

INTERPRETIVE DECISION

Legal No. 38

March 27, 1939

To: Wyoming [Employment Security] Commission
From: James G. McClintock, Attorney
Subject: Who are Employees: Independent Contractors

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Advice is requested as to when and under what conditions or circumstances the so-called "Independent contractor's" services fall within the definition of "employment" under [Section 27-3-104, Revised, Wyoming Statutes, 1977], of the Wyoming Employment Security Law, which recites in [Section 27-3-104 (a)] that:

- (a) As used in this act, "employment" means service:
 - (i) Performed by an employee defined under 26 U.S.C. 3306 (i) including service in interstate commerce, except 26 U.S.C. 3121 (d) (2) does not apply;
 - (ii) Subject to any federal tax against which credit may be taken for contribution payments into any state unemployment fund;
 - (iii) Required to be employment under this act as a condition for full tax credit against the tax imposed by 26 U.S.C. 3301 through 3311; and
 - (iv) Otherwise specified under W.S. 27-3-104 through 27-3-108;

and specifically services performed under circumstances which do not meet the criteria of Section 27-3-104 (b) which states:

- (b) Services performed by an individual for wages is employment subject to this act unless the commission finds:
 - (i) The individual is free from control or direction over the performance of services by contract and by fact;
 - (ii) The service is outside the usual course of business for which the service is performed or it is performed outside all of the employing unit's places of business; and
 - (iii) The individual is customarily engaged in an independent trade, occupation, profession or business.]

Some persons have a very vague and fallacious idea as to just what constitutes an "independent contractor." Some employers are declaring such a relationship on the basis of a contract or agreement (usually oral) that the individual performing the service does so on the basis of a stipulated price per hour or on an agreed sum per unit. In other words, these employers have entered into a contract of hire and assume that such contract makes an independent contractor of the workers. Such assumptions are without foundation either in law or in fact and are directly contrary to the provisions of the law above quoted.

It must be remembered that almost any sort of employment or service is performed under some sort of contract of hire, whether it be at a monthly, daily, hourly, or piece rate. The mere fact that the employer and the worker made an agreement that the rate would be thus and so cannot, by legal principles, make the worker an independent contractor.

Our Supreme Court, in the case of the Fox Park Timber Company v. Baker, (84 P. 2nd. 736), decided on December 17, 1938, set out very definitely some of the things to be considered in establishing the "independent contractor" relationship. Delivering the opinion which held that Baker, a truck driver under contract to haul ties for the Fox Park Company at 11c per tie, was an employee of the timber company, Justice Riner said:

"Many tests have been devised by legal thought to determine whether or not the person who has entered upon the performance of certain work should be classed as such (independent contractor), and a survey of the cases, of which there are legion, makes it clear that the individual circumstances of each case play an important part in answering the query. The decisions of all courts are far from reconcilable. However, there are certain well known earmarks which are pretty generally examined by them before announcing their conclusions.

An outstanding one of these is whether the employer has or has not retained the right of control over the party whose status is in question. If he has retained such right, the party is generally regarded as a servant.

Another test is whether either of the parties possesses the right to terminate the services at will without incurring liability to the other, this embracing, of course, the right of the employer at any time to discharge the party performing the work, an affirmative answer establishing the status of master and servant.

Some of the other matters looked to by the courts in aid of their determination of the problem are the manner in which the compensation for the work done is paid, that is, whether it is based upon time or piece, the workman being frequently regarded in such case as a servant, while where it is fixed as a lump sum for the task, the obligations of

an independent contractor are imposed upon him; the furnishing of teams, wagons or tools by the employer or the workman, and the right of the workman to begin or stop work as he pleases, involving the privilege of working on such days as he may choose.

As phases of control or right of control may be mentioned the factors; the place where the work is to be performed, the scope of the work and the control of the premises where the work is required to be done."

As Justice Riner has said, each individual set of circumstances must play an important part in determining whether or not the person who has entered upon the performance of certain work should be classed as an independent contractor. I feel that, by applying the tests quoted above, interested persons can, in most instances, arrive at the correct solution. All borderline cases should be submitted to the Legal Section.

It is accordingly held that unless and until the employer or employing unit makes a definite and affirmative showing that:

- (1) the work performed is beyond his direction and control;
- (2) there is a contract, the breach of which will make either party liable for damages;
- (3) the remuneration payable is on the basis of a lump sum for the task, rather than on an hourly or piece work basis;
- (4) the workman can start and stop work when and if he chooses;
- (5) the place where the work is to be performed and the control of the premises where the work is required to be done is outside the jurisdiction of the employer; and/or
- (6) the alleged independent contractor performs work or is actually available to perform work for any individual willing to contract with him, and is also found to be engaged in an independently established trade, occupation, business or profession;

the service is "employment" as the term is defined in the Wyoming Employment Security Law, and the employer is liable for contributions.