

National Employment Law Project



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NELP Publications:

Employment Relationship Checklists

The following checklists are designed to assist organizers and workers when confronted with a minimum wage or overtime violation in a subcontracting or independent contractor employment situation. In these instances it is sometimes unclear who employs the worker, and it is sometimes unclear whether the worker is an employee.

The checklists below represent the three major tests for employment status under various federal labor and employment laws, in order of the narrowest to the broadest. The checklists are not exhaustive, and are meant to assist workers in determining whether there is an employment relationship with any number of possible responsible employers.¹

- A. [Common Law Control Test / IRS 20- Factor Test](#)
- B. [The Economic Reality/ Economic Dependence Test](#)
- C. [The "Suffer or Permit to Work" Test](#)

A. Common Law Control Test / IRS 20- Factor Test

This is the test for employee status under FICA, FUTA, ERISA, most state Workers' Comp laws, and the NLRA. It is also usually used for Title VII, the ADA, and other anti-discrimination laws and OSHA, depending on the Circuit. This test can be used to determine who is the employer, if the question is which of a number of entities employs an employee.

The IRS 20-factor test is the most comprehensive view of the common law right-to-control test. It is the narrowest test used to find coverage under labor and employment laws; if employment status is found under this test, a worker is automatically covered under the broader economic reality and suffer or permit tests, described below.

A worker is more likely an employee and not an independent contractor if the worker:

1. Is required to comply with the employer's instructions about the work.
2. Receives training from the employer.
3. Provides services that are integrated into the business.

4. Provides services that must be rendered personally.
5. Hires, supervises and pays assistants for the employer.
6. Has a continuing relationship with the employer.
7. Follows set hours of work.
8. Works full-time for the employer.
9. Works on the employer's premises.
10. Does the work in a sequence set by the employer.
11. Submits regular reports to the employer.
12. Receives payments of regular amounts at set intervals.
13. Receives payments for business or traveling expenses.
14. Relies on the employer to furnish tools and materials.
15. Lacks a major investment in facilities used to perform the service.
16. Cannot make a profit or suffer a loss from the services.
17. Works for one employer at a time.
18. Does not offer services to the general public.
19. Can be fired.
20. Can quit at any time without liability.

B. [The Economic Reality/ Economic Dependence Test](#)²

This test is used typically to answer the question of who is the employer in cases where there is more than one potential employer. It can also be used to determine whether a worker is an employee or an independent contractor. The test may only be used for finding coverage of workers under the FLSA, AWP, EPA, and the FMLA. The factors listed below are to be applied with an eye to determining whether and on whom the worker is economically dependent for his or her earnings and working conditions.

A worker is more likely to be an employee of an entity when:

1. The individual works in a production process or service that is an integrated part of the employer's business.

Example: garment workers pressed clothes for clothing manufacturer Renaissance, or, farmworkers pick cucumbers for a grower who sells them.³

OR Did the subcontractor function as a part of the employer's business?

Example: Manufacturer Renaissance used the subcontractor Han Byul to sew and press the clothes it sold, or the grower used the farm labor contractor to harvest its crop.

2. The individual works on the employer's premises and equipment.

Example: Although Han Byul rented the factory and equipment needed to sew and press clothes, the factory was only a few blocks away from Renaissance and Renaissance provided all the material for sewing, except thread.

3. The individual performs most of his/ her work for that employer.

Example: over 85% of Han Byul's work came from Renaissance. Garment workers spent over 80% of their time pressing exclusively for Renaissance.

4. The worker had a steady and consistent working relationship with the employer.

Example: Renaissance consistently relied on Han Byul to sew and press garments and Han Byul was dependent on Renaissance for business. Han Byul closed when Renaissance stopped giving Han Byul work.

5. The employer retains the right to control and/or in fact controls or supervises the work.⁴

Example: the employer sets the hours or rate of pay of the workers by dictating turn-around times and piece rates, or monitors the quality of the garments by visiting or sending an agent to visit the plant. If the work is unskilled, the right to supervise is more important than the actual supervision.

6. The subcontractor changed its name or ownership but still performed the same work.

Example: ownership of Woo Bros. passed to Han Byul, meanwhile the same people that were employed at Woo Bros. continued to be employed at Han Byul, doing the same work for Renaissance.

7. The worker did not seek out his or her own work.

Example: Garment workers were expected to spend every work day at Han Byul's factory. They didn't hear by word of mouth that there was a job one day at this subcontractor and another day at another subcontractor.

8. The employer and the subcontractor shared personnel.

Example: Peter Pak used to be the owner/manager of subcontractor Woo and then he went to work for manufacturer Renaissance as a production manager. While production manager, he sent work to his former business where his parents still worked.

9. The employer absorbed losses for unsatisfactory merchandise.

Example: when Han Byul made mistakes in production, Renaissance didn't deduct it from the amount it agreed to pay Han Byul for completed garments.

10. The employer determines the pay rates or method of payment.

Example: by setting strict turn-around times and the piece rates, the garment employer determined the rate of pay of the workers.

11. The employer has the right, directly or indirectly, to hire and fire the workers.

12. The employer prepares the payroll and pays the wages.

Example: a packinghouse operator maintains the payroll and has workers' compensation insurance to cover the labor contractors' workers.

13. Performs work that is not highly skilled, or is more like piece work.

14. The employer invests more in the equipment and facilities than the worker.

C. The "Suffer or Permit to Work" Test

The broadest theory for finding an employment relationship is the "suffer or permit" test. This may only be used to find coverage under the FLSA, AWP, EPA, and the FMLA. It is based on a return to the statutory definitions of employment contained in these statutes. It can be used to find an employment relationship where one would not be found under the more restrictive tests described above.⁵

This test is more likely to be met when the worker:

1. Works in a production process or service that is an integrated part of the employer's business.
2. Works on the premises and equipment of the business.
3. Works for another business that is integrated into the business of the employer.
 - A. Due to the low skill/ piece work nature of the work
 - B. Due to the small investment of capital in that integrated business.

Remember: These Checklists are not exhaustive, and should be adapted for use in other industries. Use them as a general fact-finding tool to determine whether or not there is an employment relationship between a worker and any potential employer. YOU DO NOT HAVE TO ANSWER "YES" TO 100% OF THESE FACTORS TO FIND AN EMPLOYMENT RELATIONSHIP.

Endnotes

1. All of the tests are to be applied by considering the totality of the circumstances, and most adjudicators state that no one factor is dispositive when making the employment coverage determination. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).
2. This test varies widely by circuit; the listing here constitutes most of the factors used in the following cases: *Antenor v. D&S Farms*, 88 F.3d 925 (11th Cir. 1996); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); and *Lopez v. Silverman*, 14 F.Supp. 2d. 405 (S.D.N.Y. 1998).
3. Most of the examples listed here are taken from the reported cases listed above, in footnote 2, and cases cited therein. Since there are few cases applying these tests to industries outside of the agricultural and garment industries, there are no reported examples of applying these factors to other work settings. Strong factual analogies can and should be made, however, using the precedent in the existing cases.
4. This factor is sometimes broken out into two factors: right to control and degree of supervision, but the analysis is the same.
5. For a more thorough explication of the genesis of this test, see Goldstein et al, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L.Rev. 983 (Spring 1999).

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