

The ABCs of Independent Contractors and Unemployment Insurance

Labor & Employment Law Update

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Good news: Unlike employees, an independent contractor ("IC") is not eligible for unemployment benefits when the work relationship terminates.

Bad news: When a former IC files an unemployment claim (and they sometimes do) or the government disagrees with the IC status (either in approving a claim or performing an audit), whether the IC will be denied benefits often depends on whether the IC:

- A. Is free from control and direction; and
- B. Performs services outside the usual course of business for the enterprise for which such service was performed; and
- C. Is engaged in an independently established trade, occupation, profession, or business.

This "ABC Test" exists in most states, though the elements/sub-elements may vary slightly. Typically, the party seeking IC status has the burden to prove that all three of these elements are satisfied. Neither an IC agreement nor designation controls.

Worse news: Administrative agencies (e.g., unemployment agencies, workers' compensation/industrial commissions, and departments of labor and tax/revenue) may share information with each other regarding independent contractor misclassification. This may increase the risk of an audit by one agency triggering an audit by others.

Recent Example:

An appellate court applied the ABC Test to IC window washers under a three year unpaid contributions audit, and found them to be employees, affirming an administrative finding of \$64,051 in unpaid unemployment contributions plus \$35,773 in unpaid interest. *L.A. McMahon Bldg. Maint., Inc. v. Dept. Employment Sec.*, 2015 IL App (1st) 133227 (May 7, 2015).

The court found unpersuasive that the workers: were not exclusive or required to wear a uniform; used their own vehicles and supplies, for which they were not reimbursed; received no training or direction in their work process; advertised their own services; and hired their own helpers and employees.

Instead, the court found that the window washers were employees because their services were central to the business which could not exist without them (e.g., Element B). The company's "place of business" extended to each location where the workers represented the company's interests (customer's homes), especially since the workers carried the company's price card and invoiced under the company's name.

Doing it Right:

Properly engaging independent contractors extends beyond an actual contract between the parties (helpful – if you ensure that the IC upholds its end of the bargain). When using ICs to perform work central to your business (e.g., workers to pick-and-pack in your warehouse, or provide regular services to customers):

1. Be sure that you have either engaged a separate company providing contract/temporary labor; or
2. That all three elements of the ABC Test (or relevant statutory test) are fully and completely satisfied; or
3. Ensure that the IC is a bona fide corporation or limited liability company.

Outside counsel should audit the relationship **now** to ensure that it is actually "independent" before a worker files a claim with any federal, state, or local administrative agency (triggering anti-retaliation protections!) and/or an agency initiates its own audit.

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