

Independent Contractors: Utah

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A Q&A guide to state law on independent contractor status for private employers in Utah. This Q&A addresses how independent contractors are classified under state law, including the various tests to evaluate worker status, penalties for misclassification, and practices to avoid misclassification. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across several jurisdictions (see *Independent Contractors: State Q&A Tool* (<http://us.practicallaw.com/2-505-9584>)).

INDEPENDENT CONTRACTOR BASICS

1. Summarize how the issue of independent contractors is analyzed under state law.

There is no single established definition of independent contractor under Utah law. Different tests are applied, depending on the circumstances, to determine whether an individual is an employee or an independent contractor for purposes of:

- Workers' compensation.
- Unemployment insurance.
- Tax liability.
- Common law.

The same employee could be an employee in one context and an independent contractor in another context.

2. Is the term independent contractor defined by statute, regulation, or case law (not including any required elements)? If so, what is the definition? Please cite the appropriate authority.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

Regulations implementing Utah's Employment Security Act define the term independent contractor as a worker who:

- Is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the services performed.
- Provides the services free from the employer's control and direction.

(Utah Admin. Code r. 994-204-301(1).)

A worker must clearly establish his status as an independent contractor by taking steps that demonstrate his independence on informed business decisions (Utah Admin. Code r. 994-204-301(1)).

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

Utah's Workers' Compensation Act (WCA) defines independent contractor as any person who, while performing work for another is:

- Independent of the employer in all that pertains to the execution of the work.
- Not subject to the routine rule or control of the employer.
- Engaged only in the performance of a definite job or piece of work.
- Subordinate to the employer only in effecting a result according to the employer's design.

(Utah Code § 34A-2-103(2)(b)(i).)

UTAH STATE TAX COMMISSION

The Utah State Tax Commission (USTC) does not specifically define the term independent contractor. Instead, the USTC uses the factors outlined in IRS Publication 1779, *Independent Contractor or Employee* to determine whether an individual is an independent contractor.

COMMON LAW

There is no recent Utah common law on the classification of independent contractors. Although Utah courts applied a right to control standard in early cases (see *Dayton v. Free*, 148 P. 408 (Utah 1914)),

recent decisions have analyzed worker classification exclusively under the WCA (see Question 3: Workers' Compensation Act).

3. For each type of independent contractor, please describe the benefits of using an independent contractor over an employee to perform work.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

Because independent contractors are not covered by Utah's Employment Security Act:

- Employers are not required to pay unemployment insurance taxes or other payroll taxes.
- Independent contractors are not eligible for unemployment benefits.

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

Because independent contractors are not covered by the Utah Workers' Compensation Act:

- Employers do not need to obtain workers' compensation coverage for independent contractors.
- Independent contractors are not eligible to receive or file workers' compensation claims.

UTAH STATE TAX COMMISSION

Employers are not required to contribute toward:

- Federal and state income tax withholding.
- Social Security and Medicare taxes.
- Unemployment insurance.

Independent contractors are required to pay their own income tax and self-employment tax.

INDEPENDENT CONTRACTOR TESTS

4. What tests are used to evaluate whether a worker is an independent contractor? Please describe each test and explain when each is used.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

Courts consider the following factors when analyzing whether a worker is an employee or an independent contractor:

- **Independently Established.** An individual is customarily engaged in an independently established trade, occupation, profession, or business if the individual is, when the service is performed, regularly engaged in a trade, occupation, profession, or business of the same nature as the service performed. The trade, occupation, profession, or business must be established independently of the alleged employer. In other words, an independently established trade, occupation, profession, or business is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence.

- **Control and Direction.** A worker is deemed an employee under the Employment Security Act when an employer retains the right to control and direct the performance of a service or actually exercises control and direction over the worker who performs the service, not only about the result to be accomplished by the work but also about the manner and means by which that result is to be accomplished.

(Utah Admin. Code r. 994-204-303.)

Independently Established

The following factors, if applicable, determine whether a worker is customarily engaged in an independently established trade or business:

- **Separate place of business.** The worker has a place of business separate from the employer's.
- **Tools and equipment.** The worker has a substantial investment in the tools, equipment, or facilities customarily required to perform the services. However, "tools of the trade" used by certain trades or crafts do not necessarily demonstrate independence.
- **Other clients.** The worker regularly performs services of the same nature for other customers or clients and is not required to work exclusively for one employer.
- **Profit or loss.** The worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity.
- **Advertising.** The worker advertises services in telephone directories, newspapers, magazines, the Internet, or by other methods clearly demonstrating an effort to generate business.
- **Licenses.** The worker has obtained any required and customary business, trade, or professional licenses.
- **Business records and tax forms.** The worker maintains records or documents that validate expenses, business asset valuation, or income earned so the worker may file self-employment and other business tax forms with the Internal Revenue Service and other agencies.

(Utah Admin. Code r. 994-204-303(1)(b).)

If an employer proves to the satisfaction of the Utah Department of Workforce Services that the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service in question, there will be a rebuttable presumption that the employer did not have the right of or exercise direction or control over the service (Utah Admin. Code r. 994-204-303(1)(c)).

Control and Direction

The following factors, if applicable, help determine whether an employer has the right of or exercises control and direction over the service of a worker:

- **Instructions.** A worker who must comply with other persons' instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

- **Training.** Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner.
- **Pace or sequence.** A requirement that the service must be provided at a pace or ordered sequence of duties imposed by the employer indicates control or direction. The coordinating and scheduling of the services of more than one worker does not indicate control and direction.
- **Work on employer's premises.** A requirement that the service be performed on the employer's premises indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere.
- **Personal service.** A requirement that the service must be performed personally and cannot be assigned to others indicates the right to control or direct the manner in which the work is performed.
- **Continuous relationship.** A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring, although irregular, intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.
- **Set hours of work.** The establishment of set hours or a specific number of hours of work by the employer indicates control.
- **Method of payment.** Payment by the hour, week, or month points to an employer-employee relationship, given that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed on as the cost of a job. Control may also exist when the employer determines the method of payment.

(Utah Admin. Code r. 994-204-303(2).)

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

In *Harry L. Young & Sons v. Ashton*, the Utah Supreme Court stated that, in general, under the Workers' Compensation Act (WCA), an employee is one who is both:

- Hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer.
- Subject to a comparatively high degree of control in performing those duties.

(538 P.2d 316, 318 (Utah 1975).)

In contrast, the court stated that an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion (*Harry L. Young & Sons*, 538 P.2d at 318).

The main factors to consider include:

- Whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied.
- The right to hire and fire.
- Whether the method of payment is:
 - in wages or fees; or
 - for a complete job or project.
- The furnishing of the equipment.

(*Harry L. Young & Sons*, 538 P.2d at 318.)

UTAH STATE TAX COMMISSION

The Utah State Tax Commission (USTC) does not specifically define the term independent contractor. Instead, the USTC uses the factors outlined in IRS Publication 1779, Independent Contractor or Employee to determine whether an individual is an independent contractor.

COMMON LAW

There is no recent common law in Utah on the classification of independent contractors. Although Utah courts applied a right to control standard in early cases (see *Dayton v. Free*, 148 P. 408, 411 (Utah 1914)), recent decisions have analyzed worker classification exclusively under the WCA (see Workers' Compensation Act).

ADMINISTRATION AND ENFORCEMENT

5. For each independent contractor type, what entity administers and enforces independent contractor classification?

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

The Utah Department of Workforce Services enforces the Employment Security Act.

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

The Utah Labor Commission enforces the Workers' Compensation Act.

UTAH STATE TAX COMMISSION

The Utah State Tax Commission administers independent contractor classification.

6. How are independent contractor classifications selected for misclassification evaluation by each enforcement agency (for example, by random selection or by complaint by a worker or both)?

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

Misclassification evaluations by the Utah Department of Workforce Services typically arise when a worker classified by the employer as an independent contractor applies for unemployment benefits and

lists himself as an employee. Misclassification evaluations may also be triggered by:

- A random audit.
- Worker complaints.

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

Misclassification evaluations by the Utah Labor Commission typically arise when a worker classified by the employer as an independent contractor applies for workers' compensation benefits and lists himself as an employee. Misclassification evaluations may also be triggered by:

- A random audit.
- Worker complaints.

UTAH STATE TAX COMMISSION

Misclassification evaluations by the Utah State Tax Commission typically arise when a worker classified by the employer as an independent contractor applies for benefits or otherwise lists or represents himself as an employee to a state agency. Misclassification evaluations may also be triggered by:

- A random audit.
- Worker complaints.

7. Please describe how aggressively independent contractor classification is enforced by each agency.

In recent years, the Utah Department of Workforce Services, Utah Labor Commission and Utah State Tax Commission have all become increasingly aggressive in enforcing correct worker classifications. It has also become increasingly difficult for employers to demonstrate that workers they classified as independent contractors satisfy statutory standards for independent contractor status.

Utah was among seven states to enter into a memorandum of understanding (MOU) with the US Department of Labor (DOL) in September 2011. The MOU enables the DOL to share information and coordinate law enforcement with the Internal Revenue Service and the participating states, including Utah, to ensure that employees are not misclassified as independent contractors. (See DOL, Partnership Agreement Between the U.S. Department of Labor, Wage and Hour Division and Utah Labor Commission (Sept. 19, 2011).)

AVOIDING PENALTIES FOR MISCLASSIFICATION

8. For each independent contractor type, is there a safe harbor available for employers that unintentionally misclassify workers as independent contractors? If so, please describe it.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

The Utah Employment Security Act (UESA) allows an employer to rely on a previous declaratory order, ruling, or final determination by the Utah Department of Workforce Services (DWS) that determined the independent contractor status of a worker or class of workers.

If it is later determined that the individual is in fact an employee, the DWS may waive the employer's retroactive liability for contributions regarding wages paid to the individual before the date of the division's later determination. (Utah Code § 35A-4-204(4); Utah Admin. Code r. 994-204-401.)

The final determination only establishes whether the employer is liable to pay contributions on payments made to the workers in question. It does not affect the worker's right to challenge the determination at a more appropriate time, for example, when the work relationship has ended and the worker has filed a claim for benefits. The worker or class of workers are not bound by the determination if a worker later files a claim for unemployment benefits. (Utah Admin. Code r. 994-204-401.)

If a declaratory order or final audit finding concludes that a worker or class of workers are independent contractors, the employer will have no liability to pay unemployment contributions on payments made to the worker or workers, except as provided in Section Rule 994-204-404 of the Utah Administrative Code (Utah Admin. Code r. 994-204-403).

If a new determination by the DWS, an administrative law judge, or the Workforce Appeals Board holds that the status of a worker or class of workers is that of an employee for purposes of the UESA, the employer is liable to pay unemployment contributions on:

- All wages paid to workers in the class the individual belonged to, from the beginning of the calendar quarter in which the new determination is made.
- Any wages used by a claimant for purposes of establishing any claim for benefits affected by the new determination.

(Utah Admin. Code r. 994-204-404.)

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

The Workers' Compensation Act does not provide a safe harbor for employers who unintentionally misclassify workers.

UTAH STATE TAX COMMISSION

The Utah State Tax Commission does not provide a safe harbor for employers who unintentionally misclassify workers.

9. For each independent contractor type, can employers request a determination of worker status to assist them in determining whether to classify particular workers as independent contractors? If so, please describe:

- How an employer would make the request.
- The process and timeframe for a response.
- The possible benefits and risks of making such a request.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

A worker status determination can be made at the request of either an employer or the Utah Department of Workforce Services (DWS) as the result of an audit or status investigation. The procedure for

issuing a safe haven determination varies depending on whether the status issue arises out of:

- An audit or request for declaratory order and there is no claim for benefits pending at the time.
- A claim for benefits and there has been a previous audit determination or declaratory order determining the status of the worker or a class of workers to which the individual belonged.

(Utah Admin. Code r. 994-204-402(1), (3).)

An Audit or Request for Declaratory Order

The DWS determines status based on the best information available at the time. A request for a declaratory order will be denied if there is a pending benefits claim by a worker who would be affected by the order. A worker whose status is determined as a result of an audit or declaratory order is not required to file a written consent to the determination. (Utah Admin. Code r. 994-204-402(1), (2).)

A Claim for Benefits

The DWS will issue a notice as part of the monetary determination, denying use of the worker's independent contractor earnings as wage credits for the base period based on the previous status determination if both:

- The issue of a worker's status arises out of a claim for benefits.
- There has been a previous audit determination or declaratory order determining the status of the worker or class of workers the individual belonged to.

(Utah Admin. Code r. 994-204-402(3).)

A worker may protest a status determination by filing an appeal within 15 days of the date of the notice. After receiving a protest, the DWS will review the worker's status. Based on its review, the DWS will issue a new determination which will either affirm, reverse, or revise the original determination. The new determination will be mailed to the parties and can be appealed by the employer or the worker as though it were an "initial DWS determination" as provided in Section Rules 994-508-101 through 994-508-104 of the Utah Administrative Code. (Utah Admin. Code r. 994-204-402(3).)

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

There is no procedure under which employers can request a determination of worker status.

UTAH STATE TAX COMMISSION

There is no procedure under which employers can request a determination of worker status.

10. Please describe the penalties for improper classification for each independent contractor type.

EMPLOYMENT SECURITY ACT: UTAH CODE §§ 35A-4-101 TO 35A-4-508

The Unemployment Insurance Division's determination of whether a worker is an employee or independent contractor constitutes the

basis for contribution liability determinations (Utah Code § 35A-4-313).

Knowingly making a false statement under the Employment Security Act to avoid or reduce the obligation to pay unemployment compensation is a criminal offense. The degree of the offense depends on the total monetary value that is obtained or sought (Utah Code § 76-8-1301(2)).

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005

Intentionally, knowingly, or recklessly misclassifying an employee as an independent contractor to avoid obtaining insurance coverage constitutes workers' compensation insurance fraud.

Workers' compensation insurance fraud is punishable by:

- Imprisonment up to one year or a fine up to \$2,500, or both, if:
 - the value of the property, money, or other thing of value sought is less than \$1,000; or
 - the number of individuals **not** covered is less than five.
- Imprisonment up to five years or a fine up to \$5,000, or both, if:
 - the value of the property, money, or other thing of value sought is between \$1,000 and \$5,000; or
 - the number of individuals **not** covered is between 5 and 50.
- Imprisonment between 1 and 15 years or a fine up to \$10,000, or both, if:
 - the value of the property, money, or other thing of value sought is \$5,000 or greater; or
 - the numbers of individuals **not** covered is 50 or greater.

(Utah Code §§ 34A-2-110, 76-3-203, 76-3-204, and 76-3-301.)

Additionally, employers who fail to comply with the Workers' Compensation Act may be liable in a civil action to their employees for:

- Damages suffered by reason of personal injuries arising out of or in the course of employment.
- Necessary costs.
- Reasonable attorneys' fees.

(Utah Code § 34A-2-207(1)(a), (4).)

UTAH STATE TAX COMMISSION

There are no penalties for an improper classification. However, employers who misclassify workers may be liable for additional tax (see Question 3: Utah State Tax Commission).

OTHER STATE-SPECIFIC REQUIREMENTS

11. Must independent contractor agreements include any particular language that is not required under federal law? If so, please insert that language and explain the requirement.

MODEL UTAH JURY INSTRUCTIONS, SECOND EDITION

There is no particular language that must be included in an independent contractor agreement. However, the Model Utah Jury

Instructions, Second Edition have provided an additional definition of independent contractor based on Supreme Court cases analyzing worker classification under the Workers' Compensation Act. Under these instructions, an independent contractor is one who:

- Has the right to control the manner and means of accomplishing the work.
- Does the work in his own way, subject only to minimal direction.
- Is responsible only for completing the job.

To determine whether an individual is an independent contractor, the key issue is whether the employer had the right to control the manner and means of accomplishing the work. If the employer:

- Does not have the right of control, then the individual is an independent contractor.
- Has the right of control, then the individual is not an independent contractor.

In determining whether the employer has the right of control, Utah courts weigh the following factors:

- Agreements between the parties about who had the right of control.

- The right to hire and fire.
- The method of payment.
- Who was actually directing the work.
- Who furnished the equipment.

(Model Utah Jury Instructions, Instruction CV2814 (2nd ed.); *Utah Home Fire Ins. Co. v. Manning*, 985 P.2d 243, 247 (Utah 1999); *Harry L. Young & Sons*, 538 P.2d at 318.)

12. Please describe any other variance in how independent contractors in your jurisdiction are treated compared to under federal law.

There are no other variances in how independent contractors in Utah are treated as compared to under federal law.

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