

## Independent Contractors

The Unemployment Insurance Law excludes independent contractors from coverage.

Independent contractors:

- Are in business for themselves **and**
- Make their services available to the public

An independent contractor performs services free from:

- Supervision
- Direction **and**
- Control

The law does not define an independent contractor. Court decisions hold that we must apply the common law tests of master and servant to make a determination of whether services an individual provides are that of an employee or an independent contractor. Under the common law tests, we must consider all factors about the relationship between the two parties. We need to determine if the party who has the contract for the services provides, or has the right to provide, supervision, direction and control over the person who performs the services.

If an employer designates a worker as an independent contractor and the worker agrees, it does not mean the worker is an independent contractor under the law. A written agreement does not mean we do not examine the facts of the relationship. A contract term that outlines the right of control may establish an employment relationship even if the employer allows the individual significant freedom of action. If the employer provides, or has the right to provide, supervision, direction or control, an employer-employee relationship exists. It does not matter if the services are full time, part time, or on a casual basis.

In general, an officer of a corporation is an employee. The officer, who performs usual management activities, or services for the corporation, is not an independent contractor.

Based on court decisions, an **employer-employee relationship** exists when an employer:

- Requires full-time work
- Sets work hours
- Requires attendance at meetings and / or training
- Requires prior permission for absences
- Tells the individual when, where, and how to do the job
- Directly supervises the job
- Provides facilities, equipment, tools, or supplies
- Sets the rate of pay
- Provides compensation in the form of:
  - Salary
  - An hourly rate of pay **or**
  - A draw account against future commissions with no requirement to repay unearned commissions
- Provides reimbursement or allowance for business or travel expenses
- Provides fringe benefits
- Sets time, money, or territorial limits
- Requires services to be rendered personally
- Requires oral or written reports
- Makes the services an integral part of the business, particularly when performed on a continuing basis
- Furnishes business cards, or other identification of the individual as a representative of the employer
- **Does not** allow the individual to perform services for competitive businesses
- Reserves the right to end services on short notice
- Supervises unskilled labor (or is subject to supervision)

Based on court decisions an **independent contractor** has:

- An independent business:
  - Offers services to the public
  - Media advertising
  - Commercial telephone listing
  - Business cards, stationery and billheads
  - Carries business insurance
  - Maintains own establishment
- Significant investment in facilities (Hand tools and personal transportation are not significant)
- Risk of profit or loss in providing services
- Freedom to work own hours and to schedule own activities
- No requirement to:
  - Attend meetings or training sessions
  - Provide oral or written reports
- Freedom to provide services for other businesses (competitive or non-competitive)

The following persons are employees by law even though the circumstances under which they work may not meet the common law tests of an employer-employee relationship:

1. An agent or commission-driver who delivers:
  - a. Meat, vegetables, fruit or bakery products
  - b. Beverages (other than milk)
  - c. Laundry or dry-cleaning services
2. A full-time salesperson that solicits orders for merchandise for resale or supplies for use in the purchaser's business. The salesperson must work in a continuing relationship with an employer and perform all the work. The salesperson must have no substantial investment in the facilities used in the performance of the services, except the facilities for transportation.
3. Professional musicians or persons "engaged in the performing arts", who perform services for a television or radio station or network, a film production, theater, hotel, restaurant, night club or similar establishment unless, by written contract, such musicians or persons are employees of another employer.

"Engaged in the Performing Arts" means performing services in connection with the production of, or performance in, any artistic endeavor that requires artistic or technical skill or expertise.
4. Professional models who model for, or who consent in writing to transfer use of their name or likeness for advertising or trade to, a person or entity that controls assignments, hours of work or performance location and that compensates them, in return for a waiver of their privacy rights, unless they perform services under a written contract that states the model is an employee of another covered employer.
5. Certain workers in the construction industry. Effective October 26, 2010 the New York State Construction Fair Play Act was enacted. The law creates a new standard to determine whether a worker is an employee or an independent contractor in the construction industry. Information about the Construction Fair Play Act can be found on form IA318.29 available on the department's web site at [www.labor.ny.gov](http://www.labor.ny.gov).

Employers can request a determination of the status of any individual. Write to the Liability and Determination Section and provide complete details of the relationship. Failure to report earnings and pay contributions due on the earnings of persons on the assumption that they are an independent contractor may result in additional assessments and interest if they are later determined to be employees.