

Tennessee Adopts 20-Factor Test in Independent Contractor Analysis

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Rejecting the strict “ABC” test adopted by its appellate court, Tennessee has enacted a new law (H.B. 539) adopting a 20-factor test to determine employee-versus-independent contractor status. The new law becomes effective January 1, 2020.

Current Standard

Under the current standard, courts consider multiple factors when evaluating employee or independent contractor status. These factors include:

1. The right to control the conduct of the work;
2. The right to terminate the worker;
3. How the worker is paid;
4. The worker’s freedom to select and hire helpers;
5. Who furnishes the tools and equipment;
6. Who controls the working hours; and
7. The worker’s freedom to offer services to other entities.

Tenn. Code Ann. § 50-6-102(11).

The right to control is the primary factor, and the *existence* of the right to control, rather than the exercise of such right, is sufficient to establish this factor. *Lindsey v. Trinity Communs., Inc.*, 275 S.W.3d 411, 418-19 (Tenn. 2009). Additionally, the burden of establishing that a service provider is an independent contractor rests on the employer and the presumption is that absent such showing, an individual is an employee.

New Standard

The new statute rejects the current approach in favor of a more employer-friendly standard. Under the new law, the Tennessee Code is amended such that statutory employment obligations apply only “if the individual performs services for an employer for wages and the services performed by the individual qualify as an employer-employee relationship with the employer based upon consideration of the [] twenty (20) factors as described in ... Internal Revenue Service Revenue Ruling 87-41, 1987-1 C.B. 296.” Those factors are:

1. Whether the worker is required to comply with other persons’ instructions about when, where, and how the worker is to work.
2. Whether the worker must be trained by an experienced employee through correspondence, mandatory meetings, or other methods indicating that the person(s) for whom the services are performed want the services performed in a particular method or manner.
3. Whether the worker’s services are integrated into the business operations, which, if present, generally shows that the worker is subject to direction and control.
4. If the services must be rendered personally, then the persons for whom the services

are performed are presumably interested in the methods used to accomplish the work, as well as in the results.

5. If the person(s) for whom the services are performed hire, supervise, and pay assistants, then that generally shows control over the workers on the job.
6. A continuing relationship between the worker and the person(s) for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring, although irregular, intervals.
7. The establishment of set hours of work by the person(s) for whom the services are performed is a factor indicating control.
8. If the worker must devote substantially full time to the business of the person(s) for whom the services are performed, then the person(s) has control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor is free to work when and for whom the independent contractor chooses.
9. If the work is performed on the premises of the person(s) for whom the services are performed, then that suggests control over the worker, especially if the work could be done elsewhere.
10. If a worker must perform services in the order or sequence set by the person(s) for whom the services are performed, or if the person(s) for whom the services are to be performed retains the right to control the sequence, then that shows the worker is not free to follow the worker's own pattern of work, but, instead, must follow the established routines and schedules of the person(s) for whom the services are performed.
11. A requirement that the worker submits regular or written reports to the person(s) for whom the services are performed indicates a degree of control.
12. Payment to the worker by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates the worker is an independent contractor.
13. If the person(s) for whom the services are performed ordinarily pays the worker's business or traveling expenses, then the worker is ordinarily an employee.
14. The fact that the person(s) for whom the services are performed furnishes significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.
15. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees, such as the maintenance of an office rented at fair value from an unrelated party, then that tends to indicate that the worker is an independent contractor. However, lack of investment in facilities indicates dependence on the person(s) for whom the services are performed for the facilities and the existence of an employer-employee relationship.
16. A worker who can realize a profit or suffer a loss as a result of the worker's services, in addition to the profit or loss ordinarily realized by employees, is generally an independent contractor, but the worker who cannot is an employee.
17. If a worker performs more than *de minimis* services for multiple, unrelated persons or firms at the same time, then that generally indicates that the worker is an independent contractor.
18. The fact that a worker makes the worker's services available to the general public on

a regular and consistent basis indicates an independent contractor relationship.

19. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
20. If the worker has the right to end the worker's relationship with the person(s) for whom the services are performed at any time the worker wishes without incurring liability, then that indicates an employer-employee relationship.

Pursuant to the new test, none of the 20 factors are determinative of employment status and there is no presumption that an individual performing services is an employee. Hence, the 20-factor test is more akin to a "totality of the circumstances" approach, rather than its predecessor, which considers fewer circumstances and imposes a greater burden on alleged employers.

Takeaway

Tennessee employers who have entered into work arrangements with individuals other than those who traditionally have been deemed independent contractors (*e.g.*, electricians, plumbers, and HVAC professionals) should be prepared to review carefully the status of those workers in light of the 20-factor analysis.

If you have any questions about the new Tennessee law, the employee-versus-independent contractor analysis or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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