing unit proves that the person is free from the essential direction and control of the employing unit. In order for an individual to be an independent contractor, the following criterial must be met:</p>

	A, § 102 (2013)		<p>(1) The person has the essential right to control the means and progress of the work except as to final results;</p> <p>(2) The person is customarily engaged in an independently established trade, occupation, profession, or business;</p> <p>(3) The person has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;</p> <p>(4) The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervise the details of the assistants' work; and</p> <p>(5) The person makes the person's services available to some client or customer community even if the person's right to do so is voluntary not exercised or is temporarily restricted.</p> <p>Additionally, at least three of the following criteria must be met:</p> <p>(1) The person has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the person to complete the work;</p> <p>(2) The person is not required to work exclusively for the other individual or entity;</p> <p>(3) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;</p> <p>(4) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;</p> <p>(5) Payment to the person is based on factors directly related to the work performed and not solely on the amount of time expended by the person;</p> <p>(6) The work is outside the usual course of business for which the service is performed; or</p> <p>(7) The person has been determined to be an independent contractor by the federal Internal Revenue Service.</p> <p>ME. REV. STAT. tit. 39-A, § 102 (2013).</p>
MD	Yes Md. CODE ANN. LAB. &	MD. CODE ANN. LAB. & EMP. §§ 9-203 to 9-236 (2009)	Maryland courts consider five criteria in determining a worker's status. The decisive consideration is the "control" test: whether the employer has the right to control and direct the employee in the performance of the work and in the

	EMP. § 9-202 (2009)		<p>manner in which the work is done. The following factors are also relevant:</p> <ol style="list-style-type: none"> <li>(1) The power to select and hire the employee;</li> <li>(2) The payment of wages;</li> <li>(3) The power to discharge; and</li> <li>(4) Whether the work is part of the regular business of the employer.</li> </ol> <p><i>Injured Workers' Ins. Fund v. Orient Exp. Delivery Serv., Inc.</i>, 988 A.2d 1120 (Md. Ct. Spec. App. 2010); MD. CODE ANN. LAB. &amp; EMP. § 9-202 (2009).</p>
MA	<p>Yes</p> <p>MASS. GEN. LAWS ch. 149, § 148B (2004)</p>	<p>MASS. GEN. LAWS ch. 152, § 1 (2011)</p>	<p>The standard in determining a worker's status is the same as the common law agency standard, the primary factor being the right to control. Massachusetts courts consider the factors set out in the Restatement (Second) of Agency, which are as follows:</p> <ol style="list-style-type: none"> <li>(1) The extent of control which, by the agreement, the master may exercise over the details of the work;</li> <li>(2) Whether or not the one employed is engaged in a distinct occupation or business;</li> <li>(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;</li> <li>(4) The skill required in the particular occupation;</li> <li>(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;</li> <li>(6) The length of time for which the person is employed;</li> <li>(7) The method of payment, whether by the time or by the job;</li> <li>(8) Whether or not the work is part of the regular business of the employer;</li> <li>(9) Whether or not the parties believe they are creating the relation of master and servant; and</li> <li>(10) Whether the principal is or is not in business.</li> </ol> <p><i>Travelers Prop. Cas. Co. of Am. v. Universal Drywall, LLC.</i>, 10 N.E.3d 178 (Mass. App. Ct. 2014); Restatement (Second) of Agency § 220 (1958); MASS. GEN. LAWS ch. 152, § 1 (2011).</p>
MI	No provision	<p>MICH. COMP. LAWS §§ 418.115 to 418.120; 418.161 (2017)</p>	<p>In order for a worker to be considered an employee, three criteria must be met. The worker must not:</p> <ol style="list-style-type: none"> <li>(1) Maintain a separate business;</li> <li>(2) Hold himself/herself out to and render service to the public; or</li> <li>(3) Be an employer subject to the worker's compensation act.</li> </ol>



			MICH. COMP. LAWS § 418.161 (2012); <i>Auto-Owners Ins. Co. v. All Star Lawn Specialists Plus, Inc.</i> , 857 N.W.2d 520 (Mich. 2014).
MN	No provision	<p>Minnesota regulations set forth criteria for 34 specific occupations. Minn. R. 5224.0010 to 5224.0340 (2017).</p> <p>MINN. STAT. § 181.723 (2009) sets forth criteria for construction contractors.</p> <p>MINN. STAT. § 176.043 (2009) sets forth criteria for trucking and messenger/courier industries.</p>	<p>Minnesota courts have adopted a five factor test to determine the status of workers not specifically engaged in the occupations enumerated in MINN. R. 5224.0010 to 5224.0340 (2017):</p> <ol style="list-style-type: none"> <li>(1) The right to control the means and manner of performance;</li> <li>(2) The mode of payment;</li> <li>(3) The furnishing of tools and materials;</li> <li>(4) Control over the premises where the work was done; and</li> <li>(5) The right of discharge.</li> </ol> <p>Of the factors, the right to control is the most important. A number of considerations are used to determine whether the employer possesses such a right to control, including:</p> <ol style="list-style-type: none"> <li>(1) Employer's authority over the individual's assistants;</li> <li>(2) The individual's compliance with instructions;</li> <li>(3) Whether oral or written reports are required to be submitted to the employer;</li> <li>(4) Whether the work is performed on the employer's premises;</li> <li>(5) Whether services must be personally rendered to the employer;</li> <li>(6) Whether there exists a continuing relationship between the parties;</li> <li>(7) Whether the employee has set hours of work;</li> <li>(8) Whether the individual has been trained by the employer;</li> <li>(9) The amount of time the individual dedicates to the work;</li> <li>(10) Whether the individual has simultaneous contracts with different firms;</li> <li>(11) Whether tools and materials have been furnished by the employer;</li> <li>(12) Whether the individual's expenses are reimbursed; and</li> <li>(13) Whether the employer is required to enforce standards or restrictions imposed by regulatory and licensing agencies.</li> </ol> <p><i>Guhlke v. Roberts Truck Lines</i>, 128 N.W.2d 324 (Minn. 1964); <i>Hunter v. Crawford Door Sales</i>, 501 N.W.2d 623 (Minn. 1993); MINN. R. 5224.0330 (2017); Minn. Dept. of Lab. And Indus., <i>Workers' Compensation – Determining Independent Contractor or Employee Status</i>, <a href="http://www.dli.mn.gov/WC/lndpCont.asp">http://www.dli.mn.gov/WC/lndpCont.asp</a>.</p>

MS	No provision	MISS. CODE ANN. §§ 71-3-3; 71-3-5 (West 2017)	<p>Mississippi courts have adopted the “right to control” test to determine a worker’s status. The test consists of the following factors:</p> <ul style="list-style-type: none"> <li>(1) Direct evidence of right or exercise of control;</li> <li>(2) The method of payment;</li> <li>(3) The furnishing of equipment; and</li> <li>(4) The employer’s right to fire.</li> </ul> <p><i>Se. Auto Brokers v. Graves</i>, 210 So.3d 1012 (Miss. Ct. App. 2015); MISS. CODE ANN. § 71-3-3 (West 2011).</p>
MO	<p>No</p> <p><i>McCracken v. Wal-Mart Stores East, LP</i>, 298 S.W.3d 473 (Mo. 2009)</p>	MO. REV. STAT. § 287.020 (2017)	<p>The primary test to determine a worker’s status is the right to control. If an employer has the right to control the means and manner of a worker’s service, the worker is an employee rather than an independent contractor. A number of factors are considered in this analysis:</p> <ul style="list-style-type: none"> <li>(1) The extent of control;</li> <li>(2) The actual exercise of control;</li> <li>(3) The duration of the employment;</li> <li>(4) The right to discharge;</li> <li>(5) The method of payment;</li> <li>(6) The degree to which the alleged employer furnished equipment;</li> <li>(7) The extent to which the work is the regular business of the employer; and</li> <li>(8) The employment contract.</li> </ul> <p>Where the control analysis does not settle the issue, the “relative nature of the work” test is also applied. This test analyzes the economic and functional relationship between the nature of the work and a business’ operation. The following factors are considered:</p> <ul style="list-style-type: none"> <li>(1) The amount of skill the worker’s job requires;</li> <li>(2) The degree to which the work is a separate calling or enterprise;</li> <li>(3) The extent to which the job might be expected to carry its own accident burden;</li> <li>(4) The relation of the job to the employer’s business;</li> <li>(5) Whether the job being performed is continuous or intermittent; and</li> <li>(6) Whether the job’s duration amounts to the hiring of continuous services rather than a contract for the completion of a particular job.</li> </ul> <p>Missouri law allows some independent contractors to recover under worker’s compensation law. Individuals having work done under contract on or about their premises which is an operation of the usual business which he there</p>

			<p>carries is considered an employer and is liable to all workers, regardless of status, for worker's compensation.</p> <p><i>Leach v. Bd. of Police Comm'rs of Kansas City</i>, 118 S.W.3d 646 (Mo. Ct. App. 2003); MO. REV. STAT. § 287.040 (2017).</p>
MT	Yes	<p>MONT. CODE ANN. § 39-71-118 (2017)</p>	<p>In determining whether an individual is an independent contractor, the court will consider the following factors:</p> <ul style="list-style-type: none"> <li>(1) Direct evidence of right or exercise of control;</li> <li>(2) Method of payment;</li> <li>(3) Furnishing of equipment; and</li> <li>(4) Right of employer to fire</li> </ul> <p>Under MONT. CODE ANN. § 39-71-417 (2011), a worker can apply for an "Independent Contractor Certification" if, among other things, the worker swears to and acknowledges:</p> <ul style="list-style-type: none"> <li>(1) That the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and</li> <li>(2) That the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department</li> </ul> <p><i>Doig v. Graveley</i>, 809 P.2d 12 (Mont. 1991); MONT. CODE ANN. §§ 39-71-118 (2017); 39-71-417 (2011).</p>
NE	Yes	<p>NEB. REV. STAT. § 48-106 (2010)</p> <p>Industry Exceptions</p>	<p>Nebraska's Workers' Compensation Law and case law suggest there is no single test for determining whether one is an employee or independent contractor, but instead the following factors will be considered in the determination of status:</p> <ul style="list-style-type: none"> <li>(1) The extent of control which the employer may exercise over the details of the work;</li> <li>(2) Whether the one employed is engaged in a distinct occupation or business;</li> <li>(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;</li> <li>(4) The skill required in the particular occupation;</li> <li>(5) Whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work;</li> <li>(6) The length of time for which the one employed is engaged;</li> <li>(7) The method of payment, whether by time or by the job;</li> </ul>

			<p>(8) Whether the work is part of the regular business of the employer;</p> <p>(9) Whether the parties believe they are creating an agency relationship; and</p> <p>(10) Whether the employer is or is not in business</p> <p>NEB. REV. STAT. § 48-101 (2010); <i>Omaha World-Herald v. Dernier</i>, 570 N.W.2d 508 (Neb. 1997).</p>
NV	No	NEV. REV. STAT. §§ 616A.105 to 616A.360 (2013)	<p>Nevada's Worker's Compensation law defines an independent contractor as any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the person's work only and not as to the means as to which the result is accomplished.</p> <p>Under Nevada's Industrial Insurance Act, if a worker meets three or more of the following criteria, there is a presumption that the worker is an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary item bargained for by the principal in the contract;</li> <li>(2) the person generally has control over the time the work is performed;</li> <li>(3) The person is not required to work exclusively for once principal unless a law, regulation or ordinance otherwise prohibits the person from providing services to more than one principal or the person has entered into a written contract to provide services to only one principal;</li> <li>(4) The person is free to hire employees to assist with the work; and</li> <li>(5) The person contributes a substantial investment of capital in the business of the person, including without limitation <ol style="list-style-type: none"> <li>(a) purchase or lease of ordinary tools, material and equipment</li> <li>(b) obtaining of a license or other permission from the principal to access any work space of the principal to perform the work</li> <li>(c) lease of any work space from the principal required to perform the work for which the person was engaged</li> </ol> </li> </ol> <p>The fact that a person does not satisfy three or more of the listed criteria does not automatically create a presumption that the person is an employee.</p>

			NEV. REV. STAT. §§ 608.0155 (2015); 616A.255.
NH	Yes	N.H. REV. STAT. ANN. § 281-A:2 (2017)	<p>Under New Hampshire's Worker's Compensation Law, the presumption of employee status can be rebutted if a person meets all of the following criteria:</p> <ol style="list-style-type: none"> <li>(1) the person possesses or has applied for a federal employer identification number or a social security number, or in the alternative, has agreed in writing to carry out the responsibility imposed on employers under this chapter;</li> <li>(2) the person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed is the primary element bargained for by the employer;</li> <li>(3) the person has control over the time when the work is performed, and the time of performance is not dictated by the employer, although the employer may still prescribe a completion schedule, range of work hours, and maximum number of work hours to be provided by the person;</li> <li>(4) the person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work;</li> <li>(5) the person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations;</li> <li>(6) the person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work; and</li> <li>(7) the person is not required to work exclusively for the employer</li> </ol> <p>N.H. REV. STAT. ANN. § 281-A:2 (2017).</p>

NJ	Yes	N.J. STAT. ANN. § 43:21-19 (2010)	<p>Under New Jersey’s Unemployment Law, services provided for remuneration shall be deemed to be under an employment relationship unless it is shown that:</p> <ol style="list-style-type: none"> <li>(1) an individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;</li> <li>(2) 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</li> <li>(3) such individual is customarily engaged in an independently established trade, occupation, profession or business</li> </ol> <p>The New Jersey Supreme Court in <i>Hargrove v. Sleepy’s, LLC</i>, 106 A.3d 449 (2015) adopted the above test for Worker’s Compensation purposes and stated that for determining whether an individual is an employee or an independent contractor, the courts must consider twelve factors:</p> <ol style="list-style-type: none"> <li>(1) the employer’s right to control the means and manner of the worker’s performance</li> <li>(2) the kind of occupation and whether the work is supervised or unsupervised;</li> <li>(3) the amount of skill involved;</li> <li>(4) who furnishes the equipment and workplace;</li> <li>(5) the length of time in which the individual has worked;</li> <li>(6) the method of payment;</li> <li>(7) the manner of termination of the work relationship;</li> <li>(8) whether there is annual leave;</li> <li>(9) whether the work is an integral part of the business of the employer;</li> <li>(10) whether the worker accrues retirement benefits;</li> <li>(11) whether the employer pays social security taxes</li> <li>(12) the intention of the parties</li> </ol> <p>N.J. STAT. ANN. § 43:21-19 (2010), <i>Hargrove v. Sleepy’s, LLC</i>, 106 A.3d 449 (N.J. 2015).</p>
NM	Yes	No provision	<p>New Mexico courts will first employ a “right-to-control” test to determine whether a worker is an employee or independent contractor. If the right-to-control test points to independence, the court will then apply a “relative-nature of the work” test.</p> <p>Factors that may be considered in determining existence of employment relationship include:</p> <ol style="list-style-type: none"> <li>(1) direct evidence of exercise of control</li> </ol>

			<p>(2) right to terminate employment relationship at will by either party without liability</p> <p>(3) right to delegate work or to hire and fire assistants</p> <p>(4) method of payment whether by time or by job</p> <p>(5) whether party employed engages in distinct operation or business</p> <p>(6) whether or not the work is part of employer's regular business</p> <p>(7) skill required in particular occupation</p> <p>(8) whether employer supplies instrumentalities, tools or place of work</p> <p>(9) duration of person's employment; and</p> <p>(10) whether person works full-time or part-time of control by one and submission to control by the other</p> <p>N.M. STAT. ANN. § 52-1-22 (1978); <i>Romero v. Shumate Constructors, Inc.</i>, 888 P.2d 940 (N.M. 1994); <i>Harger v. Structural Services, Inc.</i>, 916 P.2d 1234 (N.M. 1996).</p>
NY	Yes	<p>Presumption for employment for construction workers unless the worker is a "separate business entity"</p> <p>§ 861-c; N.Y. WORKER'S COMPENSATION LAW § 21</p>	<p>An independent contractor is one who is:</p> <ol style="list-style-type: none"> <li>1. free from control and direction in performing the job, both under his contract and in fact</li> <li>2. the service is performed outside the usual course of business for which the service is performed; and</li> <li>3. the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue</li> </ol> <p>When making a determination of whether an employer-employee relationship exists, the New York courts will consider factors such as the right to control the work, the method of payment, the right to discharge, the furnishing of equipment and supplies, and the relative nature of the work. No single factor is dispositive.</p> <p>N.Y. WORKER'S COMPENSATION LAW §§ 2, 21 (2017); <i>Sang Hwan Park v. Lee</i>, 53 A.D.3d 936 (2008).</p>
NC	Yes	<p>§ 97-5.1 (2013)</p> <p>Presumption that taxicab drivers are independent contractors</p>	<p>North Carolina courts define independent contractor as one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.</p> <p>The determinative factor in North Carolina courts as to whether person is an employee or independent contractor for purposes of workmen's compensation is control. North Carolina courts will use the "right to control" when determining whether a person is an employee or an independent contractor for purposes of the Workers' Compensation Act. Generally, where an employer has the</p>

			<p>right to control over the means and the methods of an employee's work, there will be an employer-employee relationship. The requirement of control is sufficiently met where its extent is commensurate with that degree of supervision which is necessary and appropriate considering the type of work to be done and the capabilities of the person doing it.</p> <p>The North Carolina courts will also look at eight factors which indicate classification as independent contractor, including if:</p> <ol style="list-style-type: none"> <li>(1) the worker is engaged in independent business, calling, or occupation;</li> <li>(2) worker has independent use of his special skill, knowledge, or training in execution of work;</li> <li>(3) worker is doing specified piece of work at fixed price or for lump sum or upon quantitative basis;</li> <li>(4) worker is not subject to discharge because he adopts one method of doing work rather than another;</li> <li>(5) worker is not in regular employ of other contracting party;</li> <li>(6) worker is free to use such assistants as he may think proper;</li> <li>(7) worker has full control over such assistants; and</li> <li>(8) worker is able to select his/her own time</li> </ol> <p>N.C. GEN. STAT. § 97-2 (2000); <i>Youngblood v. North State Ford Truck Sales</i>, 364 S.E.2d 433 (N.C. 1988); <i>Alford v. Victory Cab Co., Inc.</i>, 228 S.E.2d 43 (N.C. 1976); <i>McCown v. Hines</i>, 537 S.E.2d 242 (N.C. 2000).</p>
ND	Yes	N.D. CENT. CODE § 65-01-03	<p>N.D. ADMIN CODE § 92-01-02-49 (2012) states that twenty factors are to be considered when determining whether a worker is an independent contractor or an employee:</p> <ol style="list-style-type: none"> <li>(1) Amount of instructions given to the employee by the employer;</li> <li>(2) Amount of training given to the employee;</li> <li>(3) Amount of integration of a person's services into the business operations;</li> <li>(4) Services rendered personally; if the services must be rendered personally, the person who the services are performed for are interested in the methods used, which goes towards employee-employer relationship</li> <li>(5) Ability to hire, supervise, and pay assistants;</li> <li>(6) Continuing relationship between the person and person(s) for whom the services are performed;</li> <li>(7) Set hours of work;</li> <li>(8) Full time required; an independent contractor is one who is free to work when and for whom he chooses.</li> </ol>



			<p>Full time required suggests an employer-employee relationship.;</p> <ul style="list-style-type: none"> <li>(9) Where the work is performed;</li> <li>(10) Order or sequence set the work must be performed;</li> <li>(11) Whether there is a requirement for regular oral or written reports;</li> <li>(12) How the worker is paid;</li> <li>(13) Whether there is payment of business or traveling expenses, or both;</li> <li>(14) Who is responsible for furnishing of tools and materials;</li> <li>(15) Whether there is significant investment in facilities used by the workman;</li> <li>(16) Realization of profit or loss: a person who may realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee;</li> <li>(17) Whether the worker provides services for more than one employer at a time;</li> <li>(18) Whether the worker's services are available to the general public;</li> <li>(19) the right of the employer to terminate/discharge exists; and</li> <li>(20) the right to dismissal</li> </ul> <p>There is no certain number of the 20 factors of the common-law test that must be met to qualify as an independent contractor, and the degree of each factor varies depending on the occupation and the factual context in which the services are performed.</p> <p>N.D. CENT. CODE. § 65-01-02 (2017); <i>Myers-Weigel Funeral Home v. Job Ins. Div. of Job Serv. N.D.</i>, 578 N.W.2d 125 (N.D. 1998).</p>
OH	No provision	OHIO REV. CODE ANN. § 4123.01 (2015)  Industry Exceptions	<p>OHIO REV. CODE ANN. § 4123.01 (2015) states that a person who meets at least ten of the following criteria are excluded from the definition of employee:</p> <ul style="list-style-type: none"> <li>(1.) the worker is required to comply with instructions from the other contracting party regarding the manner or methods of performing services</li> <li>(2.) The person is required by the other contracting party to have particular training</li> <li>(3.) The person's services are integrated into the regular functioning of the other contracting party</li> <li>(4.) The person is required to perform the work personally</li> <li>(5.) The person is hired, supervised, or paid by the other contracting party</li> <li>(6.) A continuing relationship exists between the person and the other contracting party that contemplates</li> </ul>

			<p>continuing or recurring work even if the work is not full time</p> <ul style="list-style-type: none"> <li>(7.) The person's hours of work are established by the other contracting party</li> <li>(8.) The person is required to devote full time to the business of the other contracting party</li> <li>(9.) The person is required to perform the work on the premises of the other contracting party</li> <li>(10.) The person is required to follow the order of work set by the other contracting party</li> <li>(11.) The person is required to make oral or written reports of progress to the other contracting party</li> <li>(12.) The person is paid for services on a regular basis such as hourly, weekly, or monthly</li> <li>(13.) The person's expenses are paid for by the other contracting party</li> <li>(14.) The person's tools and materials are furnished by the other contracting party</li> <li>(15.) The person is provided with the facilities used to perform services</li> <li>(16.) The person does not realize a profit or suffer a loss as a result of the services provided</li> <li>(17.) The person is not performing services for a number of employers at the same time</li> <li>(18.) The person does not make the same services available to the general public</li> <li>(19.) The other contracting party has a right to discharge the person</li> <li>(20.) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement</li> </ul> <p>The general test for determining independent contractor status considers the following factors: who has the right to direct what shall be done and when and how it shall be done, the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the worker's business, the worker's employment of assistants with the right to supervise their activities, his/her obligation to furnish the necessary tools, supplies, and materials, his/her right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer.</p> <p><i>Gillum v. Ind. Com'n</i>, 141 Ohio St. 373 (1943).</p>
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OK	No provision	<p>OKLA. ADMIN. CODE § 380:30-1-2 (2012)</p> <p>Department of Labor excludes business owners, volunteers, co-partners, and joint venturers from the definition of “employee”</p>	<p>Oklahoma’s case law and Department of Labor set out several factors to be considered when determining whether an employee/employer relationship exists, including:</p> <ul style="list-style-type: none"> <li>(1)The nature of the contract between the parties;</li> <li>(2)The degree of control the employer may exercise on the details of the of the work;</li> <li>(3)Whether or not the one employed is engaged in a distinct occupation or business for others;</li> <li>(4)The kind of occupation with reference to whether in the locality the work is usually done under the direction of the employer;</li> <li>(5)The skill required in the particular occupation;</li> <li>(6)Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;</li> <li>(7)The length of time for which the person is employed;</li> <li>(8)The method of payment;</li> <li>(9)Whether the work is part of the regular business of the employer;</li> <li>(10)Whether or not the parties believe they are creating the relationship of master and servant; and</li> <li>(11)The right of either to terminate the relationship without liability</li> </ul> <p>No one factor is controlling and the court will look into the set of particular facts of each case.</p> <p><i>Carbajal v. Precision Builders, Inc.</i>, 333 P.3d 258 (OK 2014); OKLA. ADMIN. CODE § 380:30-1-2 (2012).</p>
OR	No provision	<p>OR. REV. STAT. § 656.027 (2010)</p> <p>Certain holders of professional licenses</p>	<p>OR. REV. STAT. § 670.600 (2005) defines an independent contractor as a person who provides services for remuneration and who is:</p> <ul style="list-style-type: none"> <li>(1) Free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;</li> <li>(2) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;</li> <li>(3) Is licensed under Oregon Revised Statutes Chp. 671 or 701 if the person provides services for which a licensed is required under those chapters; and</li> <li>(4) Is responsible for obtaining other licenses or certificates necessary to provide services</li> </ul> <p>This definition of independent contractor has been adopted into the Worker’s Compensation statute. OR. REV. STAT. § 656.005 (2017)</p> <p>Oregon case law states that in determining whether a person is an independent contractor, the right to control is decisive.</p>

			<p>The principal factors in determining independent contractor status are:</p> <ul style="list-style-type: none"> <li>(1) The evidence of the right to or actual exercise of control</li> <li>(2) The method of payment</li> <li>(3) The furnishing of equipment</li> <li>(4) The right to fire</li> </ul> <p><i>See McQuiggin v. Burr</i>, 119 Or. App. 202 (1993); <i>Soderback v. Townsend</i>, 57 Or.App. 366 (1982).</p>
PA	Yes	<p>Construction workers and industry workers exemptions</p> <p>77 PA. STAT. AND CONS. STAT. ANN. § 676 (1996); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3 (2010)</p>	<p>In determining employee or independent contractor status, the following factors should be considered, but all do not need to be present:</p> <ul style="list-style-type: none"> <li>(1) Control of the manner in which work is to be done</li> <li>(2) Responsibility for result only</li> <li>(3) Terms of agreement between the parties</li> <li>(4) Nature of the work or occupation</li> <li>(5) Skill required for performance</li> <li>(6) Whether one employed is engaged in distinct occupation or business</li> <li>(7) Which supplies the party tools</li> <li>(8) Whether payment is by time or by job</li> <li>(9) Whether work is part of regular business or alleged employer</li> <li>(10) Whether alleged employer had right to terminate employment at anytime</li> </ul> <p>Control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status for purposes of the Worker's Compensation Act.</p> <p>77 PA. STAT. AND CONS. STAT. ANN. § 22 (West 2014); <i>Johnson v. W.C.A.B. (Dubois Courier Exp.)</i>, 631 A.2d 693 (Pa. 1993); <i>Universal Am-Can, Ltd. V. W.C.A.B.</i>, 762 A.2d 328 (Pa. 2000).</p>

RI	No provision	<p>28 R.I. GEN. LAWS. ANN. §§ 28-29-2; 28-29-7 to 28-29-7.2; 28-29-15</p> <p>Certain industries have special status or are exempted</p>	<p>Under Rhode Island's Worker's Compensation law, independent contractor means a person who has filed a notice of designation as independent contractor with the director pursuant to or as otherwise found by the workers' compensation court.</p> <p>In determining whether a worker is an employee or independent contractor, the status depends on the employer's right or power to exercise control over methods and means of performing the work and not the exercise of actual control. Whether an injured worker is an employee or independent contractor must be decided by the employment contract in the particular case and the surrounding particular circumstances.</p> <p>28 R.I. GEN. LAWS. ANN. §§ 28-29-2; 28-29-17.1 (1956) <i>Pasetti v. Brusa</i>, 98 A.2d 833 (1953); <i>Henry v. Mondillo</i>, 142 A. 230 (1928).</p>
SC	Yes	<p>S.C. CODE ANN. § 42-1-360 (2007)</p> <p>Exemption of certain industries from Worker's Compensation law</p>	<p>Case law establishes the criteria for distinguishing between employee and independent contractor under South Carolina's Worker's Compensation law.</p> <p>Determination of whether a worker's compensation claimant is an employee or independent contractor focuses on the issue of control.</p> <p>In determining whether an employer had a right to control a worker's compensation claimant in performance of his work, there are four factors the court will look at</p> <ul style="list-style-type: none"> <li>(1) direct evidence of the right or exercise of control;</li> <li>(2) furnishing of equipment;</li> <li>(3) method of payment;</li> <li>(4) right to fire</li> </ul> <p>It is not actual control exercised, but whether there exists right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment.</p> <p>S.C. CODE ANN. § 42-1-130 (1976); <i>Nelson v. Yellow Cab Co.</i>, 343 S.C. 102, 538 S.E.2d 276 (S.C.App. 2000); <i>Shatto v. McLeod Regional Medical Center</i>, 406 S.C. 470 (2013).</p>
SD	No provision	<p>S.D. CODIFIED LAWS §§ 62-1-4 to 62-1-5.1</p> <p>Certain industry exceptions</p>	<p>There are three primary factors South Dakota courts look at to determine whether one is employee or independent contractor include:</p>

			<p>(1) Whether individual has been and will continue to be free from control or direction over performance of services</p> <p>(2) Both under contract of service and in fact; and</p> <p>(3) Whether the individual is customarily engaged in independent established trade, occupation, profession or business.</p> <p>Specifically, courts will employ a “right of control” test is used to determine independent contractor status, which includes consideration of the following factors:</p> <p>(1) Direct evidence of rate of control</p> <p>(2) Method of payment</p> <p>(3) Furnishing of major items of equipment</p> <p>(4) Right to terminate employment relationship at will and without liability</p> <p>S.D. CODIFIED LAWS §§ 62-1-2 (1994); 62-1-3 (2008) <i>Egemo v. Flores</i>, 470 N.W.2d 817 (S.D. 1991); <i>Davis v. Frizzell</i> 504 N.W.2d 330 (S.D. 1993).</p>
TN	Yes	Construction workers are exempt from the statutory classification test if requirements of TENN. CODE ANN. § 50-6-102(10) are met	<p>Tennessee’s Worker’s Compensation Law states that to determine whether an individual is an employee or independent contractor, the following factors will be considered:</p> <p>(1) The right to control the conduct of the work</p> <p>(2) The right of termination</p> <p>(3) The method of payment</p> <p>(4) The freedom to select and hire helpers</p> <p>(5) The furnishing of tools and equipment</p> <p>(6) Self-scheduling of working hours; and</p> <p>(7) The freedom to offer services to other entities</p> <p>For purposes of determining whether employee’s relationship is employee or independent contractor, courts consider whether work being performed by contractor is same type of work usually performed by company which hired contractor and whether company has right to control employees of contractor.</p> <p>TENN. CODE ANN. § 50-6-102 (2017); <i>Barber v. Ralston Purina</i>, 825 S.W.2d 96 (1991).</p>
TX	No provision	TEX. INS. CODE ANN. §§ 406.091 to 406.098; 406.141 to 406.146; 406.161 to 406.165	<p>Texas’ Worker’s Compensation Act defines an independent contractor as a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:</p> <p>(1) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;</p>

		Special coverage to members of certain industries, construction workers and farm and ranch employees	<p>(2) is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;</p> <p>(3) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and</p> <p>(4) possesses the skills required for the specific work or service.</p> <p>The Texas courts will also consider the following factors when considering whether one is an independent contractor: the independent nature of the worker's business, the worker's obligation to furnish necessary tools, supplies, and material to perform the job, the worker's right to control progress of work, except as to final results, the time for which (s)he is employed, and method of payment, whether by time or by job.</p> <p>TEX. INS. CODE ANN. § 406.121 (1993); <i>Industrial Indem. Exchange v. Southard</i>, 138 Tex. 531 (1942); <i>INA of Texas v. Torres</i>, 808 S.W.2d 291. (1991).</p>
UT	Yes	<p>UTAH CODE ANN. § 34A-2-104 (2017)</p> <p>Excludes certain industries from the definition of "employee" for purposes of the statute</p>	<p>Utah's Workers' Compensation Law defines an independent contractor as any person engaged in the performance of any work for another who, while so engaged, is:</p> <p>(1) Independent of the employer in all that pertains to the execution of the work;</p> <p>(2) Not subject to the routine rule or control of the employer;</p> <p>(3) Engaged only in the performance of a definite job or piece of work; and</p> <p>(4) Subordinate to the employer only in effecting a result in accordance with the employer's design</p> <p>The Utah court will consider whatever agreements exist concerning the right of control as well as the actual dealings between the parties and the control that was in fact asserted. Determination of status of individual as an employee or an independent contractor is based on various factors, and of primary concern is the control, direction, supervision, or the right to control, direct or supervise on behalf of the employer.</p> <p>UTAH CODE ANN. § 34A-2-103 (2017); <i>Utah Home Fire Ins. Co. V. Manning</i>, 985 P.2d 243 (1999); <i>Ruster Lodge v. Industrial Commission</i>, 562 P.2d 227 (1977).</p>
VT	No provision	<p>Vt. Stat. Ann. tit. 21, §§ 601; 706</p> <p>Certain industry exceptions</p>	<p>Vermont's case law establishes the test for determining whether a worker is an employee or independent contractor and will utilize the "right to control" test.</p> <p>Factors that are taken into account when employing the "right to control" test include the location of the work, whether the employee chose their own hours, whether the employee</p>

			<p>used their own tools for the job, how the employee was paid and whether the type of work being carried out by a worker is the type of work that could have been carried out by the owner's employees as part of the regular course of business.</p> <p>VT. STAT. ANN. tit. 21, § 601; <i>Crawford v. Lumbermen's Mut. Cas. Co.</i>, 220 A.2d 480 (1966); <i>Klinker v. Furdiga</i>, 22 F.Supp.3d 366 (2014).</p>
VA	Yes	VA CODE ANN. §§ 65.2-101- to 65.2-104	<p>Virginia case law defines an independent contractor as one who contracts to produce a specific result for a fixed price without outside control concerning the method use.</p> <p>The status of a worker as an employee or as an independent contractor is not governed by Virginia's Workers' Compensation Act, but instead is governed by common law.</p> <p>The test applied in determining whether employee of independent contractor will be considered statutory employee of owner of project is whether the worker is "performing an indispensable activity normally carried on through employees, rather than independent contractors."</p> <p>The ordinary test to determine whether one is an "employee" or an "independent contractor" is to ascertain who can control and direct servants in performance of their work. Factors that are considered in determination of a worker's status include what the parties to an employment contract call their relationship,</p> <p>VA CODE ANN. § 65.2-101 (2015); <i>Phillips v. Brinkley</i>, 72 S.E.2d 339 (Va. 1952); <i>Ramsburg v. Target Stores, Inc.</i>, 982 F.Supp. 1194 (Va. 1997); <i>Nolde Bros. v. Chalkley</i>, 1945, 35 S.E.2d 827, 184 Va. 553.</p>
WA	No provision	WASH. REV. CODE ANN. §§ 51.12.010 to 51.12.185 (1996)  Industry Exception	<p>Under Washington's Worker's Compensation Law, there are three elements that must be satisfied to be considered an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) The individual has been and will be free from control over performance of services, both under the contract and in fact.</li> <li>(2) The service is either outside the course of business or performed outside the place of business.</li> <li>(3) The individual is customarily engaged in an independently established trade of the same nature as that being performed</li> </ol> <p>In determining whether the worker is an employee or an independent contractor, the court will look to the employment contract, the work, the parties' situation, and other concomitant circumstances.</p> <p>WASH. REV. CODE ANN. §§ 51.08.180; 51.08.181; 51.08.195 (West 2008); <i>Department of Labor and Industries of State v. Lyons Enterprises, Inc.</i>, 347 P.3d 464 (Wash.App. 2015);</p>



			<i>Henry Industries, Inc. v. Department of Labor and Industries</i> , 381 P.3d 172 (Wash.App. 2016).
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Exposure Draft

WV	Yes	W. VA. CODE R. § 85-8-6 (2008)	<p>Under West Virginia's Worker's Compensation Law, the burden of proving that an individual is an independent contractor is on the party asserting independent contractor status. The following factors are dispositive of whether a worker is an independent contractor:</p> <ol style="list-style-type: none"><li>(1) Whether the individual holds themselves out to be in business for themselves, including whether they possess a license, permit or other certification required to engage in the type of work the worker is performing; whether they enter into verbal or written contracts with the persons and/or entities for whom the work is being performed; and the individual has the right to regularly solicit business from different persons or entities to perform for compensation the type of work that is being performed</li><li>(2) Whether the individual has control over the time when the work is being performed</li><li>(3) The individual has control and discretion over the means and manner of the work being performed and in achieving the result of the work</li><li>(4) Unless expressly required by law, the individual is not required to work exclusively for the person or entity for whom the work is being performed</li><li>(5) If the use of equipment is required to perform the work, the individual provides most significant equipment required to perform the job</li></ol> <p>The West Virginia courts will look at the following factors to determine if a worker is an employee or independent contractor: the right or lack of right to supervise work, the method of payment, who owns substantial equipment to be used on the job, who determines what hours are worked, and the nature and terms of the employment contract.</p> <p>W. VA. CODE ANN. § 23-2-1a (1999); W. VA. CODE R. § 85-8-6 (2008); <i>Smith v. Donald Coal Co.</i>, 115 S.E. 477 (W.Va. 1922); <i>Null v. State Compensation Com'r</i>, 35 S.E.25 359 (W.Va. 1945); <i>Myers v. Workmen's Compensation Com'r</i>, 148 S.E.2d 664 (W.Va. 1966).</p>
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WI	Yes	No provision	<p>Wisconsin's Worker's Compensation Law lists nine criteria, all of which must be met to be considered an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) Maintains a separate business with his or her own office, equipment, materials and other facilities.</li> <li>(2) Holds or has applied for a federal employer identification number with the IRS or has filed business or self-employment income tax returns with the IRS based on that work or service in the previous year</li> <li>(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.</li> <li>(4) Incurs the main expenses related to the service or work that he or she performs under contract.</li> <li>(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.</li> <li>(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.</li> <li>(7) May realize a profit or suffer a loss under contracts to perform work or service.</li> <li>(8) Has continuing or recurring business liabilities or obligations.</li> <li>(9) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures</li> </ol> <p>The presumption that a person injured while performing service for another is an employee rather than an independent contractor is rebuttable and ceases to have force or effect when evidence to the contrary is adduced.</p> <p>Wis. STAT. ANN. § 102.07 (2016); <i>J. Romberger Co. v. Industrial Commission</i>, 234 Wis. 226, 229 (Wis. 1940).</p>
WY	No	No provision	<p>Wyoming's Worker's Compensation Law defines independent contractor as "an individual who performs services for another individual or entity" and:</p> <ol style="list-style-type: none"> <li>(5) is free from control or direction over the details of the performance of services by contract and by fact;</li> <li>(6) represents his services to the public as a self-employed individual or an independent contractor; and</li> <li>(7) may substitute another person to perform his services</li> </ol>

			<p>The Wyoming Supreme Court has defined an independent contractor as “one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.” An express contract between the parties is not conclusive on whether a worker is an independent contractor; however, it is an important factor in defining the relationship between the employer and the worker. The Wyoming Supreme Court stated other factors that are important to the determination include:</p> <ul style="list-style-type: none"><li>(4) the method of payment</li><li>(5) the right to determine the relationship without incurring liability</li><li>(6) the furnishing of tools and equipment</li><li>(7) the scope of the work</li><li>(8) the control of the premises where the work is to be done; and whether the worker devotes all of his efforts to the position or if he also performs work for others</li></ul> <p>WYO. STAT. ANN. § 27-14-102 (2017); <i>Diamond B Services Inc. v. Rohde</i>, 120 P.3d 1031 (Wyo. 2005); <i>Stratman v. Admiral Beverage Corp.</i>, 760 P.2d 974, 980 (Wyo. 1988); <i>Cline v. State, Dep’t of Family Services</i>, 927 P.2d 261, 263 (Wyo. 1996).</p>
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