2019 Fall National Meeting

Workers’ Compensation (C) Task Force Meeting

December 9, 2019
Austin, Texas
Attachment One
Consider Adoption of its Oct. 24 and Summer National Meeting Minutes
The Workers’ Compensation (C) Task Force met via conference call Oct. 24, 2019. The following Task Force members participated: John G. Franchini, Chair, represented by Robert Doucette (NM); Lori K. Wing-Heier, Vice Chair, represented by Michael Ricker (AK); Jim L. Ridling represented by Gina Hunt (AL); Keith Schraad represented by Tom Zuppan (AZ); Ricardo Lara represented by Patricia Hein and Mitra Sanandajifar (CA); Andrew N. Mais represented by Wanchin Chou (CT); Trinidad Navarro represented by Frank Pyle (DE); John F. King represented by Steve Manders (GA); Colin M. Hayashida represented by Kathleen Nakasone (HI); Dean L. Cameron represented by Michele Mackenzie (ID); Robert H. Muriel represented by Reid McClintock (IL); Vicki Schmidt represented by Heather Droge (KS); Nancy G. Atkins represented by Patrick O’Connor (KY); James J. Donelon represented by Warren Byrd (LA); Eric A. Cioppa represented by Sandra Darby (ME); Steve Kelley represented by Tammy Lohmann and Phil Vigliaturo (MN); Mike Causey represented by Fred Fuller (NC); Glen Mulready represented by Cuc Nguyen and Joel Sander (OK); Jessica Altman represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Raymond G. Farmer represented by Lee Hill (SC); Larry Deiter represented by Dan Nelson (SD); Hodgen Mainda represented by Mike Shinnick (TN); and James A. Dodrill represented by Juanita Wimmer (WV). Also participating was: Bob Lutton (MI); and Dave Roju (NH).

1. Adopted its Spring National Meeting Minutes

Mr. Byrd suggested rewording the charge, “[d]iscuss issues with respect to advisory organizations and insurance companies in the workers’ compensation arena” to read, “[d]iscuss issues with respect to advisory organizations, rating organizations, statistical agents and insurance companies in the workers’ compensation arena.”

Mr. Hill made a motion, seconded by Mr. Manders, to adopt the Task Force’s amended 2020 proposed charges. The motion passed unanimously.

Having no further business, the Workers’ Compensation (C) Task Force adjourned.
The Workers’ Compensation (C) Task Force met in New York, NY, Aug. 5, 2019. The following Task Force members participated: John G. Franchini, Chair, represented by Robert Doucette (NM); Lori K. Wing-Heier, Vice Chair represented by Joanne Bennett (AK); Allen W. Kerr represented by William Lacy (AR); Keith Schraad represented by Erin Klug (AZ); Ricardo Lara represented by Ken Allen (CA); Andrew N. Mais represented by George Bradner (CT); Stephen C. Taylor represented by David Christhif (DC); Trinidad Navarro represented by Fleur McKendell (DE); David Altmaier represented by Sandra Starnes (FL); John F. King represented by Steve Manders (GA); Colin M. Hayashida represented by Paul Yuen (HI); Doug Ommen represented by Travis Grassel (IA); Dean L. Cameron represented by Weston Trexler (ID); Robert H. Muriel represented by Judy Mottar (IL); Vicki Schmidt represented by Justin McFarland (KS); Nancy G. Atkins represented by Patrick O’Connor (KY); James J. Donelon represented by Warren Byrd and Rich Piazza (LA); Eric A. Cioppa represented by Sandra Darby (ME); Steve Kelley represented by Tammy Lohmann (MN); Chlora Lindley-Myers and Angela Nelson (MO); Mike Causey represented by Fred Fuller (NC); Marlene Caride represented by Mark McGill (NJ); Glen Mulready represented by Cuc Nguyen (OK); Andrew Stolfi represented by TK Keen (OR); Jessica Altman represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Raymond G. Farmer represented by Joe Cregan (SC); Larry Deiter (SD); Carter Lawrence represented by Lorrie Brouse and Brian Hoffmeister (TN); Todd E. Kiser represented by Tracy Krausmeier (UT); Michael S. Pieciak represented by Rosemary Raszka (VT); and James A. Dodrill (WV). Also participating was: Peg Brown (CO).

1. Adopted its Spring National Meeting Minutes

Mr. Byrd made a motion, seconded by Mr. Trexler, to adopt the Task Force’s April 8 minutes (see NAIC Proceedings – Spring 2019, Workers’ Compensation (C) Task Force). The motion passed unanimously.

2. Adopted the NAIC/IAIABC Joint (C) Working Group Report

Jennifer Wolf (International Association of Industrial Accident Boards and Commissions—IAIABC) said she wants to stimulate discussion regarding an IAIABC white paper at the Task Force level, as she is seeking feedback from Task Force members. She said the goal of the white paper is to address how work is changing, especially with respect to how individuals are connecting to work. Ms. Wolf said the changing work environment is putting stress on the legal classification system when determining whether an individual worker is an employee or an independent contractor. This will raise questions regarding how the individual receives coverage for a work injury, illness or fatality.

Ms. Wolf said the white paper is broken down into three sections. The first section discusses changes in the labor force and changes with the ways in which individuals are connecting to work. She said this part of the paper provides a context for these contemporary policy discussions. Ms. Wolf said some comments were received regarding the reason for the changing demographics of the labor force and the changing types of work. She said it is important to include this information because it provides a context and demonstrates how the environment has changed over the last century. This is also important when evaluating policy changes or innovations in the future. Ms. Wolf said the discussion of wage replacement for second, or multiple, jobs is important. She said many people talk about platform work as being supplemental benefits, and many states require that if there is an injury at a primary workplace, it is required the supplemental benefits be paid. Ms. Wolf said this is not included in the current draft of the white paper. She asked the Task Force if this should be included and if so, where it should be included. Ms. Nelson said she is unsure where this should be added, but she believes it is a valuable topic to cover in this white paper. Ms. Wolf said she would include this in the white paper.

Ms. Wolf asked the Task Force if there are any other changes being seen in the workforce that the Task Force believes are important to note in the first part of the white paper. Mr. Byrd suggested adding more regarding employees who work from their home and discussing issues such as how workers’ compensation covers injuries at home. Mr. Bradner said another issue worth discussing is the age at which people are entering the workplace. Ms. Nelson said she would also be worthwhile to discuss how automation is changing the workforce. She agreed to review the first part of the paper and provide written feedback.

Ms. Wolf said the second section of the white paper focuses on employment status. She said it looks at the legal landscape of how workers are classified under federal and state statutes—whether they are an employee or an independent contractor. The two parts to the second section include the federal landscape, as well as the state landscape. Ms. Wolf said one of the key takeaways is that the complexity in the legal classification system has created an uncertain business climate. She said there
Draft Pending Adoption

have been a lot of new state legislative efforts to confirm independent contractor status for platform workers. In 2016-2017 and 2018, there was the development of marketplace contractor designations in eight states. Additionally, Arkansas adopted a new 20-point independent contractor test. Ms. Wolf said she believes there should be some highlights regarding some state case law in this section. Mr. Byrd volunteered his staff to review the second section.

Ms. Wolf said an issue raised in the comments received on the white paper was that when it comes to the funding of state agencies, many workers’ compensation administrative agencies are funded by premium payroll taxes. She said if there is a decrease in premium because fewer workers are covered by workers’ compensation, it will affect state agency budgets. Ms. Wolf asked the Task Force if they think this is a topic that is important to mention in the white paper. Ms. Nelson said this is something noted in Missouri when there are huge changes in terms of payroll bases and different legislative proposals. She said it is important to note this in the white paper. She said she does not know if there is a large impact currently but said it may be worth noting for further observation. Mr. Yuen said he also believes it is important.

Ms. Wolf said there have been suggestions from academics and think tanks regarding developing additional classifications for workers. There have been proposals to add a dependent contractor. Canada has this type of classification. She asked the Task Force if the white paper should offer these items as considerations or just discuss the current landscape as it is today. Ms. Klug said she believes it would be interesting to list these considerations as a reference. Ms. Wolf asked for volunteers to review this section of the white paper, as well as to discuss the current legal classification system and the subtlety nuance involved.

Mr. McKenney asked if it would be worthwhile to mention states where the independent contractors can opt in to the workers’ compensation system. Ms. Wolf said she believes this would be worthwhile to mention. She said she would conduct a survey and obtain that legal landscape.

Ms. Wolf said the third section of the white paper addresses alternative coverage models. This section discusses the alternative coverage solutions. These coverage solutions include occupational coverage benefits to those workers who might not be considered under a traditional workers’ compensation system. Ms. Wolf said the section outlines some models that have been reviewed across the country. She said the section also discusses some other considerations and policy questions that policymakers and regulators need to think about when examining these alternative coverage models.

Ms. Wolf said the third section discusses some of the alternative models that are currently in place, allowing independent contractors to opt-in to workers’ compensation, such as the Black Car Fund based in New York, the extension of occupational accident insurance policies, disability insurance policies and portable benefits. She said these are the key models that are currently being reviewed. She asked the Task Force if the descriptions of these models needed to be expanded. Ms. Klug said she believes the occupational hazard coverage information would be interesting to include in the white paper. She said she would re-read this section and provide comments.

Ms. Wolf said the final part of the paper was included to stimulate thought and discussion regarding the questions that need to be answered when considering these new solutions. She said this is the most important section going forward, as the first two sections offer context and the current situation. The final section addresses what the future landscape will look like. She asked the Task Force to take some time to consider what additional information regarding these models would be helpful and what policy questions Task Force members would like to see raised. Ms. Nelson said Ms. Wolf might consider adding some information regarding how health care reform may affect workers’ compensation insurance. Mr. McKenney said the history of workers’ compensation insurance was to keep employees from being able to sue employers. He suggested adding something that speaks to the fact that in any independent contractor relationship, there is no one to sue for workplace injuries.

Ms. Wolf said the appendix included provides charts regarding employee/independent contractor definitions by state. She said this chart was compiled in the summer of 2017, so there may be updates for individual states. She asked Task Force members to review the information regarding their states and provide updates to NAIC staff.

Ms. Nelson made a motion, seconded by Mr. Byrd, to adopt the Working Group report. The motion passed unanimously.

3. Heard a Presentation from Cake Insure on the Use of Digital Direct Distribution for Workers’ Compensation Insurance for Small Businesses

Robert Norris (Cake Insure) gave an overview of Cake Insure. He said Cake Insure is a wholly owned subsidiary of Pinnacol Assurance, which is the workers’ compensation state fund in Colorado. He said Cake Insurance sells and services policies, but also provides software to other insurers. Cake was formed in early 2017 in response to observations that the workers’ compensation market was starting to move away from independent agents and toward direct distribution models.
Mr. Norris said it is Cake Insure’s belief that the commonality across all of the digital distributors is that they are responding to changing expectations of small business owners. They want the experience of buying an insurance policy to be the same as buying a roll of paper towels on Amazon. Small business owners want a fast, easy digital experience. It is not that small business owners do not want human client care or an agent; they just want the journey to start digitally, and then the small business owners will let the insurer know if they need help from a customer service person.

Mr. Norris said price is important, as small business owners want to know they are getting a low price and want to make sure there is some transparency in the process. Mr. Norris said there are more and more entrants into the digital distribution space on a monthly basis.

Mr. Norris said from an insurer perspective, Cake Insure believes it is important not to just provide a customer experience on par with the other digital insurance providers, but also to ensure that they did not get an advantage in terms of their ability to understand and price risk more precisely. Mr. Norris said there are a couple of ways that there is a potential for that to happen. If insurance is being distributed digitally, you may have access to different sources of data then you would typically see on an Accord form. If those data elements are predictive in terms of losses, that might allow one insurer to file rates that are inclusive of those insights.

Mr. Norris said the biggest challenge, especially for a small business, is classifying risk appropriately. Whoever can classify high risks more appropriately is going to have an advantage in ultimately pricing that risk. Combined with paperless efficiencies, you create a potential for insurers to have cost efficiency they can pass off to the consumer in the form of lower prices. From Pinnacol’s perspective, they want to be sure they are on par with every other insurer out there as they respond to the digital disruption of the insurance industry.

Mr. Norris said in 2017, Cake Insure confronted some specific questions. The first question is that in a digital world, how would they would remain a carrier of choice. Secondly, as the world is changing so rapidly, how can Cake Insure innovate rapidly to keep up. The insurance industry is not known for moving quickly. Mr. Norris said no industry is immune to digital disruption. Mr. Norris said small or mid-size insurers are limited by statutory constraints regarding where they operate and what lines of insurance they can provide. He said we need to be answering the questions regarding the implications of digital distribution on those constraints.

Mr. Norris said the first issue Cake Insure solved was the issue of speed. He said it is no surprise that bureaucracies move slowly, and corporate bureaucracy does not necessarily support innovation. Cake Insure decided that the best way to provide experience on par with what startups are providing was to create their own startup. Cake Insure used all of the things that work well with a startup.

Mr. Norris said Cake Insure calls itself a managing general agent (MGA) even though it does not meet the statutory definition of an MGA. Cake Insure’s key insight regarding innovating quickly was to take a holistic approach, realizing this was not just an information technology (IT) problem but a marketing program, a customer service problem, an agent problem and an operations problem. Cake Insure worked with all these areas together to work closely with a team of people who were schooled in human-centered design. Mr. Norris said the result has been successful.

Mr. Norris said through the process, Pinnacol was able to determine what needed to be done to be successful as an agent. Pinnacol is an agent-focused insurer, and the goal was not to compete with agents but rather to say there is a portion of the market where independent agents have told Pinnacol that they struggle to serve them cost-effectively.

Mr. Norris said a business can be quoted and priced a policy in three to five minutes. He said Cake Insure dramatically simplifies the application process and the way they ask questions. Cake Insure does not ask businesses to choose a classification code from a list. Instead, the Cake Insure platform asks the business to describe their business in plain English. Using machine learning, the platform chooses the correct classification code with a high degree of accuracy.

The Cake Insure platform is married with omni channel human client care. This simply means that while a business is trying to buy a policy, Cake Insure is able to get to a licensed property/casualty (P/C) producer who has been trained as an underwriter. These producers are available during the purchasing process if needed via chat, email, phone, etc.

Mr. Norris said the Cake Insure platform includes electronic signatures. The company has not eliminated all paper, as the law requires insurers to use paper for things such as cancellation notices. Cake Insure’s platform includes a chatbot, which is not used a great deal. A customer can also text the word “cert” to Cake Insure and obtain a certificate of insurance immediately.
Mr. Norris said the next challenge Cake Insure is facing is that the shift from independent agent distribution to the direct distribution channel is not occurring as rapidly as many analysts have predicted. Insurers that focus on independent agents, as well as different types of independent agents, such as alternative channels, are now starting to provide a good digital experience to their customers. Cake Insure believes it is important from an insurer perspective to expand the Cake Insure platform to agents. Mr. Norris said Cake Insure is going to expand their platform to agents. This will provide a better experience for agents.

Mr. Norris said the distribution channels in the workers’ compensation arena are getting more complicated. Cake Insure believes in allowing agents for the smallest customers to be able to refer those customers to Cake Insure and still be compensated. Cake Insure believes it needs to create an agent service center, which involves a co-servicing relationship between the agent and the insurer on top of this digital platform. Cake Insure is looking for ways to interact with the new distribution channels that are emerging in the digital front.

Mr. Norris said companies with similar platforms exist across the U.S. He said although Pinnacol is focused on workers’ compensation insurance in Colorado, it has an obligation to keep its costs as low as possible. This type of innovation is expensive, and one-way Pinnacol can keep costs low for Colorado policyholders is to lower its net cost of innovation by licensing some of its innovations to other insurers.

Mr. Norris said there are two states in the country right now that have signed deals with Cake Insure that allows them to provide the same thing Cake Insure is providing in Colorado. These benefits naturally flow back to Colorado policyholders to help recover part of their investment in this innovation.

Mr. Byrd said most workers’ compensation policies have a provision for post-policy audit. He asked if Pinnacol provides this service and if it had revealed any misclassifications. Mr. Norris said Pinnacol has the same audit process for Cake Insure policies that it would for any other policies; however, it has developed a digital audit model that it refers to as a periodic check in process that is now making the audit process much easier for customers. He said regarding the specific classification and pricing, the accuracy rates have increased relative to the traditional model. The reason for this is that for very small customers, underwriters do not have enough time to spend on them to always do it right.

Ms. Klug said the most frequently appealed issue on workers’ compensation policies in Arizona is classification code. She said in their experience of going through the appeals, there are some classification codes that are rather general or vague, and there are others that are very nuanced. Ms. Klug asked about the artificial intelligence (AI) used on the applicant’s general description of his or her business. She asked if Mr. Norris is able to explain how the AI works and the testing that is used. Mr. Norris said even with a good AI algorithm, Cake Insure knows there needs to be follow-up questions. He said, for example, if someone says he or she is a landscaper, Cake Insure knows there is a good chance that in the winter, the landscaper is doing snow plowing, so Cake Insure has follow-up questions. Mr. Norris said Cake Insure additionally manually reviews every single policy it writes. He said the key point here is not to remove human judgment from that process. The key is to push it back, so the human is not causing a small business owner to have to wait for its policy.

Ms. Klug asked if the manual review is happening simultaneously to the AI review, or once the policy is issued, then a human is looking at the classification code assignments. Mr. Norris said this was the case. Ms. Klug asked if Cake Insure had to adjust the automated classification codes. Mr. Norris said adjustments were only made a small percentage of the time. Ms. Klug asked if Cake Insure was also at times in the audit process finding classification code errors. Mr. Norris said “yes” and they can be due to changes in business operations.

4. Discussed Other Matters

Mr. Doucette said there is a copy of the National Council of Insurance Legislators’ (NCOIL) draft Workers’ Compensation Drug Formulary Act as a reference, as well as comments from Arkansas. He said the Task Force will be discussing this draft model act during or prior to the Fall National Meeting. He asked members of the Task Force to review the model.

David Kodama (American Property Casualty Insurance Association—AIPCA) asked if the white paper regarding the changing workforce will be distributed for comment prior to publication. Mr. Doucette said interested parties would have time to comment.

Adam Orrs (Columbia Care) said his organization is a cannabis company that specializes in the production and distribution of pharmaceutical-quality cannabis products. He said Columbia Care uses delivery formats one would see at any single pharmacy. Mr. Orrs said New York is one of the 14 states where it operates. He said a licensed pharmacist greets the customer, and a pharmacy technologist fills the prescription with a pharmaceutical-quality product. Mr. Orrs acknowledged and thanked many of the state insurance regulators attending the meeting that have recognized that medical cannabis is a needed and fruitful
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treatment option for those who have accidents in the workplace. He said Columbia Care would like to continue to engage with the Task Force following the meeting, or at the Fall National Meeting, to figure out how it can find some way to bring new states online and to help standardize the treatment options, formulary options, coding, etc. that is lacking even in some of the states that have taken this initial step.

Having no further business, the Workers’ Compensation (C) Task Force adjourned.
Attachment Two
Consider Adoption of its Working Group Report
WORKERS’ COMPENSATION POLICY AND THE CHANGING WORKFORCE

ABSTRACT
This paper explores changes in work, the evolving landscape of legal employment classification, and future policy considerations to ensure individuals are protected now and in the future against occupational injuries, illnesses, and fatalities. Policymakers and regulators need to understand how these changes may create gaps in coverage for workers and leave employers vulnerable to uncertain liability for injuries and deaths on the job.

INTRODUCTION
The workforce and workplace of today looks very different than the workforce and workplace when the first workers’ compensation laws were passed. The cumulative impact of these changes has made it important to consider the role public policy plays in protecting workers from the health and economic consequences of an occupational injury, illness, or fatality. For most of the past century, a significant portion of the U.S. labor force was protected through state workers’ compensation laws. As work relationships have grown increasingly complex, there is uncertainty in workers’ compensation protections for some in the labor force. The changes and discussions in this paper are a part of a broader series of discussions on how employment benefits and protections might be revised, redesigned, or reimagined to more accurately reflect the contemporary work environment.

The twenty-first century workforce is more diverse, more de-centralized, and more mobile than ever before. This is often at tension with employment classification law which was adopted when workers were predominately male, and work was conducted in centralized facilities with a rigidly defined management hierarchy. Increasing work fluidity and the application of often conflicting state and federal law is resulting in business uncertainty and legislative proposals across the country. This paper presents an overview of the existing employment classification models and describes the latest legislation aimed at clarifying employment status.

Finally, the paper raises important policy questions that must be considered in light of the new work environment. Policymakers, in addition to business and labor leaders, will also appreciate the description of models and pilot programs that seek to deliver health and economic benefits to injured workers beyond the traditional workers’ compensation system. Discussion and development of solutions is essential for continued economic prosperity and social stability.
Part I: Changing Relationships with Work

Background

An individual’s connection to work shapes his or her life in visible and invisible ways – from lifestyle habits to self-esteem to social benefits. Throughout the last two centuries, those connections to work have become more formal and enshrined in local, state, and federal law. This work, or employment relationship, is important to individuals and their families as benefits and social protections are frequently gained through employment. [Sidebar: Employment benefits can include health, disability, and/or life insurance, retirement contributions, paid time off, flexible spending accounts, and/or tuition reimbursement. Social protections can include unemployment, workers’ compensation, accommodations, equal opportunity, etc.]

The first workers’ compensation laws in the United States arose out of changes in the nature and connection to work. The Industrial Revolution saw workers move from farms and villages to cities, transitioning from farm and community-based work to manufacturing and industrial jobs. These changes resulted in more workers in employee/employer relationships with defined wages, hours, and job requirements.

Industrial work was dangerous and work injuries and fatalities rose, reaching more than 61,000 deaths in 1914.1 Recognizing the economic and social cost of these injuries and deaths, state policymakers successfully passed workers’ compensation laws in the majority of states by 1920. Workers’ compensation was no-fault, providing guaranteed wage replacement and medical benefits for employees injured or killed at work.

Workers’ compensation is generally compulsory for employers2 and each state has rules that define employees for the purpose of workers’ compensation coverage. Securing workers’ compensation coverage for each of its employees is a direct business cost. In contrast, independent contractors are generally not required to have workers’ compensation coverage.

Defining an employee or independent contractor has been a challenge within state workers’ compensation systems, but classification has become more difficult as employment relationships have increased in complexity. These changes have important implications for workers’ compensation including which workers should be covered under workers’ compensation and who should bear the costs of coverage. Additionally, policymakers need to explore how coverage requirements align incentives for businesses and workers.

A Century of Change

The past century has witnessed a transformation across the workforce and the workplace. The number of women in the labor force has steadily increased since the 1950s. Women represented 46% of the US labor force in 2016. [Illustration that shows % labor force that are women rose from 29.6% in 1950 to 46.8% in 2016.]3 The labor force has increased in ethnic diversity. Hispanics represented 17% of the US labor force in 2016 and all minorities (African Americans, Asian-

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1 Bureau of Labor Statistics.
2 All states, except Texas and South Dakota, have compulsory workers’ compensation requirements for employers. Exclusions for certain employers or kinds of employees exist in most states. The IAIABC/WCRI Inventory of Workers’ Compensation laws describes coverage exclusions for each of the states.
3 The % of women who participate in the labor force has also increased from 37% in 1962 to 57% in 2016.
Americans, Hispanics/Latinos, and Native Americans) are projected to make up 37% of the working-age population by 2020\(^4\). The labor force is steadily getting older. Workers 55 and older are projected to be 24.7% of the labor force by 2024. Union participation has been in decline, 10.7% of wage and salary workers were union members in 2017.\(^5\) [Illustration that shows union participation peaked in the 1950s at 34.7% and has declined steadily since that time.] The labor force is also more educated with 33% of workers having a bachelors or graduate degree in 2016\(^6\).


\(^5\) Union Rates: [https://www.bls.gov/news.release/union2.nr0.htm](https://www.bls.gov/news.release/union2.nr0.htm)

The workplace is physically different. Offices that had rows of desks with telephones and typewriters have been replaced by flex workstations and collaboration rooms. It is estimated that 4.3 million employees, close to 3% of the U.S. labor force, worked at home at least half the time in 2016; and regular work-at-home by employees have grown 140% over the last decade.\(^7\) Manufacturing facilities have moved from manually operated heavy equipment to technology-run, highly automated processing. (Side note: possibly include images to illustrate these concepts)

The kind of work is changing. The last century saw steady decline in agricultural work, manufacturing has remained steady, and service work has dramatically increased. The Bureau of Labor Statistics projects that 9 out of 10 new jobs in the next decade will be in the service-providing sector.\(^8\) Healthcare, personal care, community and social services, and computer and mathematical employment are some of the expected fastest-growing occupations.

The overall impact of these changes has dramatically impacted the way people work and live across the United States. The cumulative impact of these changes is an expansion of the U.S. economy. Real gross domestic product (GDP) has grown from $1 trillion in 1929 to $17 trillion in 2017. [Illustration with chart of real GDP growth over that time period.\(^9\)] Labor productivity was 3.8 times higher in 2016 than in 1950.\(^{10}\)

\(^7\) Work at home: http://globalworkplaceanalytics.com/telecommuting-statistics
\(^8\) https://www.bls.gov/news.release/pdf/ecopro.pdf
\(^9\) Data source found at: https://www.thebalance.com/us-gdp-by-year-3305543
\(^{10}\) Data source found at: https://research.stlouised.org/publications/economic-synopses/2016/08/12/labor-compensation-and-labor-productivity-recent-recoveries-and-the-long-term-trend/
Over the century, work has also gotten safer. Workplace injuries and fatalities have declined dramatically. Fatalities at work have declined 500%. The workplace fatality rate was 3.3 workers per 100,000 in 2014 contrasted with 61 workers per 100,000 in 1914. The rate of injuries/illnesses requiring time away from work was less than 2 per 100 workers in 2014 contrasted with 5 per 100 workers in 1914.11

The decrease in occupational injuries, illnesses, and fatalities is especially good news for workers’ compensation. These declines are keeping more employees engaged in the labor force and making it more affordable for businesses to obtain coverage. However, demographic and work changes have raised other challenges for the workers’ compensation system. The kinds of injuries and illnesses are different, compensability questions are different, and treatment options are different. These, taken with the evolving employment relationship landscape, should raise important questions about the central principles of workers’ compensation and if and how they should evolve for the future.

Connections to Work

*Employee or Independent Contractor*

Another significant change happening within the US labor force is how individuals are connected to work. From the legal perspective, there are two classifications of workers - employees and independent contractors. The common picture of an independent contractor is a person with specialized skills, talents, or expertise who works on a project basis. Independent contractors would typically have multiple clients and conduct their work with a fair degree of autonomy.

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Businesses would use independent contractors to supplement knowledge or experience of their existing workforce on a temporary basis to meet demand or deadlines.

While many businesses use independent contractors in this way, many organizations have made contract labor a more permanent part of their workforce. July 2018 headlines noted that the number of contractors now exceeds the number of employees at Google. Countless large businesses, including Apple, Facebook, and Amazon, have noted the same trend. Contract labor is used by businesses for everything from security and food service to coding and sales.

The decision by a business in how to classify its workers is significant as many protections and benefits for workers are tied to employment, including workers’ compensation coverage requirements. Businesses weigh many factors when considering utilizing employees or independent contractors but the direct cost to businesses for employees is estimated at 20-30% higher than independent contractors.

### Employee vs. Independent Contractor Status

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<td><strong>Pros</strong></td>
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<tr>
<td>Employees</td>
<td>- Control over how, when, and where work is conducted.</td>
<td>- Employer contributions to Medicare, SS, UI, WC, other payroll contributions</td>
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<td>- Less turnover</td>
<td>- Employment protections (ADA, minimum wage, FMLA, anti-discrimination, etc.)</td>
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<td></td>
<td>- Reduced litigation from employment classification disputes</td>
<td>- Stability and security</td>
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<td><strong>Consequences</strong></td>
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<tr>
<td>Employees</td>
<td>- Higher cost (contributions to Medicare, SS, UI, WC, other payroll contributions)</td>
<td>- Diminished flexibility in how, when, and where work is conducted</td>
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<td>- Compliance and enforcement with employment protections (ADA, minimum wage, FMLA, anti-discrimination, etc.)</td>
<td>- Limited ability to work for multiple businesses</td>
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<td>- Stability and security</td>
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<tr>
<td>Independent Contractors</td>
<td>- Reduced cost</td>
<td>- Flexibility in how, when, and where work is conducted</td>
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<td>- More flexibility (on-demand labor)</td>
<td>- Ability to work with multiple businesses/clients</td>
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<td></td>
<td>- Gain specialized skills or experience</td>
<td>- Responsible for all required payroll contributions</td>
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<td>- Not covered by many employment protections</td>
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Part II reviews how state laws have distinguished between employees and independent contractors.

**Alternative Work Arrangements**

Whether a worker benefits from the protection of a workers’ compensation policy depends on whether they are classified as an employee or an independent contractor. However, a number of alternative work relationships exist which fall along the spectrum of employee or independent contractor. These alternative work arrangements create additional complexity in determining employment classification. The following alternative work arrangements are defined and tracked by the US Bureau of Labor Statistics:

**Independent contractors:** Workers identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers.

**On-call workers:** Workers called to work only as needed, although they can be scheduled to work for several days or weeks in a row.

**Temporary help agency workers:** Workers paid by a temporary help agency, whether or not their job is temporary.

**Workers provided by contract firms:** Workers employed by a company that provides them or their services to others under contract, are usually assigned to only one customer, and usually work at the customer’s worksite.

**Platform Work**

Alternative work arrangements are not new; however, the rise of online platforms has created additional complexity in defining the legal work relationship. Synonymous with the sharing or “gig” economy, online platforms give workers the ability to connect with clients and customers virtually.

The term “gig” economy refers to any type of independent contractor that performs short-term or project-based work for some corporation; i.e. these are not permanent jobs.¹³

Some platform workers may use this type of work as supplemental income while having a full-time job. Others work for multiple platforms at one time, piecing together a living wage.¹⁴ Platform work has expanded broadly across industries, with many types of work and services offered.

**Examples of Online Platforms**

<table>
<thead>
<tr>
<th>Industry</th>
<th>Companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human Intelligence Tasks</td>
<td>Amazon Mechanical Turk</td>
</tr>
<tr>
<td>Service (cleaning, installation, etc)</td>
<td>Taskrabbit, Handy, Shiftgig</td>
</tr>
<tr>
<td>Transportation</td>
<td>Uber, Lyft Sidecar</td>
</tr>
<tr>
<td>Shipping/Logistics</td>
<td>Postmates, airmule</td>
</tr>
<tr>
<td>Legal</td>
<td>Upcounsel, PowerUp Legal,</td>
</tr>
<tr>
<td>Design/Communications</td>
<td>Upwork, 99designs, freelancer</td>
</tr>
</tbody>
</table>


¹⁴ It is estimated that 40% of platform workers work for multiple platforms at one time. 2015 1099 Economy Report by Requests for Startups published May 2015.
By the Numbers

Quantifying the number of individuals within these various work arrangements is important to understanding how well workers are covered for occupational injuries, illnesses, and fatalities. A rising number of individuals in alternative work arrangements could necessitate the need for new private or public solutions to address coverage gaps. Design and implementation of new programs will be influenced by who and how many workers they will serve.

Numerous public and private research efforts have attempted to quantify individuals in various work arrangements. Estimates range from less than 3% to more than 40% of the workforce. There are many reasons for the significant difference in estimates including data sources, survey methodology, definitions of work arrangements, and counting primary or supplemental income. Cornell University’s School of Industrial and Labor Relations and the Aspen Institute’s Future of Work Initiative maintain the Gig Economy Data Hub which catalogues public and private research efforts to quantify various alternative work arrangements.

### Estimates of Alternative or Independent Work

<table>
<thead>
<tr>
<th>Date</th>
<th>Publication</th>
<th>Description</th>
<th>Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 2018</td>
<td>BLS Contingent Worker Supplement</td>
<td>Published by the Bureau of Labor Statistics, the supplement measures workers in contingent (short-term or temporary) or alternative arrangements (independent contractors, temporary, on-call, or contract) as their primary source of income.</td>
<td>10.1% workforce in alternative arrangements for “primary income source”</td>
</tr>
<tr>
<td>May 2018</td>
<td>Report on Economic Well-Being of U.S. Households in 2017</td>
<td>Released by the Federal Reserve System, the survey measures adults engaged in “gig work” including both offline and online services and sales. 15</td>
<td>31% adults engaged in “gig work”</td>
</tr>
<tr>
<td>2018</td>
<td>State of Independence in America 2018</td>
<td>Longitudinal study by MBO Income that quantifies workers with independent work arrangements including consultants, freelancers, contractors, temporary and on-call workers.</td>
<td>26.9% of employed population in independent work</td>
</tr>
<tr>
<td>October 2017</td>
<td>Freelancing in America, 2017</td>
<td>Published by the Freelancers Union and Upwork, the publication estimates the number of workers in supplemental, temporary, project or contract-based work.</td>
<td>36% of the workforce in alternative work</td>
</tr>
</tbody>
</table>

15 Offline services could include caregiving or house-cleaning and offline sales could include flea markets or thrift sales; online services could include platform or app work and online sales could include selling items online.
This broad range and lack of research consensus has resulted in inconsistent focus and no clear mandate for policy change.

Beyond measuring the number of individuals in different types of work arrangements, it is also useful to examine multi-year trends. Besides the 2017 BLS Contingent Workforce Supplement, most studies have charted an increase over the last decade in the percentage of individuals engaged in independent or alternative work for primary or supplemental income. If this trend continues it may have important implications for labor and employment policy, including workers’ compensation programs.

Impact of Change

These changes and continued technological advancement will influence the U.S. workforce and workplace in the years to come. These changes have a direct impact on workers’ compensation systems shaping the insurance market and influencing how care is delivered and return to work opportunities for those displaced from work. Many of the changes have been positive for the workers’ compensation system, but none greater than the long-term trend of declining injuries and illnesses. Fewer injuries and fatalities have translated to stable or reduced premiums for employers and robust private insurance markets in most states.

Other changes, including labor force demographics and the new work environments, could influence workers’ compensation both directly and indirectly. The ability to engage and perform services in new ways, virtual and remote, blurs lines between control and the direction of work. Additionally, demographic changes are influencing who, how, and where individuals are connecting to work. The differing needs (flexibility, portability, supplemental income, debt repayment, etc.) of these diverse workers may result in accelerating growth in alternative work arrangements.

While some organizations are taking advantage of the alternative workforce, the BLS states the share of contingent workers is not increasing. Part of this could be attributed to dissimilar definitions used by various researchers. It is important to continue researching the number of gig economy workers over time for purposes of economic measurement.16

These changes combined are increasing the need to examine existing labor law and how social benefits and protections are structured in the future. The workers’ compensation system does not exist in a vacuum. How coverage exists for an occupational injury, illness, or fatality must be considered in the context of the large-scale changes within the economy. At the heart of this discussion is how workers are connecting to work and who will bear responsibility for any occupational injury, illness, or fatality that occurs.

Part II: Determining Employment Status

Employment status is essential for understanding the benefits and protections to which a worker is entitled and the financial obligations a business must pay. The rules for this determination are found in federal and state statute. This a complex and nuanced area of the law, with determinations of employment status dependent on the application of various tests and characteristics. There is no coordination of employment determination between federal and state law.

Federal Standard

Federal statutes define employee in many ways. Employment related tests are considered by the Internal Revenue Service (IRS), US Social Security System, Federal Insurance Contributions Act (FICA), Fair Labor Standards Act (FLSA), Civil Rights Act, Age Discrimination in Employment Act, Americans with Disabilities Act (ADA), Federal Unemployment Tax Act (FUTA), and many others.

Three tests have been used in employment determination under federal law. Depending on the law, test used, and case-specific facts a worker could be considered an employee under one law and an independent contractor under another. Employee determination under federal law does not influence workers’ compensation coverage obligations under state law. However, there are similarities in the various characteristics considered at the state and federal level. In addition, continued changes in how workers connect to work may result in pressure to clarify and/or align certain areas of the law.

Tests for Employment Determination under Federal Law

Common law (Control): The common law test hinges on control of the means and methods of work. This can include a variety of different factors including direction and supervision of work activities, tools and materials, payment, and intent of the relationship. The IRS uses the common law test and advises three broad categories of consideration – behavioral control, financial control, and relationship of the parties.

Economic realities: The economic realities test looks at the financial dependence of a worker on services performed for a specific business. This can include a variety of different factors including the level of financial risk, are services integral to the business operation, and investment in facilities and equipment. The economic realities test is commonly applied under the Fair Labor Standards Act (FLSA) which governs minimum wage and overtime requirements. The economic realities test is broader than the control test and generally favors employee status.

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17 Even the courts have expressed frustration in the lack of clarity in employment determinations. The Supreme Court, for example, has referred to the definition of an employee under the Americans with Disabilities Act as a “mere ‘nominal definition,’” Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 444 (2003), and has stated that the definition of an employee under the Employee Retirement Income Security Act is “completely circular and explains nothing,” Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)
19 See IRS at https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation
Hybrid: The hybrid test looks at both economic and common law factors. Under the hybrid test, economic realities are more heavily weighted than common law characteristics. The hybrid test has been applied in employment determinations under Title VII of the Civil Rights Act. (see https://www.bls.gov/opub/mlr/2002/01/art1full.pdf)

Numerous cases have tested the interpretation of federal law in determining employment status. A series of FedEx cases across 20 states\textsuperscript{20} found the company improperly classified ground delivery drivers as independent contractors. The decisions hinged largely on the direction and control of drivers. Factors considered included requirements by FedEx drivers to wear uniforms, adhere to appearance standards, drive approved vehicles, and deliver packages on specific days and within certain times.

Decisions of the National Labor Relations Board (NLRB) have also been influential in the interpretation of federal law in this area. Most recently, a January 2019 ruling overturned a 2014 decision\textsuperscript{21} in favor of employee status based on the application of factors related to entrepreneurial opportunity. The NLRB decision in SuperShuttle DFW noted the independence of drivers in setting hours, ownership/lease of vans, and control of payment methods results in significant entrepreneurial opportunity. The greater the entrepreneurial opportunity the more likely it is an independent business which would favor independent contractor status (see SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338).

This decision was influential in shaping the NLRB Advice Memorandum related to Uber and Uber drivers’ ability to unionize. The memo finds drivers for Uber are independent contractors based on the factors discussed in SuperShuttle DFW, with significance placed on control over manner and means and how the driver is compensated. Both decisions cite entrepreneurial independence as a key consideration in independent contractor status.

The NLRB notes, “Whether to take advantage of these opportunities were among the many entrepreneurial judgments UberX drivers made due to their freedom to set their work schedules, choose log-in locations, and pursue earnings opportunities outside the Uber system.” The ability to work for competitors beyond Uber outweighed other factors of control asserted by the platform, including baseline fares, inability to subcontract work, or repeated rejection of trips. Additionally, they noted minimum service standards and driver ratings had little impact on the driver’s earning potential (see Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483).

In considering platform workers, the U.S. Department of Labor issued an opinion letter in April 2019 which clarified the service providers of one platform as independent contractors under Fair Labor Standards Act (FLSA). In applying the “economic realities” test the US Department of Labor considered six factors\textsuperscript{22} of service providers who secured jobs through the virtual platform. The opinion letter described the platform as a referral service not an employer.

\textsuperscript{20} Numerous lawsuits against FedEx were filed beginning in 2004. Two class action lawsuits were heard and decided by the Seventh Circuit Court of Appeals and the Ninth Circuit Court. The decisions resulted in mediated settlements with FedEx of more than $400 million.
\textsuperscript{21} NLRB in a 2014 FedEx case found in favor of employee status for drivers based on application of the common law test emphasizing direction and control.
\textsuperscript{22} The six factors included control; permanency of relation; investment in facilities, equipment, and helpers; skill, initiative, judgment, or foresight required; opportunity for profit and loss; and integrality.
These recent opinions have been interpreted by many as a signal of the current administration’s leaning toward liberal application of independent contractor status. It should be noted these interpretations have no bearing in employment classification status under state workers’ compensation laws. It remains to be seen if state courts will evaluate control or economic realities tests in similar ways.

**State Standards**

State law defines workers’ compensation coverage requirements for most workers in the United States. In all states but Texas and South Dakota, coverage is compulsory for all employees. In 2017 more than 140 million U.S. jobs were covered under state workers’ compensation systems. (NASI, Workers’ Compensation Benefits, Cost, and Coverage, 2019) However, coverage exemptions are common. Many states do not require that workers’ compensation coverage be purchased for domestic and agricultural workers and small employers.

The general trend over the past century has been expansion of coverage to increase the number of workers protected under the workers’ compensation system. The rise of alternative employment relationships may signal a reversal of this trend. As more workers find themselves in alternative work arrangements, the more likely they will fall outside the protection of workers’ compensation.

Much like Federal law, there may be multiple definitions of “employee” within a state that apply to different areas of the law. This can include intra-state variation across the department of revenue, unemployment insurance, and/or workers’ compensation. [State will insert their own example here]

In an effort to simplify and reduce confusion from differing “employment” determinations across state agencies some states have looked to develop a statewide definition of employee. One such effort was in Maine, when the Governor created a cross-agency task force compromised of the Maine Department of Labor, Maine Workers’ Compensation Board, and the Maine Attorney General’s Office, to develop a single definition of employee. The result was the following:

> Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau, that the individual is free from the essential direction and control of the employing unit, both under the individual’s contract of service and in fact, the employing unit proves that the individual meets all of the criteria in Number 1 and three (3) of the criteria in Number 2 as listed below. (See [https://www.maine.gov/labor/misclass/employment_standard.shtml](https://www.maine.gov/labor/misclass/employment_standard.shtml))

A similar effort is underway in Alaska in response to the adoption of a new eight-part independent contractor test as a part of HB 79 passed in 2018.

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23 Workers’ compensation is voluntary in both Texas and South Dakota. In both states, employers lose the right to the exclusive remedy if they fail to purchase coverage.

24 Recently, exemptions for agricultural workers have been challenged. The New Mexico Supreme Court ruled in 2016 that the agricultural exemption was unconstitutional.

25 A list of state-by-state exemptions can be found in Table 2 of the WCRI/IAIABC Workers’ Compensation Laws as of January 1, 2019.
**State Employment Classification**

Classification of a worker as an employee or independent contractor is essential for the workers' compensation system as it determines the coverage obligation. From the legal perspective, states are varied in their approach to employment classification. In general, states fall into the following categories:

**“Employee” Presumption:** Twenty-five states presume a worker is an employee unless they meet the requirements of an independent contractor. A worker may be found to be an independent contractor by meeting certain criteria as defined by law (i.e. they meet all nine provisions set forth in statute) or as determined by an opinion of a judicial body (i.e. determination by a commissioner or judge based on case specific facts).

**“Independent Contractor” Presumption:** Two states presume independent contractor status for those workers who have completed necessary requirements before beginning work. These requirements generally include a written contract/form filed with the state confirming independent contractor status. The presumption of independent contractor status can be overcome.

**Silent:** Twenty-three states have no presumption of status for a worker. The criteria for determining employment status may be described but are applied to cases individually.

Appendix A compiles the state standards used to determine employment classification status for purposes of workers’ compensation coverage.

**State Employment Tests**

Similar to federal law, states have developed a variety of tests and/or criteria that are used in the decision of employment status. There are numerous factors considered in state law but generally states evaluate based on:

**Control of the means, manner, and methods of work:** Rooted in common-law, decisions about what work must be accomplished and how it should be done are central to considering control in the employment relationship. Factors of control vary across states but include who sets days/hours of work, manner in how work is conducted, service standards, appearance requirements, quality specifications, or other factors interpreted as giving direction to a worker.

**Relative nature of work:** Considers the type of work and how it relates to core business functions. Examines how fundamental the work is to what the business does or how it operates.

**Hybrid:** Weights factors of both control and relative nature of work.

Each state has a body of case law that interprets statutes and rules based on various case-specific facts. A decision may result in more or less workers considered employees for purposes of workers’ compensation coverage. The opinion of the California Supreme Court in Dynamex demonstrates the time, cost, complexities, and impact a case can have with respect to employment classification.

In 2004, Dynamex converted its delivery drivers to independent contractors. They were sued and the final ruling was issued in 2018 which found the delivery drivers were in fact employees of the company. In the decision, the California Supreme Court applied the ABC test which...
requires all three factors be met to be considered an independent contractor. The three factors include:

1. Freedom from control or direction in the performance of work under the contract or engagement;
2. Work is outside the work of the hiring entities normal business;
3. Worker is engaged in an independently established trade, occupation, or business of which they are performing the work.

Some have interpreted the application of the ABC test as significantly expanding those workers considered employees\textsuperscript{26} in California.

In contrast, courts in several other states did not find an employee-employer relationship based on similar factors. In 2018, the New York Appellate Division held there was no employer-employee relationship in \textit{Vega vs. Postmates Inc.} because couriers failed to provide sufficient proof of Postmates’ control over the way work was performed. \textit{Seabago vs. Boston Cab Dispatch} in 2015 found taxicab drivers were independent contractors because they were free from control and direction of the cap companies.

\textbf{Marketplace Contractors}

The state-by-state nature of employment law, uncertainty, cost, and time to confirm employment status creates a volatile business environment. In the past several years, platform companies have worked to change laws to clarify the status of platform service providers as independent contractors. A new term of art, Marketplace Contractors, was defined which applies to service providers who are connecting to work through a virtual platform.

Between 2016 and 2018, eight states successfully passed legislation or rule related to marketplace contractors. The eight states are Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, Texas,\textsuperscript{27} and Utah. Under these new laws, platform service providers are independent contractors if they meet certain requirements. Common marketplace contractor criteria include:

- Written agreement between the platform and the marketplace contractor which says the marketplace contractor is providing services as an independent contractor and not an employee. Most of the legislation granted retroactive status if these agreements were in place previously.
- Marketplace platform must be virtual; a web, mobile application, or software program. Some legislative language specifically excludes phone or fax services or prohibits services being carried out in a physical location within the state.
- Payment for services performed must be paid on a contract or rate basis. The marketplace contractor is responsible for all tax obligations.
- Marketplace contractor is responsible for providing their own tools or materials to complete the work.

\textsuperscript{26} Legislation has been signed by the Governor of California that makes the ABC test standard for employment classification in California. It takes effect on January 1, 2020.

\textsuperscript{27} The Texas Workforce Commission adopted a rule (40 T.A.C. § 815.134) which defines a “Marketplace Contractor” as an independent contractor and makes those individuals ineligible for unemployment benefits. Since workers’ compensation is optional in Texas it has no impact on workers’ compensation coverage.
• Marketplace contractor can set their own hours.
• Common exclusions include Transportation Networking Companies (TNCs), freight transportation, political subdivisions, religious/charitable/educational organizations, and Indian tribes.

Impact of Legal Uncertainty of Employment Classification

It is unlikely the legislative landscape for employment classification will be significantly simplified in the near future. Changes in the workforce noted in Part I raise questions about the application and applicability of current methods of determining employment status, especially as related to control of means and methods of work. The continued evolution of workers connecting and performing work in new ways may require revision or a redesigned framework for employment classification.

Part III: Alternative Coverage Models

Changes in work relationships raise important public policy questions about the protections and benefits currently linked to employment. A continued increase in alternative work arrangements may necessitate new models and programs for social protections including wage replacement and medical care for occupational injuries, illnesses, and fatalities. New programs might exist within the current workers’ compensation system or outside of it. Regardless, consideration of the human, economic and social costs of injuries, illnesses, and fatalities at work is an important element to be included in future policy conversations.

Several ideas have emerged that consider benefits and protections in new forms.

Independent Contractor Coverage

One way to extend coverage is to amend the state workers’ compensation statute to allow a business to optionally provide workers’ compensation coverage to designated independent contractors. Elective coverage for an independent contractor would extend exclusive remedy for the business and be considered a benefit for the contractor. If properly structured, this would not affect the individual’s independent contractor status for unemployment insurance and wage purposes. Texas allows this option for hiring contractors in Texas Labor Code, Section 406.144.

Black Car Fund

The Black Car Fund is a mechanism that provides workers’ compensation coverage for more than 70,000 black car drivers in New York State. The Fund was created in statute in 1999 and is funded by a surcharge paid by the customer on each ride provided by an eligible driver. Drivers obtain coverage through their dispatch organizations, which are members of the Fund. The unique statutory nature of the Black Car Fund designates drivers as “employees” so they are eligible for workers’ compensation benefits under New York state law. They retain independent contractor status for all other purposes.

More generically, this concept could be considered a “guild model” where workers providing services in a specific industry (transportation, hairdressing, engineering, etc) could access workers’ compensation coverage collectively. This is could be an attractive

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28 The current surcharge is 2.5%; The Fund
alternative for platform companies because the statutory nature of the fund gets around paying “benefits” that could be interpreted as “employee status.”

**Occupational Accident Insurance**

The private insurance market offers **Occupational Accident Insurance** policies for those workers not eligible for workers’ compensation. These policies are often associated with high risk industries with a significant number of independent operators/contractors (i.e. long-haul trucking.) An occupational accident insurance policy is purchased by an operator/independent contractor and offers defined coverage for a work-related injury or fatality by the policyholder.

As a general matter, Occupational Accident Insurance typically includes coverages and benefits associated with workers’ compensation insurance including medical, wage replacement and death benefits. However, there are important differences in a workers’ compensation policy and an occupational accident policy. Occupational accident policies generally have a total benefits cap; a cap on medical benefits, and a cap on wage replacement. In addition, there may be no compensation for permanent impairment or consideration of vocational rehabilitation. There are often exclusions for kinds of injuries/illnesses covered, and abbreviated injury or claim reporting requirements. While there is limited access to an external dispute resolution system, Occupational Accident Insurance is subject to the standard insurance claim dispute processes (e.g., a claimant is permitted to file a complaint with his/her state insurance department, and the insurer is subject to fair claims handling and bad faith laws).

One example is the **Driver Injury Protection** policy offered to Uber drivers by AON and Atlantic Specialty Insurance. Uber drivers pay $.03 per mile and coverage includes medical benefits, wage replacement benefits, and death benefits if they suffer a covered injury while on the app is on. Likewise, as of June 2019, DoorDash now maintains occupational accident insurance on behalf of all U.S. “Dashers” while on a delivery.

Occupational Accident Insurance policies are regulated by the state insurance department. However, workers’ compensation is considered a property & casualty line of business where occupational accident insurance is in personal lines. This may create a disconnect or confusion about the kind and access to benefits across the two policy types. It may also create confusion for consumers or businesses who do not understand the differences in coverage provided.

**Disability Insurance**

Another mechanism for providing coverage would be expanded use of Disability Insurance. Disability Insurance provides wage replacement benefits for an individual who suffers a sickness or injury. Disability insurance has both private and public insurance options – five states - California, Hawaii, New Jersey, New York, and Rhode Island have mandatory disability insurance programs.

There are key differences in disability insurance and workers’ compensation – disability insurance does not pay medical benefits, wage replacement is capped, and there is no consideration of either permanent partial or total disability or fatalities.
Portable Benefits

Portable Benefit accounts de-couple benefits from the employer and instead offer coverage to an individual worker. An account is funded 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

https://www.lexology.com/library/detail.aspx?g=23c3701c-0fccc-4d4-8de7-de35b81e17d3

Philly passed the country’s first portable benefits program.
responsibility (i.e. for all workers regardless of employment status) or is there a cost-sharing obligation by classification or work type?

**Market access:** Workers’ compensation has developed market solutions for businesses who are unable to purchase coverage in the voluntary market (residual market or insurer of last resort). Is a solution like this required for workers in alternative work arrangements? Does the cost of coverage be a consideration in developing or determining solutions (i.e. if you are making $1,000 a year in additional income should you have to buy a policy that costs you some fraction of that?)

**Safe Harbor:** There are likewise international examples of insurance programs available to gig economy workers that provide many benefits like traditional workers’ compensation. A specific example is the Partner Protection insurance program provided to Uber driver-partners by Axa Corporate Solutions in twenty-one countries across Europe. In that instance, insurance coverage is purchased by Uber to apply to all Uber driver-partners for covered events. The policy provides benefits including sickness, injury and maternity/paternity payments for drivers when they are on and off the Uber app. However, in light of various U.S. state laws identified above, it would currently be challenging to implement a similar program in the U.S. absent a safe-harbor provision to preclude a finding of employment status.
## Appendix A: State Standards Used to Determine Independent Contractor Status (2019)

<table>
<thead>
<tr>
<th>State</th>
<th>Presumption employee status</th>
<th>Special Rules Specific Occupations</th>
<th>General Description of Criteria</th>
</tr>
</thead>
</table>
| AL    | No provision                | ALA. CODE § 25-5-50 (2017)         | If the employer’s right of control over the individual extends no further than directing what is to be ultimately accomplished, the individual is an independent contractor. The employer must not retain the right to dictate the manner of operation or how the work should be done. The factors to be considered in determining whether an individual or an entity has retained the right of control include:  
(1) Direct evidence demonstrating a right or an exercise of control;  
(2) The method of payment for services;  
(3) Whether equipment is furnished;  
(4) Whether the other party has the right to terminate the employment.  
| AK    | No provision                | ALASKA STAT. § 23.30.230 (2017)    | The Alaska Supreme Court has adopted the “relative nature of the work” test for distinguishing between employees and independent contractors. The test first considers the character of the individual’s work or business, which is determined by considering three factors:  
(1) The degree of skill involved;  
(2) Whether the individual holds himself out to the public as a separate business; and  
(3) Whether the individual bears the accident burden.  
The test then considers the relationship of the individual’s work or business to the purported employer’s business, which is also broken into three factors:  
(1) The extent to which the individual’s work is a regular part of the employer’s regular work;  
(2) Whether the individual’s work is continuous or intermittent; and  
(3) Whether the duration of the work is such that it amounts to hiring of continuous services rather than a contract for a specific job.  

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the first two being the most important—at least one of these two factors must be resolved in favor of an “employee” status for the board to find that a person is an employee. The six factors are whether the work:

(1) Is a separate calling or business. If the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee. If the employer
   (a) Has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;
   (b) And the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;
   (c) Has the right to extensive supervision of the work then there is a strong inference of employee status;
   (d) Provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;
   (e) Pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and
   (f) And person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

(2) Is a regular part of the employer’s business or service. If it is a regular part of the employer’s business, there is an inference of employee status;

(3) Can be expected to carry its own accident burden. This element is more important than factors (4)-(6). If the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;
Involves little or no skill or experience. If so, there is an inference of employee status;

(5) Is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job. If the work amounts to hiring of continuous services, there is an inference of employee status; and

(6) Is intermittent, as opposed to continuous. If the work is intermittent, there is a weak inference of no employee status.

**ALASKA ADMIN. CODE** tit. 8, § 45.890 (2017); **ALASKA STAT.** § 23.30.395 (2017).

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| AZ | Rebuttable presumption of independent contractor status created upon the execution of a written agreement compliant with **ARIZ. REV. STAT. ANN.** § 23-909-910 (2017) | An independent contractor is a person engaged in work for a business who is:

1. Independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done;
2. Engaged only in the performance of a definite job or piece of work; and
3. Subordinate to that business only in effecting a result in accordance with that business design.

As for the first element, Arizona courts have adopted the “right to control” test, which examines the following factors:

1. The duration of the employment;
2. The method of payment;
3. Who furnishes necessary equipment;
4. The right to hire and fire;
5. The extent to which the employer may exercise control over the details of the work; and
6. Whether the work was performed in the usual and regular course of the employer’s business.


A business or independent contractor may prove the existence of an independent contractor relationship by executing a written agreement stating that the business:

1. Does not require the independent contractor to perform work exclusively for the business;
2. Does not provide the independent contractor with any business registrations or licenses required to perform the specific services set forth in the contract;
3. Does not pay the independent contractor a salary or hourly rate instead of an amount fixed by contract;
<table>
<thead>
<tr>
<th>AR</th>
<th>Yes</th>
<th>ARK. CODE ANN. § 11-9-102 (2017)</th>
<th>Various factors are considered to determine the status of a worker:</th>
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<td></td>
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<td>(1) The right to control the means and the method by which the work is done;</td>
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<td>(2) The right to terminate the employment without liability;</td>
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<td>(3) The method of payment;</td>
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<td>(4) The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;</td>
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<td>(5) Whether the person employed is engaged in a distinct occupation or business;</td>
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<td>(6) The skill required in a particular occupation;</td>
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<td>(7) Whether the employer is a business;</td>
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<td>(8) Whether the work is an integral part of the regular business of the employer; and</td>
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<td>(9) The length of time for which the person is employed.</td>
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</table>

However, the “right to control” test is usually sufficient to decide most disputes. The ultimate question in these cases is whether the employer has the right to control over the doing of the work, not whether the employer actually exercises such control.


<table>
<thead>
<tr>
<th>CA</th>
<th>Yes</th>
<th>CAL. LAB. CODE § 3352 (2017)</th>
<th>California courts have adopted a number of factors used to determine a worker’s status. The “control of work” test, which analyzes whether the alleged employer had the right to control the manner and means of accomplishing the result desired from the services rendered, is the primary consideration. However, this test is not entirely determinative as the courts consider a number of other factors, including:</th>
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<td>(1) Whether there exists a right to discharge, at will, without cause;</td>
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</tbody>
</table>
| CO  | Yes | COLO. REV. STAT. ANN. § 8-40-202 (West 2017) | (2) Whether the worker is engaged in a distinct occupation;  
(3) Whether the occupation is the kind that is performed at a locale where the work is usually done under the direction of the principal or by a specialist without supervision;  
(4) The nature and level of skill required in the particular occupation;  
(5) Whether the principal or the worker supplied the tools and the place of work for the worker;  
(6) The length of time the services were to be performed;  
(7) Whether the method of payment was based on the amount of time worked or on completion of the job;  
(8) Whether the work was part of the principal’s regular business; and  
(9) Whether the parties intended to create an employment relationship.  
CAL. LAB. CODE § 3353 (West 2017); S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 769 P.2d 399 (Cal. 1989).  

Colorado courts have adopted both the “control” test and the “relative nature of the work” test for purposes for determining a worker’s status. If either test is met, the worker is considered an employee for workers' compensation purposes.  

The “control” test primarily considers whether the alleged employer exercises control over the means and methods of accomplishing the contracted service. Other factors include:  

(1) Whether compensation is measured by time or lump sum; and  
(2) Which party furnishes the necessary tools and equipment to perform the work.  

The “relative nature of the work” test considers the following factors:  

(1) The character of the individual’s work; and  
(2) The relationship of the individual’s work to the alleged employer’s business.  

| CT | No provision | CONN. GEN. STAT. § 31-275 (2017) | Connecticut courts have adopted the “right to control” test to determine a worker’s status. The test asks whether the employer has “the right to control the means and methods” used by the worker in the performance of his or her job. As such, an independent contractor is defined as one who,  

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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 his work.


| DE | No provision | DEL. CODE. ANN. tit. 19, §§ 2301; 2307; 2308; 2316 (2017) | Delaware courts have adopted § 220 of the Restatement (Second) of Agency in determining a worker’s status. The Restatement requires consideration of the following factors:

1. The extent of control, which, by the agreement, the master may exercise over the details of the work;
2. Whether or not the one employed is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the discretion of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is a part of the regular business of the employer;
9. Whether or not the parties believe they are creating the relation of master and servant; and
10. Whether the principal is or is not in business.


| DC | No provision | D.C. CODE § 32-1501 (2017) | The Department of Employment Services applies the “relative nature of the work” test to determine a worker’s status, which focuses on whether the individual is hired to do work in which the company specializes. There are 2 prongs to the test. First, the nature and character of the individual’s work or business is considered by analyzing 3 factors:

1. The degree of skill involved;
2. The degree to which it is a separate calling or business; and
3. The extent to which it can be expected to carry its own accident burden. |
The second prong analyzes the relationship of the individual's work to the purported employer's business. Three factors are considered:

1. The extent to which the individual's work is a regular part of the employer’s regular work;
2. Whether individual’s work is continuous or intermittent; and
3. Whether the duration is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job.


| FL | No provision | FLA. STAT. § 440.02 (2017) | A worker is considered an independent contractor provided at least 4 of the following criteria are met:

1. The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
2. The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
3. The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
4. The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
5. The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or
6. The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

If 4 of the criteria above do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the
individual situation with regard to satisfying any of the following conditions:

(1) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;

(2) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;

(3) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;

(4) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;

(5) The independent contractor may realize a profit or suffer a loss in connection with performing work or services;

(6) The independent contractor has continuing or recurring business liabilities or obligations; or

(7) The success or failure of the independent contractor’s business depends on the relationship of business receipts to expenditures.

<table>
<thead>
<tr>
<th>State</th>
<th>Provisions</th>
<th>Code or Statute</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>GA</td>
<td>No provision</td>
<td>GA. CODE ANN. § 34-9-2 (2017)</td>
<td>An individual is an independent contractor if such person meets all of the following criteria: (1) Is a party to a contract which intends to create an independent contractor relationship; (2) Has the right to exercise control over the time, manner, and method of the work to be performed; and (3) Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.</td>
</tr>
<tr>
<td>HI</td>
<td>No provision</td>
<td>HAW. REV. STAT. § 386-1 (2017)</td>
<td>Both the “control” and “relative nature of the work” tests are used to determine an individual’s status. Under the “control” test, an employment relationship exists when the person in whose behalf the work is done has the power to dictate the means and methods by which the work is to be accomplished. Conversely, “[o]ne who contracts with another to do a specific piece of work for him [or her], and who furnishes and has the absolute control of his [or her] assistants, and who executes the work entirely in accord with his [or her] ideas, or with a plan previously given him [or her] by the person for whom the work is done, without being subject to the latter’s orders in respect of the details of the work.”</td>
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FLA. STAT. § 440.02 (2017).
work, with absolute control thereof...is an independent contractor.”

The “relative nature of the work test” involves a balancing of factors regarding the general relationships which the employee has with regard to the work performed for each of his employers. Relevant factors include:

1. Whether the work done is an integral part of the employer’s regular business; and
2. Whether the worker, in relation to the employer’s business, is in a business or profession of his own.

HAW. REV. STAT. §§ 386-73.5; 386-1 (2017); Locations, Inc. v. Haw. Dept. of Labor, 900 P.2d 784 (Haw. 1995).

<table>
<thead>
<tr>
<th>ID</th>
<th>Yes</th>
<th>IDAHO CODE ANN. §§ 72-102; 72-212 (2017)</th>
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<tbody>
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<td></td>
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<td>The test to determine an individual’s status is whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results. The Idaho courts use a 4 factor test to determine an individual’s status:</td>
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<td>(1) There must be evidence of the employer’s right to control the employee;</td>
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<td>(2) The method of payment;</td>
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<td>(3) Whether the employer or individual furnishes major items of equipment; and</td>
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<td>(4) Whether either party has the right to terminate the relationship at will, or whether one is liable to the other in the event of a preemptory termination.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>IL</th>
<th>No provision</th>
<th>820 ILL. COMP. STAT. 305/1 (2017)</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>A number of factors are considered in determining an individual’s status. The most important factor is whether the purported employer has a right to control the actions of the individual, followed by the nature of the work performed by the individual in relation to the general business of the employer. Additional relevant, albeit less important, factors include:</td>
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<td>(1) The method of payment;</td>
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<td>(2) The right to discharge;</td>
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<td>(3) The skill the work requires;</td>
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<td>(4) Which party provides the needed instrumentalities;</td>
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<td>(5) Whether income tax has been withheld; and</td>
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<td>(6) The label the parties place upon their relationship.</td>
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</tbody>
</table>
| IN  | Yes | **IND. CODE §§ 22-3-2-9; 22-3-6-1 (2017)** | The Indiana Supreme Court has adopted the test articulated in § 220 of the Restatement (Second) of Agency in determining a worker's status. The Restatement requires consideration of the following factors:

1. The extent of control which, by the agreement, the master may exercise over the details of the work;
2. Whether or not the one employed is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is a part of the regular business of the employer;
9. Whether or not the parties believe they are creating the relation of master and servant; and
10. Whether the principal is or is not in business.

**Moberly v. Day**, 757 N.E.2d 1007 (Ind. 2001); Restatement (Second) of Agency § 220 (1958); **IND. CODE § 22-3-6-1 (2015).** |

| IA  | Yes | **IOWA CODE § 85.61 (2016)** | Iowa courts have adopted two tests for determining a worker’s status. First, in determining the existence of an employer-employee relationship, the courts analyze the following five factors:

1. The right of selection, or to employ at will;
2. Responsibility for payment of wages by the employer;
3. The right to discharge or terminate the relationship;
4. The right to control the work; and
5. The identity of the employer as the authority in charge of the work or for whose benefit it is performed.

Second, in determining whether a worker qualifies as an independent contractor, the courts consider the following eight factors:

1. The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; |
|----|--------------|---------------------------------|

Kansas courts have adopted the Restatement factors in determining a worker’s status. However, the single most important factor is whether the employer controls, or has the right to control, the manner and methods of the worker in doing the particular task. Additional considerations include:

1. Whether or not the one employed is engaged in a distinct occupation or business;
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
3. The skill required in the particular occupation;
4. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
5. The length of time for which the person is employed;
6. The method of payment, whether by the time or by the job;
7. Whether or not the work is part of the regular business of the employer;
8. Whether or not the parties believe they are creating the relation of master and servant; and
9. Whether the principal is or is not in business.

Above all, the “right to control” is the most important consideration.

The parties’ intent may also be considered as a factor in the analysis, although the courts have warned that this analysis should not be determinative and should only be considered if the “right to control” factor is debatable.

<table>
<thead>
<tr>
<th>State</th>
<th>Code</th>
<th>Factors Considered</th>
<th>Citing Cases</th>
</tr>
</thead>
</table>
| KY    | Yes  | Kentucky courts analyze four predominant factors to determine a worker's status:  
1. The alleged employer’s right to control the details of the work;  
2. The nature of the work as related to the business generally carried on by the alleged employer;  
3. The professional skill of the individual; and  
4. The true intent of the parties.  
The “right to control” factor is the most important in the analysis, which is determined by analyzing the following factors:  
1. Method of payment;  
2. Which party furnishes the equipment; and  
3. Whether the alleged employer has the right to discharge the individual performing the work.  
| LA    | Yes  | Louisiana courts consider the following factors in determining a worker’s status:  
1. Whether there is a valid contract between the parties;  
2. Whether the work being done is of an independent nature such that the individual may employ non-exclusive means in accomplishing it;  
3. Whether the contract calls for specific piecework as a unit to be done according to the individual’s own methods without being subject to the control and direction of the principal, except as to the result of the services to be rendered;  
4. Whether there is a specific price for the overall undertaking; and  
5. Whether the specific time or duration is agreed upon and not subject to termination at the will of either side without liability for breach.  
| ME    | Yes  | An individual is presumed to be an employee unless the employing unit proves that the person is free from the essential direction and control of the employing unit. In order for an individual to be an independent contractor, the following criterial must be met: |

The person has the essential right to control the means and progress of the work except as to final results;

(2) The person is customarily engaged in an independently established trade, occupation, profession, or business;

(3) The person has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;

(4) The person hires and pays the person’s assistants, if any, and, to the extent such assistants are employees, supervise the details of the assistants’ work; and

(5) The person makes the person’s services available to some client or customer community even if the person’s right to do so is voluntary not exercised or is temporarily restricted.

Additionally, at least three of the following criteria must be met:

(1) The person has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the person to complete the work;

(2) The person is not required to work exclusively for the other individual or entity;

(3) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

(4) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;

(5) Payment to the person is based on factors directly related to the work performed and not solely on the amount of time expended by the person;

(6) The work is outside the usual course of business for which the service is performed; or

(7) The person has been determined to be an independent contractor by the federal Internal Revenue Service.

Maryland courts consider five criteria in determining a worker’s status. The decisive consideration is the “control” test: whether the employer has the right to control and direct the employee in the performance of the work and in the

<table>
<thead>
<tr>
<th>MD</th>
<th>Yes</th>
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MD. CODE ANN. LAB. & EMP. §§ 9-203 to 9-236 (2009)
<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
<th>Code References</th>
<th>Determination Criteria</th>
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<tbody>
<tr>
<td>EMP. § 9-202 (2009)</td>
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<td>manner in which the work is done. The following factors are also relevant:</td>
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<tr>
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<td>(1) The power to select and hire the employee;</td>
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<td>(2) The payment of wages;</td>
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<td>(3) The power to discharge; and</td>
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<td>(4) Whether the work is part of the regular business of the employer.</td>
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<tr>
<td>MA</td>
<td>Yes</td>
<td>MASS. GEN. LAWS ch. 152, § 1 (2011)</td>
<td>The standard in determining a worker’s status is the same as the common law agency standard, the primary factor being the right to control. Massachusetts courts consider the factors set out in the Restatement (Second) of Agency, which are as follows:</td>
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<td></td>
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<td>(1) The extent of control which, by the agreement, the master may exercise over the details of the work;</td>
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<td>(2) Whether or not the one employed is engaged in a distinct occupation or business;</td>
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<td>(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;</td>
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<td>(4) The skill required in the particular occupation;</td>
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<td>(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;</td>
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<td>(6) The length of time for which the person is employed;</td>
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<td>(7) The method of payment, whether by the time or by the job;</td>
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<td>(8) Whether or not the work is part of the regular business of the employer;</td>
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<td>(9) Whether or not the parties believe they are creating the relation of master and servant; and</td>
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<td>(10) Whether the principal is or is not in business.</td>
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<tr>
<td>MI</td>
<td>No provision</td>
<td>MICH. COMP. LAWS §§ 418.115 to 418.120; 418.161 (2017)</td>
<td>In order for a worker to be considered an employee, three criteria must be met. The worker must not:</td>
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<td>(1) Maintain a separate business;</td>
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<td>(2) Hold himself/herself out to and render service to the public; or</td>
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<td>(3) Be an employer subject to the worker’s compensation act.</td>
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<tr>
<td>State</td>
<td>Provision</td>
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<tr>
<td>MN</td>
<td>No provision</td>
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**MINN. STAT. § 181.723 (2009)** sets forth criteria for construction contractors.

**MINN. STAT. § 176.043 (2009)** sets forth criteria for trucking and messenger/courier industries.

Minnesota courts have adopted a five factor test to determine the status of workers not specifically engaged in the occupations enumerated in Minn. R. 5224.0010 to 5224.0340 (2017):

1. The right to control the means and manner of performance;
2. The mode of payment;
3. The furnishing of tools and materials;
4. Control over the premises where the work was done; and
5. The right of discharge.

Of the factors, the right to control is the most important. A number of considerations are used to determine whether the employer possesses such a right to control, including:

1. Employer’s authority over the individual’s assistants;
2. The individual’s compliance with instructions;
3. Whether oral or written reports are required to be submitted to the employer;
4. Whether the work is performed on the employer’s premises;
5. Whether services must be personally rendered to the employer;
6. Whether there exists a continuing relationship between the parties;
7. Whether the employee has set hours of work;
8. Whether the individual has been trained by the employer;
9. The amount of time the individual dedicates to the work;
10. Whether the individual has simultaneous contracts with different firms;
11. Whether tools and materials have been furnished by the employer;
12. Whether the individual’s expenses are reimbursed; and
13. Whether the employer is required to enforce standards or restrictions imposed by regulatory and licensing agencies.

<table>
<thead>
<tr>
<th>State</th>
<th>No provision</th>
<th>Statute</th>
<th>Summary</th>
</tr>
</thead>
</table>
| MS    | No provision | MISS. CODE ANN. §§ 71-3-3; 71-3-5 (West 2017) | Mississippi courts have adopted the “right to control” test to determine a worker’s status. The test consists of the following factors:  
1. Direct evidence of right or exercise of control;  
2. The method of payment;  
3. The furnishing of equipment; and  
4. The employer’s right to fire.  
Se. Auto Brokers v. Graves, 210 So.3d 1012 (Miss. Ct. App. 2015); MISS. CODE ANN. § 71-3-3 (West 2011). |
| MO    | No McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473 (Mo. 2009) | MO. REV. STAT. § 287.020 (2017) | The primary test to determine a worker’s status is the right to control. If an employer has the right to control the means and manner of a worker’s service, the worker is an employee rather than an independent contractor. A number of factors are considered in this analysis:  
1. The extent of control;  
2. The actual exercise of control;  
3. The duration of the employment;  
4. The right to discharge;  
5. The method of payment;  
6. The degree to which the alleged employer furnished equipment;  
7. The extent to which the work is the regular business of the employer; and  
8. The employment contract.  
Where the control analysis does not settle the issue, the “relative nature of the work” test is also applied. This test analyzes the economic and functional relationship between the nature of the work and a business’ operation. The following factors are considered:  
1. The amount of skill the worker’s job requires;  
2. The degree to which the work is a separate calling or enterprise;  
3. The extent to which the job might be expected to carry its own accident burden;  
4. The relation of the job to the employer’s business;  
5. Whether the job being performed is continuous or intermittent; and  
6. Whether the job’s duration amounts to the hiring of continuous services rather than a contract for the completion of a particular job.  
Missouri law allows some independent contractors to recover under worker’s compensation law. Individuals having work done under contract on or about their premises which is an operation of the usual business which he there
<table>
<thead>
<tr>
<th>State</th>
<th>Dual Status Determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>MT</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td><strong>MONT. CODE ANN. § 39-71-118 (2017)</strong></td>
</tr>
</tbody>
</table>
|       | In determining whether an individual is an independent contractor, the court will consider the following factors:  
|       | (1) Direct evidence of right or exercise of control;  
|       | (2) Method of payment;  
|       | (3) Furnishing of equipment; and  
|       | (4) Right of employer to fire  
|       | Under **MONT. CODE ANN. § 39-71-417 (2011)**, a worker can apply for an “Independent Contractor Certification” if, among other things, the worker swears to and acknowledges:  
|       | (1) That the applicant has been and will continue to be free from control or direction over the performance of the person’s own services, both under contract and in fact; and  
|       | (2) That the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department  
|       | **Doig v. Graveley**, 809 P.2d 12 (Mont. 1991);  
| NE    | Yes                      |
|       | **NEB. REV. STAT. § 48-106 (2010)** |
|       | Industry Exceptions  
|       | Nebraska’s Workers’ Compensation Law and case law suggest there is no single test for determining whether one is an employee or independent contractor, but instead the following factors will be considered in the determination of status:  
|       | (1) The extent of control which the employer may exercise over the details of the work;  
|       | (2) Whether the one employed is engaged in a distinct occupation or business;  
|       | (3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;  
|       | (4) The skill required in the particular occupation;  
|       | (5) Whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work;  
|       | (6) The length of time for which the one employed is engaged;  
|       | (7) The method of payment, whether by time or by the job;  

Whether the work is part of the regular business of the employer;
(9) Whether the parties believe they are creating an agency relationship; and
(10) Whether the employer is or is not in business.


Nevada’s Worker’s Compensation law defines an independent contractor as any person who renders service for a specified recompense for a specified result, under the control of the person’s principal as to the result of the person’s work only and not as to the means as to which the result is accomplished.

Under Nevada’s Industrial Insurance Act, if a worker meets three or more of the following criteria, there is a presumption that the worker is an independent contractor:

1. The person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary item bargained for by the principal in the contract;
2. The person generally has control over the time the work is performed;
3. The person is not required to work exclusively for one principal unless a law, regulation or ordinance otherwise prohibits the person from providing services to more than one principal or the person has entered into a written contract to provide services to only one principal;
4. The person is free to hire employees to assist with the work; and
5. The person contributes a substantial investment of capital in the business of the person, including without limitation
   a. purchase or lease of ordinary tools, material and equipment
   b. obtaining of a license or other permission from the principal to access any work space of the principal to perform the work
   c. lease of any work space from the principal required to perform the work for which the person was engaged

The fact that a person does not satisfy three or more of the listed criteria does not automatically create a presumption that the person is an employee.
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<tbody>
<tr>
<td>NH</td>
<td>Yes</td>
<td>Under New Hampshire’s Worker’s Compensation Law, the presumption of employee status can be rebutted if a person meets all of the following criteria:</td>
</tr>
<tr>
<td></td>
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<td>(1) the person possesses or has applied for a federal employer identification number or a social security number, or in the alternative, has agreed in writing to carry out the responsibility imposed on employers under this chapter;</td>
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<td></td>
<td>(2) the person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed is the primary element bargained for by the employer;</td>
</tr>
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<td>(3) the person has control over the time when the work is performed, and the time of performance is not dictated by the employer, although the employer may still prescribe a completion schedule, range of work hours, and maximum number of work hours to be provided by the person;</td>
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<td>(4) the person hires and pays the person’s assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants’ work;</td>
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<td>(5) the person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations;</td>
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<td>(6) the person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work; and</td>
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<td></td>
<td>(7) the person is not required to work exclusively for the employer</td>
</tr>
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</table>

**N.H. REV. STAT. ANN. § 281-A:2 (2017).**
<table>
<thead>
<tr>
<th>State</th>
<th>Yes/No</th>
<th>Provision</th>
<th>Description</th>
</tr>
</thead>
</table>
| NJ    | Yes    | N.J. STAT. ANN. § 43:21-19 (2010) | Under New Jersey’s Unemployment Law, services provided for remuneration shall be deemed to be under an employment relationship unless it is shown that:  
1. an individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;  
2. such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and  
3. such individual is customarily engaged in an independently established trade, occupation, profession or business.  
The New Jersey Supreme Court in Hargrove v. Sleepy’s, LLC, 106 A.3d 449 (2015) adopted the above test for Worker’s Compensation purposes and stated that for determining whether an individual is an employee or an independent contractor, the courts must consider twelve factors:  
1. the employer’s right to control the means and manner of the worker’s performance  
2. the kind of occupation and whether the work is supervised or unsupervised;  
3. the amount of skill involved;  
4. who furnishes the equipment and workplace;  
5. the length of time in which the individual has worked;  
6. the method of payment;  
7. the manner of termination of the work relationship;  
8. whether there is annual leave;  
9. whether the work is an integral part of the business of the employer;  
10. whether the worker accrues retirement benefits;  
11. whether the employer pays social security taxes  
12. the intention of the parties  
| NM    | Yes    | No provision | New Mexico courts will first employ a “right-to-control” test to determine whether a worker is an employee or independent contractor. If the right-to-control test points to independence, the court will then apply a “relative-nature of the work” test.  
Factors that may be considered in determining existence of employment relationship include:  
1. direct evidence of exercise of control |
(2) right to terminate employment relationship at will by either party without liability
(3) right to delegate work or to hire and fire assistants
(4) method of payment whether by time or by job
(5) whether party employed engages in distinct operation or business
(6) whether or not the work is part of employer’s regular business
(7) skill required in particular occupation
(8) whether employer supplies instrumentalities, tools or place of work
(9) duration of person’s employment, and
(10) whether person works full-time or part-time of
control by one and submission to control by the other


<table>
<thead>
<tr>
<th>State</th>
<th>Yes</th>
<th>Presumption for employment for construction workers unless the worker is a “separate business entity” § 861-c; N.Y. WORKER’S COMPENSATION LAW § 21</th>
</tr>
</thead>
</table>
| NY    | Yes | An independent contractor is one who is:
1. free from control and direction in performing the job, both under his contract and in fact
2. the service is performed outside the usual course of business for which the service is performed; and
3. the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue

When making a determination of whether an employer-employee relationship exists, the New York courts will consider factors such as the right to control the work, the method of payment, the right to discharge, the furnishing of equipment and supplies, and the relative nature of the work. No single factor is dispositive.


<table>
<thead>
<tr>
<th>State</th>
<th>Yes</th>
<th>§ 97-5.1 (2013) Presumption that taxicab drivers are independent contractors</th>
</tr>
</thead>
</table>
| NC    | Yes | North Carolina courts define independent contractor as one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.

The determinative factor in North Carolina courts as to whether person is an employee or independent contractor for purposes of workmen’s compensation is control. North Carolina courts will use the “right to control” when determining whether a person is an employee or an independent contractor for purposes of the Workers’ Compensation Act. Generally, where an employer has the
right to control over the means and the methods of an employee’s work, there will be an employer-employee relationship. The requirement of control is sufficiently met where its extent is commensurate with that degree of supervision which is necessary and appropriate considering the type of work to be done and the capabilities of the person doing it.

The North Carolina courts will also look at eight factors which indicate classification as independent contractor, including if:

1. the worker is engaged in independent business, calling, or occupation;
2. worker has independent use of his special skill, knowledge, or training in execution of work;
3. worker is doing specified piece of work at fixed price or for lump sum or upon quantitative basis;
4. worker is not subject to discharge because he adopts one method of doing work rather than another;
5. worker is not in regular employ of other contracting party;
6. worker is free to use such assistants as he may think proper;
7. worker has full control over such assistants; and
8. worker is able to select his/her own time


ND Yes N.D. CENT. CODE § 65-01-03 N.D. ADMIN CODE § 92-01-02-49 (2012) states that twenty factors are to be considered when determining whether a worker is an independent contractor or an employee:

1. Amount of instructions given to the employee by the employer;
2. Amount of training given to the employee;
3. Amount of integration of a person’s services into the business operations;
4. Services rendered personally; if the services must be rendered personally, the person who the services are performed for are interested in the methods used, which goes towards employee-employer relationship
5. Ability to hire, supervise, and pay assistants;
6. Continuing relationship between the person and person(s) for whom the services are performed;
7. Set hours of work;
8. Full time required; an independent contractor is one who is free to work when and for whom he chooses.
Full time required suggests an employer-employee relationship.
(9) Where the work is performed;
(10) Order or sequence set the work must be performed;
(11) Whether there is a requirement for regular oral or written reports;
(12) How the worker is paid;
(13) Whether there is payment of business or traveling expenses, or both;
(14) Who is responsible for furnishing of tools and materials;
(15) Whether there is significant investment in facilities used by the workman;
(16) Realization of profit or loss: a person who may realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee;
(17) Whether the worker provides services for more than one employer at a time;
(18) Whether the worker's services are available to the general public;
(19) the right of the employer to terminate/discharge exists; and
(20) the right to dismissal

There is no certain number of the 20 factors of the common-law test that must be met to qualify as an independent contractor, and the degree of each factor varies depending on the occupation and the factual context in which the services are performed.


<table>
<thead>
<tr>
<th>OH</th>
<th>No provision</th>
</tr>
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</table>
| Industry Exceptions | OHIO REV. CODE ANN. § 4123.01 (2015) states that a person who meets at least ten of the following criteria are excluded from the definition of employee:

1. the worker is required to comply with instructions from the other contracting party regarding the manner or methods of performing services
2. The person is required by the other contracting party to have particular training
3. The person's services are integrated into the regular functioning of the other contracting party
4. The person is required to perform the work personally
5. The person is hired, supervised, or paid by the other contracting party
6. A continuing relationship exists between the person and the other contracting party that contemplates
continuing or recurring work even if the work is not full time

(7.) The person’s hours of work are established by the other contracting party

(8.) The person is required to devote full time to the business of the other contracting party

(9.) The person is required to perform the work on the premises of the other contracting party

(10.) The person is required to follow the order of work set by the other contracting party

(11.) The person is required to make oral or written reports of progress to the other contracting party

(12.) The person is paid for services on a regular basis such as hourly, weekly, or monthly

(13.) The person’s expenses are paid for by the other contracting party

(14.) The person’s tools and materials are furnished by the other contracting party

(15.) The person is provided with the facilities used to perform services

(16.) The person does not realize a profit or suffer a loss as a result of the services provided

(17.) The person is not performing services for a number of employers at the same time

(18.) The person does not make the same services available to the general public

(19.) The other contracting party has a right to discharge the person

(20.) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement

The general test for determining independent contractor status considers the following factors: who has the right to direct what shall be done and when and how it shall be done, the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the worker’s business, the worker’s employment of assistants with the right to supervise their activities, his/her obligation to furnish the necessary tools, supplies, and materials, his/her right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer.

Gillum v. Ind. Com’n, 141 Ohio St. 373 (1943).
<table>
<thead>
<tr>
<th>State</th>
<th>Provision Details</th>
<th>Relevant Code and Case Law</th>
</tr>
</thead>
</table>
| OK    | No provision      | OKLA. ADMIN. CODE § 380:30-1-2 (2012)  
Department of Labor excludes business owners, volunteers, co-partners, and joint venturers from the definition of "employee"  
Oklahoma’s case law and Department of Labor set out several factors to be considered when determining whether an employee/employer relationship exists, including:  
1) The nature of the contract between the parties;  
2) The degree of control the employer may exercise on the details of the work;  
3) Whether or not the one employed is engaged in a distinct occupation or business for others;  
4) The kind of occupation with reference to whether in the locality the work is usually done under the direction of the employer;  
5) The skill required in the particular occupation;  
6) Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;  
7) The length of time for which the person is employed;  
8) The method of payment;  
9) Whether the work is part of the regular business of the employer;  
10) Whether or not the parties believe they are creating the relationship of master and servant; and  
11) The right of either to terminate the relationship without liability.  
No one factor is controlling and the court will look into the set of particular facts of each case.  
| OR    | No provision      | OR. REV. STAT. § 656.027 (2010)  
Certain holders of professional licenses  
OR. REV. STAT. § 670.600 (2005) defines an independent contractor as a person who provides services for remuneration and who is:  
1) Free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;  
2) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;  
3) Is licensed under Oregon Revised Statutes Chp. 671 or 701 if the person provides services for which a license is required under those chapters; and  
4) Is responsible for obtaining other licenses or certificates necessary to provide services.  
This definition of independent contractor has been adopted into the Worker’s Compensation statute. OR. REV. STAT. § 656.005 (2017)  
Oregon case law states that in determining whether a person is an independent contractor, the right to control is decisive. |
The principal factors in determining independent contractor status are:

1. The evidence of the right to or actual exercise of control
2. The method of payment
3. The furnishing of equipment
4. The right to fire


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<tr>
<th>PA</th>
<th>Yes</th>
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</table>

In determining employee or independent contractor status, the following factors should be considered, but all do not need to be present:

1. Control of the manner in which work is to be done
2. Responsibility for result only
3. Terms of agreement between the parties
4. Nature of the work or occupation
5. Skill required for performance
6. Whether one employed is engaged in distinct occupation or business
7. Which supplies the party tools
8. Whether payment is by time or by job
9. Whether work is part of regular business or alleged employer
10. Whether alleged employer had right to terminate employment at anytime

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.

<table>
<thead>
<tr>
<th>State</th>
<th>Provision</th>
<th>Exemptions</th>
<th>Rhode Island’s Worker’s Compensation Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>RI</td>
<td>No provision</td>
<td>Certain industries have special status or are exempted</td>
<td>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. 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. 28 R.I. GEN. LAWS. ANN. §§ 28-29-2; 28-29-17.1 (1956) Pasetti v. Brusa, 98 A.2d 833 (1953); Henry v. Mondillo, 142 A. 230 (1928).</td>
</tr>
<tr>
<td>SC</td>
<td>Yes</td>
<td>Case law establishes the criteria for distinguishing between employee and independent contractor under South Carolina’s Worker’s Compensation law. Determination of whether a worker’s compensation claimant is an employee or independent contractor focuses on the issue of control. 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: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire</td>
<td>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. S.C. CODE ANN. § 42-1-130 (1976); Nelson v. Yellow Cab Co., 343 S.C. 102, 538 S.E.2d 276 (S.C.App. 2000); Shatto v. McLeod Regional Medical Center, 406 S.C. 470 (2013).</td>
</tr>
<tr>
<td>SD</td>
<td>No provision</td>
<td>Certain industry exceptions</td>
<td>There are three primary factors South Dakota courts look at to determine whether one is employee or independent contractor include:</td>
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<tr>
<td>State</td>
<td>Status</td>
<td>Description</td>
<td>Notes</td>
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<tr>
<td>UT</td>
<td>Yes</td>
<td>UTAH CODE ANN. § 34A-2-104 (2017)</td>
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<td>Excludes certain industries from the definition of “employee” for purposes of the statute</td>
<td>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:</td>
<td></td>
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<tr>
<td></td>
<td>(1) Independent of the employer in all that pertains to the execution of the work;</td>
<td>(1) Independent of the employer in all that pertains to the execution of the work;</td>
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<tr>
<td></td>
<td>(2) Not subject to the routine rule or control of the employer;</td>
<td>(2) Not subject to the routine rule or control of the employer;</td>
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<td>(3) Engaged only in the performance of a definite job or piece of work; and</td>
<td>(3) Engaged only in the performance of a definite job or piece of work; and</td>
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<td>(4) Subordinate to the employer only in effecting a result in accordance with the employer’s design</td>
<td>(4) Subordinate to the employer only in effecting a result in accordance with the employer’s design</td>
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</table>

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.


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<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td>State</td>
<td>Determination</td>
<td>Statute/Case</td>
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<tr>
<td>VA</td>
<td>Yes</td>
<td>VA CODE ANN. §§ 65.2-101- to 65.2-104</td>
</tr>
</tbody>
</table>
| WA    | No provision  | WASH. REV. CODE ANN. §§ 51.12.010 to 51.12.185 (1996) Industry Exception | Under Washington’s Worker’s Compensation Law, there are three elements that must be satisfied to be considered an independent contractor:  
(1) The individual has been and will be free from control over performance of services, both under the contract and in fact.  
(2) The service is either outside the course of business or performed outside the place of business.  
(3) The individual is customarily engaged in an independently established trade of the same nature as that being performed  
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. |

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<tr>
<th>WV</th>
<th>Yes</th>
<th>W. VA. CODE R. § 85-8-6 (2008)</th>
</tr>
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<tbody>
<tr>
<td></td>
<td></td>
<td>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:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(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</td>
</tr>
<tr>
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<td>(2) Whether the individual has control over the time when the work is being performed</td>
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<td>(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</td>
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<td></td>
<td>(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</td>
</tr>
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<td></td>
<td>(5) If the use of equipment is required to perform the work, the individual provides most significant equipment required to perform the job</td>
</tr>
<tr>
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<td></td>
<td>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.</td>
</tr>
</tbody>
</table>
| WI | Yes | No provision | Wisconsin’s Worker’s Compensation Law lists nine criteria, all of which must be met to be considered an independent contractor:  
(1) Maintains a separate business with his or her own office, equipment, materials and other facilities.  
(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.  
(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.  
(4) Incurs the main expenses related to the service or work that he or she performs under contract.  
(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.  
(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.  
(7) May realize a profit or suffer a loss under contracts to perform work or service.  
(8) Has continuing or recurring business liabilities or obligations.  
(9) The success or failure of the independent contractor’s business depends on the relationship of business receipts to expenditures.  
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.  
| WY | No | No provision | Wyoming’s Worker’s Compensation Law defines independent contractor as “an individual who performs services for another individual or entity” and:  
(5) is free from control or direction over the details of the performance of services by contract and by fact;  
(6) represents his services to the public as a self-employed individual or an independent contractor; and  
(7) may substitute another person to perform his services. |
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:

(4) the method of payment
(5) the right to determine the relationship without incurring liability
(6) the furnishing of tools and equipment
(7) the scope of the work
(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

Hear a Presentation Regarding the Official Disability Guidelines and Formularies
Discuss Any Other Matters Brought Before the Task Force