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EMPLOYMENT LAW

Determining Independent Contractor Status in NH

Updated as of September 3, 2012

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New Hampshire's Revised 3-Part Test for Classification of Independent Contractor Status

Note: On August 6, 2012, [HB 420](#) went into effect, which changed the independent contractor test for matters regulated by the New Hampshire Department of Labor (NH DOL). While the change reduced the number of "required elements" for NH DOL purposes, New Hampshire continues to have two other independent contractor tests with different required elements. The result is that classifying an individual as an independent contractor is fraught with risk because misclassification can lead to fines, worker's compensation violations, unemployment compensation and tax fines — to name a few.

New Hampshire's laws do not make it easy for businesses to make the correct analysis as three New Hampshire agencies ([NH DOL](#), [NH Commission for Human Rights](#) and [NH Employment Security](#)) use different tests to determine an individual's employment status. The selection of the appropriate test depends on the purpose for the determination and in which administrative agency the matter is pending.

Part 1 - NH Dept. of Labor



You may [email](#) or call [Beth Deragon](#) at 603-545-3657.

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The NH Department of Labor's prior 12-point test for determining whether an individual is an independent contractor for workers' compensation (RSA 281-A), wage and hour (RSA 275), minimum wage law (RSA 279), and whistleblower claims (RSA 275-E), has been reduced to a 7-point test. **To be considered an independent contractor, an individual must meet the requirements of all 7 points:**

1. The individual possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under NH wage laws.

2. The individual 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.

3. The individual has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the individual as to completion schedule, range of work hours, and maximum number of work hours to be provided by the individual, and in the case of entertainment, the time such entertainment is to be presented.

4. The individual hires and pays the individual's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

5. The individual 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 liability or obligations.

6. The individual is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

7. The individual is not required to work exclusively for the employer.

Employers: Download a copy of the NH DOL poster listing the [Criteria to Establish an Employee or Independent Contractor](#), to be posted in a conspicuous place.

Although several points were eliminated (success or failure of the individual's business depends on the relationship of business receipts to expenditures; compensation is not determined unilaterally by the hiring party; the individual is responsible in the first instance for main expenses related to the service or work perform; and the individual supplies the principal tools and instrumentalities used in the work), the practical result of applying the 7-point test will probably not result in an influx of newly classified independent contractors because the key elements remain the same. In addition, the two other independent contractor tests discussed below are unchanged, in effect, and differ from each other and the NH DOL 7-part test.

Part 2. NH Dept. of Employment Security

The NH Department of Employment Security applies following 'ABC' test when determining whether an individual is an independent contractor and, therefore, ineligible for unemployment compensation benefits. To be considered an independent contractor, an individual must meet all three prongs of the test:

(A) Such individual has been and will

continue to be free from control or direction over the performance of such services, both under his contract of service and in fact;

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

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

3 - NH Commission for Human Rights

The NH Commission for Human Rights applies the common law 'right to control' test when determining worker classification for discrimination, harassment and retaliation claims.

While not discussed in detail here, businesses should not forget that the IRS has a separate 14-point test for determining independent contractor status for federal tax matters that also applies to the analysis.

Both state and federal agencies have been focusing on the issue of misclassification of independent contractors resulting in costly fines and back payments for businesses that have wandered into this area of the law and applied the wrong independent test. It is worth consulting a professional to conduct an independent audit of individuals currently classified as independent contractors to ensure that your business is in compliance with New Hampshire's myriad of independent contractor tests.

For more information on this matter, please contact [Attorney Beth Deragon](#) at (603) 545-3657.

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