

TENNESSEE

NEW LAW: Tennessee Changes Its Independent Contractor Test To The IRS 20-Factor Test

On May 15, 2019, Tennessee Governor Bill Lee signed [HB 539](#) into law. This new law, which goes into effect on January 1, 2020, adopts a new standard to determine whether a worker is an independent contractor or an employee.

Currently, Tennessee uses a variation of the common law right of control test to determine whether a worker is an independent contractor. Under this test, courts use the following factors to determine whether a worker is an employee or an independent contractor:

- Whether or not the one employed is engaged in a distinct occupation or business;
- The kind of occupation with reference to whether in the locality the work is usually done under the direction of an employer or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or workman supplies the instruments, tools and place of work of the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by time or by job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relationship of master and servant; and

- Whether the principal is or is not in business.

Starting January 1, 2020, the more employer-friendly 20-Factor IRS test will be used to make the independent contractor determination. Under that test, courts will use the following 20 factors to make that determination:

1. Instructions. A worker who is required to comply with other persons' instructions about when, where, and how the worker 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;
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 person or persons for whom the services are performed want the services performed in a particular method or manner;
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;
4. Services rendered personally. If the services must be rendered personally, then presumably the persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results;
5. Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, then that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, then this factor indicates an independent contractor status;
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. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals;
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;
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, then the 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 is free to work when and for whom the independent contractor chooses;

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, then that factor suggests control over the worker, especially if the work could be done elsewhere, Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform those services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass territory within a certain time, or to work at specific places as required;
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, then that factor shows that 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 or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if the person or persons retain the right to do so;
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;
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 the worker is an independent contractor;
13. Payment of business or traveling expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business or traveling expenses, then the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities;
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;
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, then that factor tends to indicate that the worker is an independent contractor. However, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for the facilities and the existence of an employer-employee relationship;
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. For example, if the worker is subject to a real risk of economic loss due to significant investments or a *bona fide* liability for expenses, such as salary payments to unrelated employees, then that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for the worker's services is common to both independent contractors and employees and does not constitute sufficient economic risk to support treatment as an independent contractor;
17. Working for more than one firm at a time. If a worker performs more than *de minimis* services for multiple unrelated persons or firms at the same time, then that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one (1) person may be an employee of each of the persons, especially where such persons are part of the same service arrangement;
18. Making service available to general public. 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. 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. 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;and

20. Right to terminate. If the worker has the right to end the workers relationship with the person for whom the services are performed at any time the worker wishes without incurring liability, then that factor indicates an employer-employee relationship.

It is recommended that employers with existing independent contractor relationships be prepared to reevaluate those relationships using the new standard at the start of next year.