

Use the Broad “ABC” Test to Define Employer-Employee Relationships



What is it?

At least 8.6 million Americans work as independent contractors, not covered by state unemployment insurance protections. State laws contain detailed tests to determine whether a worker is an employee of a business, or whether he or she is an independent contractor not entitled to UI benefits. Twenty-four states use a broad definition of the employer-employee relationship that generally includes workers and protects their rights. This broad definition – called the “ABC” test – excludes workers from UI coverage only if (A) they are free of the employer’s control in the performance of their job; (B) their service is outside the normal course of business of the employer or off of the employer’s premises; and (C) the worker operates his or her own business.



Key arguments in favor

UI is a social insurance program that should broadly cover all workers.

Excluding workers from UI hurts workers and the social insurance system. Workers are left falling between the cracks – ineligible for benefits and unprotected by workplace regulations. Employers who are not obligated to take part in the system have no incentive to retain their workforce, a key purpose of UI. When workers are left without earnings or unemployment insurance, they must turn to other support systems such as welfare.

A broad employee definition guards against misclassification of workers as independent contractors.

Every year, at least 80,000 workers are denied UI because their employers have misclassified them as independent contractors. A broad definition of the employer-employee relationship helps to ensure that unemployment insurance is available to those who are not in business for themselves and perform jobs that are integral to someone else’s business.

Contingent or nonstandard workers are drawn from the most vulnerable sectors of the workforce.

Many of those misclassified as independent contractors are contingent workers. Contingent workers – including independent contractors, part-time and seasonal workers – are unemployed at nearly twice the rate of full-time workers. During periods of unemployment, UI can help keep these workers out of poverty, especially those who are low-income.



Key arguments against and responses to them

Opponents say: Contingent workers know what they are giving up when they accept the terms of employment and willingly exchange flexibility or higher wages for the loss of benefits.

Response: Many low-wage and contingent workers have no choice about the terms of their employment. High-wage independent contractors, who are truly in business for themselves, are legitimately considered independent contractors under state laws which use the ABC formula.

Opponents say: Workers in nonstandard arrangements will take advantage of the system if made eligible for unemployment insurance benefits.

Response: ABC laws are intended to cover low-wage, low-skilled workers who are not in an independent business, but who may be misclassified by their employers as independent contractors. A major study of unemployment insurance and workers in nonstandard work arrangements found that the availability of unemployment insurance benefits did not increase the likelihood that such workers would become unemployed.



Which states do it?

Twenty-three states use the ABC test to determine employer-employee relationship. In addition, Washington State uses an even more exacting measure to determine if workers are truly independent contractors.



Model legislation

Washington

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

(1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

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

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

State Choices

23 states use the ABC test

Alaska
Arkansas
Colorado
Connecticut
Delaware
Georgia
Hawaii
Illinois
Indiana
Louisiana
Maine
Montana
Nebraska
New Hampshire
New Jersey
New Mexico
Ohio
Pennsylvania
Utah
Vermont
Virginia
Washington
West Virginia

(2) Or as a separate alternative, it shall not constitute employment subject to this title if it is shown that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

WASH. REV. CODE § 50.04.140

References

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Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, PLANMATICS, INC., Feb. 2000.

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