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Portable Benefit accounts de-couple benefits from the employer and instead offer coverage to an individual worker. An account is funded<sup>30</sup> and can then be used to obtain various coverages including healthcare, disability or occupational accident insurance, and/or workers' compensation. Funding of the account could be designed in many ways but could include contributions from an employer(s), platform(s), contract organization(s), client(s), and/ or the worker.

There are currently two models – one for caregivers through Care.com and one for domestic workers at myalia.com that are piloting portable benefit accounts for underserved worker populations.

Portable benefit accounts have been conceptually supported by policymakers, businesses, labor leaders, and think tank organizations but have not been widely piloted. Key policy, administrative, and design considerations which would shape the implementation of portable benefit accounts and their effectiveness in delivering benefits for work-related injuries, illnesses, and fatalities.

Each of these mechanisms could serve as a model for extending work-related injury, illness and fatality coverage for workers in alternative work arrangements.

### ***Policy Questions and Considerations***

**Exclusive remedy:** One of the central principles of workers' compensation is exclusive remedy. Employees who have a work-related injury, illness, or fatality receive the medical and wage replacement benefits afforded to them by state-law. Once those have been received, employers have no further liabilities. If alternative coverage mechanisms are developed should exclusive remedy be afforded to those business? What provisions or standards must be met to have exclusive remedy?

**Universal coverage:** Workers' compensation started off as a voluntary program but trended toward universal coverage (with some exceptions). Coverage had clear benefit for both employers and employees. If universal coverage is desirable, you must decouple the mandate from the employment relationship (i.e. employee only) and determine how coverage can be delivered in different environments (i.e. do IC have to purchase a work comp policy?)

**Standard benefits:** Workers' compensation benefits (wage replacement and medical) are defined in state statute and applied in the same way for all employees in a state. The advantage of a statutory benefit scheme is that it creates equity across all employees/employers and promotes societal stability (given adequacy of benefits). The disadvantage of this scheme is that benefits may not always be "fair" (i.e. account for pain/suffering; maximums penalize high income earners, etc.)

**Funding/Delivery:** Workers' compensation policies are funded by employers who pay premiums or self-fund. In nonstandard work arrangements the financial responsibility for an occupational injury is ambiguous and therefore who funds coverage bears discussion. Is it the contracting firm's

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<sup>29</sup> <https://www.lexology.com/library/detail.aspx?g=23c3701c-0fcc-4dd4-8de7-de35b81e17d3> Philly passed the country's first portable benefits program.



























































			<p>The principal factors in determining independent contractor status are:</p> <ul style="list-style-type: none"> <li>(1) The evidence of the right to or actual exercise of control</li> <li>(2) The method of payment</li> <li>(3) The furnishing of equipment</li> <li>(4) The right to fire</li> </ul> <p><i>See McQuiggin v. Burr</i>, 119 Or. App. 202 (1993); <i>Soderback v. Townsend</i>, 57 Or.App. 366 (1982).</p>
PA	Yes	<p>Construction workers and industry workers exemptions</p> <p>77 PA. STAT. AND CONS. STAT. ANN. § 676 (1996); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3 (2010)</p>	<p>In determining employee or independent contractor status, the following factors should be considered, but all do not need to be present:</p> <ul style="list-style-type: none"> <li>(1) Control of the manner in which work is to be done</li> <li>(2) Responsibility for result only</li> <li>(3) Terms of agreement between the parties</li> <li>(4) Nature of the work or occupation</li> <li>(5) Skill required for performance</li> <li>(6) Whether one employed is engaged in distinct occupation or business</li> <li>(7) Which supplies the party tools</li> <li>(8) Whether payment is by time or by job</li> <li>(9) Whether work is part of regular business or alleged employer</li> <li>(10) Whether alleged employer had right to terminate employment at anytime</li> </ul> <p>Control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status for purposes of the Worker's Compensation Act.</p> <p>77 PA. STAT. AND CONS. STAT. ANN. § 22 (West 2014); <i>Johnson v. W.C.A.B. (Dubois Courier Exp.)</i>, 631 A.2d 693 (Pa. 1993); <i>Universal Am-Can, Ltd. V. W.C.A.B.</i>, 762 A.2d 328 (Pa. 2000).</p>

RI	No provision	<p>28 R.I. GEN. LAWS. ANN. §§ 28-29-2; 28-29-7 to 28-29-7.2; 28-29-15</p> <p>Certain industries have special status or are exempted</p>	<p>Under Rhode Island's Worker's Compensation law, independent contractor means a person who has filed a notice of designation as independent contractor with the director pursuant to or as otherwise found by the workers' compensation court.</p> <p>In determining whether a worker is an employee or independent contractor, the status depends on the employer's right or power to exercise control over methods and means of performing the work and not the exercise of actual control. Whether an injured worker is an employee or independent contractor must be decided by the employment contract in the particular case and the surrounding particular circumstances.</p> <p>28 R.I. GEN. LAWS. ANN. §§ 28-29-2; 28-29-17.1 (1956) <i>Pasetti v. Brusa</i>, 98 A.2d 833 (1953); <i>Henry v. Mondillo</i>, 142 A. 230 (1928).</p>
SC	Yes	<p>S.C. CODE ANN. § 42-1-360 (2007)</p> <p>Exemption of certain industries from Worker's Compensation law</p>	<p>Case law establishes the criteria for distinguishing between employee and independent contractor under South Carolina's Worker's Compensation law.</p> <p>Determination of whether a worker's compensation claimant is an employee or independent contractor focuses on the issue of control.</p> <p>In determining whether an employer had a right to control a worker's compensation claimant in performance of his work, there are four factors the court will look at</p> <ul style="list-style-type: none"> <li>(1) direct evidence of the right or exercise of control;</li> <li>(2) furnishing of equipment;</li> <li>(3) method of payment;</li> <li>(4) right to fire</li> </ul> <p>It is not actual control exercised, but whether there exists right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment.</p> <p>S.C. CODE ANN. § 42-1-130 (1976); <i>Nelson v. Yellow Cab Co.</i>, 343 S.C. 102, 538 S.E.2d 276 (S.C.App. 2000); <i>Shatto v. McLeod Regional Medical Center</i>, 406 S.C. 470 (2013).</p>
SD	No provision	<p>S.D. CODIFIED LAWS §§ 62-1-4 to 62-1-5.1</p> <p>Certain industry exceptions</p>	<p>There are three primary factors South Dakota courts look at to determine whether one is employee or independent contractor include:</p>

			<p>(1) Whether individual has been and will continue to be free from control or direction over performance of services</p> <p>(2) Both under contract of service and in fact; and</p> <p>(3) Whether the individual is customarily engaged in independent established trade, occupation, profession or business.</p> <p>Specifically, courts will employ a “right of control” test is used to determine independent contractor status, which includes consideration of the following factors:</p> <p>(1) Direct evidence of rate of control</p> <p>(2) Method of payment</p> <p>(3) Furnishing of major items of equipment</p> <p>(4) Right to terminate employment relationship at will and without liability</p> <p>S.D. CODIFIED LAWS §§ 62-1-2 (1994); 62-1-3 (2008) <i>Egemo v. Flores</i>, 470 N.W.2d 817 (S.D. 1991); <i>Davis v. Frizzell</i> 504 N.W.2d 330 (S.D. 1993).</p>
TN	Yes	Construction workers are exempt from the statutory classification test if requirements of TENN. CODE. ANN. § 50-6-102(10) are met	<p>Tennessee’s Worker’s Compensation Law states that to determine whether an individual is an employee or independent contractor, the following factors will be considered:</p> <p>(1) The right to control the conduct of the work</p> <p>(2) The right of termination</p> <p>(3) The method of payment</p> <p>(4) The freedom to select and hire helpers</p> <p>(5) The furnishing of tools and equipment</p> <p>(6) Self-scheduling of working hours; and</p> <p>(7) The freedom to offer services to other entities</p> <p>For purposes of determining whether employee’s relationship is employee or independent contractor, courts consider whether work being performed by contractor is same type of work usually performed by company which hired contractor and whether company has right to control employees of contractor.</p> <p>TENN. CODE ANN. § 50-6-102 (2017); <i>Barber v. Ralston Purina</i>, 825 S.W.2d 96 (1991).</p>
TX	No provision	TEX. INS. CODE ANN. §§ 406.091 to 406.098; 406.141 to 406.146; 406.161 to 406.165	<p>Texas’ Worker’s Compensation Act defines an independent contractor as a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:</p> <p>(1) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;</p>

		Special coverage to members of certain industries, construction workers and farm and ranch employees	<p>(2) is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;</p> <p>(3) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and</p> <p>(4) possesses the skills required for the specific work or service.</p> <p>The Texas courts will also consider the following factors when considering whether one is an independent contractor: the independent nature of the worker's business, the worker's obligation to furnish necessary tools, supplies, and material to perform the job, the worker's right to control progress of work, except as to final results, the time for which (s)he is employed, and method of payment, whether by time or by job.</p> <p>TEX. INS. CODE ANN. § 406.121 (1993); <i>Industrial Indem. Exchange v. Southard</i>, 138 Tex. 531 (1942); <i>INA of Texas v. Torres</i>, 808 S.W.2d 291. (1991).</p>
UT	Yes	<p>UTAH CODE ANN. § 34A-2-104 (2017)</p> <p>Excludes certain industries from the definition of "employee" for purposes of the statute</p>	<p>Utah's Workers' Compensation Law defines an independent contractor as any person engaged in the performance of any work for another who, while so engaged, is:</p> <p>(1) Independent of the employer in all that pertains to the execution of the work;</p> <p>(2) Not subject to the routine rule or control of the employer;</p> <p>(3) Engaged only in the performance of a definite job or piece of work; and</p> <p>(4) Subordinate to the employer only in effecting a result in accordance with the employer's design</p> <p>The Utah court will consider whatever agreements exist concerning the right of control as well as the actual dealings between the parties and the control that was in fact asserted. Determination of status of individual as an employee or an independent contractor is based on various factors, and of primary concern is the control, direction, supervision, or the right to control, direct or supervise on behalf of the employer.</p> <p>UTAH CODE ANN. § 34A-2-103 (2017); <i>Utah Home Fire Ins. Co. V. Manning</i>, 985 P.2d 243 (1999); <i>Ruster Lodge v. Industrial Commission</i>, 562 P.2d 227 (1977).</p>
VT	No provision	<p>Vt. Stat. Ann. tit. 21, §§ 601; 706</p> <p>Certain industry exceptions</p>	<p>Vermont's case law establishes the test for determining whether a worker is an employee or independent contractor and will utilize the "right to control" test.</p> <p>Factors that are taken into account when employing the "right to control" test include the location of the work, whether the employee chose their own hours, whether the employee</p>

			<p>used their own tools for the job, how the employee was paid and whether the type of work being carried out by a worker is the type of work that could have been carried out by the owner's employees as part of the regular course of business.</p> <p>VT. STAT. ANN. tit. 21, § 601; <i>Crawford v. Lumbermen's Mut. Cas. Co.</i>, 220 A.2d 480 (1966); <i>Klinker v. Furdiga</i>, 22 F.Supp.3d 366 (2014).</p>
VA	Yes	VA CODE ANN. §§ 65.2-101- to 65.2-104	<p>Virginia case law defines an independent contractor as one who contracts to produce a specific result for a fixed price without outside control concerning the method use.</p> <p>The status of a worker as an employee or as an independent contractor is not governed by Virginia's Workers' Compensation Act, but instead is governed by common law.</p> <p>The test applied in determining whether employee of independent contractor will be considered statutory employee of owner of project is whether the worker is "performing an indispensable activity normally carried on through employees, rather than independent contractors."</p> <p>The ordinary test to determine whether one is an "employee" or an "independent contractor" is to ascertain who can control and direct servants in performance of their work. Factors that are considered in determination of a worker's status include what the parties to an employment contract call their relationship,</p> <p>VA CODE ANN. § 65.2-101 (2015); <i>Phillips v. Brinkley</i>, 72 S.E.2d 339 (Va. 1952); <i>Ramsburg v. Target Stores, Inc.</i>, 982 F.Supp. 1194 (Va. 1997); <i>Nolde Bros. v. Chalkley</i>, 1945, 35 S.E.2d 827, 184 Va. 553.</p>
WA	No provision	<p>WASH. REV. CODE ANN. §§ 51.12.010 to 51.12.185 (1996)</p> <p>Industry Exception</p>	<p>Under Washington's Worker's Compensation Law, there are three elements that must be satisfied to be considered an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) The individual has been and will be free from control over performance of services, both under the contract and in fact.</li> <li>(2) The service is either outside the course of business or performed outside the place of business.</li> <li>(3) The individual is customarily engaged in an independently established trade of the same nature as that being performed</li> </ol> <p>In determining whether the worker is an employee or an independent contractor, the court will look to the employment contract, the work, the parties' situation, and other concomitant circumstances.</p> <p>WASH. REV. CODE ANN. §§ 51.08.180; 51.08.181; 51.08.195 (West 2008); <i>Department of Labor and Industries of State v. Lyons Enterprises, Inc.</i>, 347 P.3d 464 (Wash.App. 2015);</p>



			<i>Henry Industries, Inc. v. Department of Labor and Industries</i> , 381 P.3d 172 (Wash.App. 2016).
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WV	Yes	W. VA. CODE R. § 85-8-6 (2008)	<p>Under West Virginia's Worker's Compensation Law, the burden of proving that an individual is an independent contractor is on the party asserting independent contractor status. The following factors are dispositive of whether a worker is an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) Whether the individual holds themselves out to be in business for themselves, including whether they possess a license, permit or other certification required to engage in the type of work the worker is performing; whether they enter into verbal or written contracts with the persons and/or entities for whom the work is being performed; and the individual has the right to regularly solicit business from different persons or entities to perform for compensation the type of work that is being performed</li> <li>(2) Whether the individual has control over the time when the work is being performed</li> <li>(3) The individual has control and discretion over the means and manner of the work being performed and in achieving the result of the work</li> <li>(4) Unless expressly required by law, the individual is not required to work exclusively for the person or entity for whom the work is being performed</li> <li>(5) If the use of equipment is required to perform the work, the individual provides most significant equipment required to perform the job</li> </ol> <p>The West Virginia courts will look at the following factors to determine if a worker is an employee or independent contractor: the right or lack of right to supervise work, the method of payment, who owns substantial equipment to be used on the job, who determines what hours are worked, and the nature and terms of the employment contract.</p> <p>W. VA. CODE ANN. § 23-2-1a (1999); W. VA. CODE R. § 85-8-6 (2008); <i>Smith v. Donald Coal Co.</i>, 115 S.E. 477 (W.Va. 1922); <i>Null v. State Compensation Com'r</i>, 35 S.E.25 359 (W.Va. 1945); <i>Myers v. Workmen's Compensation Com'r</i>, 148 S.E.2d 664 (W.Va. 1966).</p>
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WI	Yes	No provision	<p>Wisconsin's Worker's Compensation Law lists nine criteria, all of which must be met to be considered an independent contractor:</p> <ol style="list-style-type: none"> <li>(1) Maintains a separate business with his or her own office, equipment, materials and other facilities.</li> <li>(2) Holds or has applied for a federal employer identification number with the IRS or has filed business or self-employment income tax returns with the IRS based on that work or service in the previous year</li> <li>(3) Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.</li> <li>(4) Incurs the main expenses related to the service or work that he or she performs under contract.</li> <li>(5) Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.</li> <li>(6) Receives compensation for work or service performed under a contract on a commission or per job or competitive-bid basis and not on any other basis.</li> <li>(7) May realize a profit or suffer a loss under contracts to perform work or service.</li> <li>(8) Has continuing or recurring business liabilities or obligations.</li> <li>(9) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures</li> </ol> <p>The presumption that a person injured while performing service for another is an employee rather than an independent contractor is rebuttable and ceases to have force or effect when evidence to the contrary is adduced.</p> <p>Wis. STAT. ANN. § 102.07 (2016); <i>J. Romberger Co. v. Industrial Commission</i>, 234 Wis. 226, 229 (Wis. 1940).</p>
WY	No	No provision	<p>Wyoming's Worker's Compensation Law defines independent contractor as "an individual who performs services for another individual or entity" and:</p> <ol style="list-style-type: none"> <li>(5) is free from control or direction over the details of the performance of services by contract and by fact;</li> <li>(6) represents his services to the public as a self-employed individual or an independent contractor; and</li> <li>(7) may substitute another person to perform his services</li> </ol>

			<p>The Wyoming Supreme Court has defined an independent contractor as “one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.” An express contract between the parties is not conclusive on whether a worker is an independent contractor; however, it is an important factor in defining the relationship between the employer and the worker. The Wyoming Supreme Court stated other factors that are important to the determination include:</p> <ul style="list-style-type: none"><li>(4) the method of payment</li><li>(5) the right to determine the relationship without incurring liability</li><li>(6) the furnishing of tools and equipment</li><li>(7) the scope of the work</li><li>(8) the control of the premises where the work is to be done; and whether the worker devotes all of his efforts to the position or if he also performs work for others</li></ul> <p>WYO. STAT. ANN. § 27-14-102 (2017); <i>Diamond B Services Inc. v. Rohde</i>, 120 P.3d 1031 (Wyo. 2005); <i>Stratman v. Admiral Beverage Corp.</i>, 760 P.2d 974, 980 (Wyo. 1988); <i>Cline v. State, Dep’t of Family Services</i>, 927 P.2d 261, 263 (Wyo. 1996).</p>
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