

**EMPLOYEE**  
**OR**  
**INDEPENDENT**  
**CONTRACTOR?**

Nicholas J. Lanza  
Civil Trial Lawyer

713-523-0400  
[www.mlm-lawfirm.com](http://www.mlm-lawfirm.com)

**Nicholas J. Lanza**

- McCormick, Lanza & McNeel LLP
- Board Certified by the Texas Board of Legal Specialization in Personal Injury Trial Law
- Representing Insurers and Their Insureds for More than Twenty Years



## What is an Employee?

- **General Rule:** Any person who performs services for you when you can control what will be done and how it will be done.
- With an employee, an employer has the **RIGHT TO CONTROL**, even if they choose not to exercise that right
- In Texas, if you are working for another person, there is a presumption that you are an employee, which then places the burden on the employer to prove the existence of an Independent Contractor relationship.

## What is an Independent Contractor?

- **General Rule:** Someone who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details.
- The payer generally has only the right to control or direct only the result of the work, and **NOT** what or how it will be done.

## Why is this important?

The determination of independent contractor status is very important and heavily litigated in a variety of arenas and cases:

- IRS (tax implications)
- Workers Comp, Texas Workforce Commission, EEOC (wage and benefit determinations)
- Tort litigation (respondeat superior/liability issues)
- Insurance issues (coverage questions)

## HOW DO WE TELL?

- There are several tests and factors used by different agencies and courts in determining a worker's status
- They are all slightly different, but all look at the same basic factors
- Unfortunately, there is no single definitive test because it's such a fact intensive question

## **INTERNAL REVENUE SERVICE**

### **Three Category Test**

- Three elements the IRS uses to determine worker classification:
  1. Behavioral control
  2. Financial control
  3. Type of relationship of the Parties

### **1. Behavioral Control**

- Anyone who performs services for you is your employee if you can control what will be done and how it will be done. What matters is that the employer has the right to control the details:
  - When and where to do the work
  - What tools or equipment to use
  - Where to purchase supplies and services
- When a business provides training on procedures and methods for performing the work, it's likely an employment situation

## **2. Financial Control**

- Does the worker have a significant investment in assets or tools?
- Are there unreimbursed expenses that the worker has to bear themselves?
- Are the worker's services available to the public?
- How do they get paid? Do they get paid only if they finish the job?
- Independent contractors can realize a profit or loss on a job.

## **3. Relationship of the Parties**

- Whether the worker gets any type of benefits – vacation and sick pay, pension plan, and health or life insurance.
- The permanency of the relationship such as continuing indefinitely or only for a specific project or period.
- Does the worker have his own business, which he markets to others?

## IRS's Attempt at simplification

- The Three Category Test is actually the IRS's attempt at simplifying the prior test used... the Twenty Factor Test.
- But when employing the new test, courts and lawyers invariably end up going back and using the Twenty Factor Test to analyze the worker's status.
- So why don't we take a look as well...

## Twenty Factor Test

### 1. INSTRUCTION/CONTROL

A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This **control factor** is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions.

## **Twenty Factor Test**

### **2. TRAINING**

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the worker is an employee.

## **Twenty Factor Test**

### **3. INTEGRATION**

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

## **Twenty Factor Test**

### **4. SERVICES RENDERED PERSONALLY**

If the services must be rendered personally, rather by subcontracting or assigning the task to others, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work, as well as in the results.

## **Twenty Factor Test**

### **5. HIRING, SUPERVISING, AND PAYING ASSISTANTS**

The hiring, supervising, and paying of assistants for the worker by or at the direction of the worker's supervisor tends to suggest employee status.

## **Twenty Factor Test**

### **6. CONTINUING RELATIONSHIP**

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

## **Twenty Factor Test**

### **7. SET HOURS OF WORK**

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control and employee status.

## **Twenty Factor Test**

### **8. FULL TIME REQUIRED**

If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

## **Twenty Factor Test**

### **9. DOING WORK ON EMPLOYER'S PREMISES**

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. The nature of the service provided will determine the importance of this factor.

## **Twenty Factor Test**

### **10. ORDER OR SEQUENCE SET**

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. This suggests an employee status.

## **Twenty Factor Test**

### **11. ORAL OR WRITTEN REPORTS**

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control and suggests employee status.

## **Twenty Factor Test**

### **12. PAYMENT BY HOUR, WEEK, MONTH**

Payment 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 that the worker is an independent contractor.

## **Twenty Factor Test**

### **13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES**

If the person or persons for whom the services are performed ordinarily pay and /or regulate the worker's business and/or traveling expenses, the worker is ordinarily an employee.

## **Twenty Factor Test**

### **14. FURNISHING OF TOOLS AND MATERIALS**

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

## **Twenty Factor Test**

### **15. SIGNIFICANT INVESTMENT**

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), that factor tends to indicate that the worker is an independent contractor.

## **Twenty Factor Test**

### **16. REALIZATION OF PROFIT OR LOSS**

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.

## **Twenty Factor Test**

### **17. WORKING FOR MORE THAN ONE FIRM AT A TIME**

If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor.

## **Twenty Factor Test**

### **18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC**

The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

## **Twenty Factor Test**

### **19. RIGHT TO DISCHARGE**

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.

## **Twenty Factor Test**

### **20. RIGHT TO TERMINATE**

If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employee-employer relationship

## **Twenty Factor Test**

### **Conclusion**

- No single factor is determinative and there is no guidance on how many factors need to be satisfied to determine the worker's status.
- Rather, it's a case by case evaluation, taking the totality of the factors in determining whether an employment relationship exists.

## Texas Courts- Factors

In determining whether a person is an employee or independent contractor, Texas Courts are required to examine and consider a number of factors, including:

- (1) the independent nature of the contractor's business;
- (2) his obligation to supply necessary tools, supplies, and materials;

## Texas Courts- Factors

- (3) his right to control the progress of the work except as to final results;
- (4) the time for which he is employed; and
- (5) the method by which he is paid, whether by the time or by the job.

## Texas Courts- Factors

- The most fundamental of these factors is the right of control.
- In Texas, if there's no dispute about the evidence that relate to the factors listed, and only one reasonable inference can be drawn from such evidence, then the question of whether the person is an employee or independent contractor is a matter of law and for the Court to decide.

## Worker's Comp Benefits

- Income Benefits: Replaces a portion of wages lost due to work related injury
- Medical Benefits: Pays for reasonable and necessary medical care to treat the work related injury
- Burial Benefits: Pays for some of the deceased burial expenses
- Death Benefits: Pays for a portion of lost income to dependent family members for employees who die because of a work related injury or illness.

## Worker's Comp

- An Employer may elect to obtain worker's comp benefits, but is not required to do so.
- Recovery of these workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . Sec. 408.001 Texas Labor Code

## Worker's Comp

- EXCEPTIONS
  - **Employee Opts out**: If an Employee elects to waive workers' comp coverage, usually within 5 days of beginning employment
  - **Exemplary Damages in Death Cases**: The recovery of exemplary damages for a deceased employee is permitted where it was caused by an intentional act/omission or by the employer's gross negligence. Sec. 408.001 Texas Labor Code

## Worker's Comp

- Worker's Comp provisions apply to Employees, NOT independent contractors, unless an agreement under Sec 406 is made otherwise.
- An independent contractor not covered by workers' comp may sue the general contractor under any applicable causes of action for injuries while performing his work.

## Respondeat Superior

- Respondeat Superior is a doctrine in law that an employer may be held responsible/liable for the tortious acts of an employee/agent if the acts are within the course and scope of employment.
- It literally means .. "Let the Master answer"
- The doctrine doesn't apply when an employee acts outside the course and scope of employment, ie. Commits a tort while detouring from the business errand to complete a personal errand.

## Respondeat Superior

- Generally, an employer is not liable or responsible for acts committed by independent contractors.
- Since independent contractors typically retain so much control over how and when the work is performed, that relationship shields the employer from liability for acts the independent contractor while completing his job.

## Case Studies

### Scenario #1

- Waytag Appliances hired Mr. Lonely to repair and maintain appliances sold by Waytag.
- Mr. Lonely furnished some of the tools for the work, drove his own truck, and paid for his own gas
- Waytag secured the jobs, set and collected the fees, and paid Mr. Lonely's work expenses
- Mr. Lonely only did jobs for Waytag

## Case Studies

Scenario #1- cont'd

Is Mr. Lonely an employee or Independent Contractor?



## Case Studies

Scenario #2

- Tripper Apartments hired Mr. Roper as a contract office manager, executing an agreement specifying Roper was an Independent Contractor.
- Roper's duties include training employees, monitoring and correcting their work, and occasional clerical duties in the office.
- Roper was paid hourly for his services.

## Case Studies

Scenario #2- cont'd

Is Mr. Roper an employee or Independent Contractor?



## Case Studies

Scenario #3

- Snowman, the owner of a long haul truck, has contracted with Big Enos to deliver a load of beer.
- Snowman hires the Bandit to be the driver for this delivery.
- Bandit is allowed to take the truck home, but is told to always park it on the street.
- Snowman pays for all expenses related to the truck, including fuel, tolls, insurance and maintenance.

## Case Studies

Scenario #3- cont'd

- Bandit is free to plan his own route but just needs to get the beer there on time.
- Snowman does require the Bandit to report his progress on a daily basis however.
- Snowman agrees to pay the Bandit 30% of the gross receipts for his services.

## Case Studies

Scenario #3- cont'd

Is The Bandit an employee or Independent Contractor?



## Case Studies

### Scenario #4

- Big Oil Co. hires Officer Muscles, an off duty police officer, to direct traffic outside Big Oil's refinery.
- Big Oil instructed the Officer Muscles where he was to direct traffic and when. Big Oil also asked him to wear his police uniform while directing traffic.
- Big Oil provided traffic cones for Officer Muscles to use.
- Officer Muscles provided his own walkie talkie and reflective vest.
- Officer Muscles was paid hourly for his services

## Case Studies

### Scenario #4- cont'd

Is Officer Muscles an employee  
or Independent Contractor?



## Case Studies

### Scenario #5

- Sleepy Furniture hired MotoMovers for deliveries, both signing an agreement that MotoMovers were ICs.
- Moto was not guaranteed any amount of work nor required to be available on any particular schedule.
- Moto provided their own vehicles and supplies and were responsible for their own expenses.
- Moto controlled who they hired and compensation for said employees.

## Case Studies

### Scenario #5- cont'd

- Sleepy paid Moto, who then paid their employees.
- Sleepy issued training materials which set forth guidelines to be followed when delivering furniture.
- Sleepy conducted background checks on all Moto employees, and excluded from Sleepy deliveries anyone who didn't pass the screening.
- Sleepy issued and required GPS locators for Moto so that Sleepy could track location and progress of deliveries.

## Case Studies

Scenario #5- cont'd

Is Motomovers an employee or Independent Contractor?



### What should you take away from all this?

- The classification of a worker as an employee or independent contractor can be very important in a multitude of situations.
- A contract or term in a contract saying a party is an independent contractor isn't always the end of the story
- The determination of status is very fact intensive
- If in doubt, consult legal counsel in the jurisdiction where the worker is employed for a thorough analysis

Q & A ?

# The End.

*Thank you for listening.*

NICHOLAS LANZA

**McCormick, Lanza & McNeel, LLP**

Houston, Texas

**713-523-0400**

[www.mlm-lawfirm.com](http://www.mlm-lawfirm.com)

[nlanza@mlm-lawfirm.com](mailto:nlanza@mlm-lawfirm.com)