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Department of Labor and Employment

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Interpretive Notice & Formal Opinion ("INFO") #10:

Worker Classification: Who Is and Isn't an "Employee" Protected by Labor Standards Laws?

Overview

- **What labor rights** a worker has depends on **what kind of worker** they are.
  - Most paid workers are "**employees**" with various labor rights — to minimum and overtime wages, rest and meal breaks, paid leave, limits on pay deductions, and more.
  - Other paid workers are "**independent contractors**" with a more limited set of rights related to their work.
  - Other workers are **unpaid** — which is allowed for situations that aren't really about providing labor to an employer, such as most bona fide volunteers for nonprofits or educational internships/externships.
- The **actual facts of the work** determine whether a worker is an "employee" — not just whether they're **called** a "contractor" (or other kind of non-employee) in **tax papers** (W-2, 1099, etc.) or in an **agreement**.[1]

The Core Definition and Question: Is the Activity "Labor or Services" for the "Benefit of an Employer"?

- What facts matter, and what order to examine them, are covered by the Colorado Wage Act "**employee**" **definition** (C.R.S. § 8-4-101(5), or "§ 101(5)") that applies to most but not all Colorado labor standards laws:[2]

Text of the § 101(5) "Employee" Definition *[bracketed letters/numbers added, to show the 3 parts]*	How to Apply Each Part of the Two-Sentence Definition
*[1] "**Employee**" means any person …* *[A] performing **labor or services*** *[B] for the **benefit of an employer**. …*	The first sentence of § 101(5) – and the **core definition**: ➢ Anyone whose labor or services benefit an employer is an employee.
*[2] Relevant **factors** … include the* *[A] degree of **control** the employer may or does exercise over the person and the* *[B] degree to which the … work … is the **primary work** of the employer;*	The first half of the second sentence – noting factors for **applying the core definition** of whether activity is or isn't "labor or services," or to "benefit … an employer": ➢ To what degree is the activity **controlled by**, or the **primary work of**, an employer?
*[3] **except** that an individual* *[A] primarily **free from control** and direction … and …* *[B] customarily engaged in an **independent trade**, occupation, profession, or business …* *is **not** an employee.*	The second half of the second sentence – an **exception**: ➢ Even if applying [1]-[2] shows a worker meets the core definition of an "employee," the worker is not an employee if they are actually doing **independent** work, with **little to no control** by those hiring them.

[1] *Colorado Custom Maid, LLC v. Industrial Claim Appeals Office*, 2019 CO 43, ¶ 2, 441 P.3d 1005, 1007 ("employee" status depends on "the realities" of the work "relationship," not just what parties wrote or said); *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47, 48 (Colo. App. 1987) (disregarding agreement "that the parties intend to create an independent contractor-employer relationship": "we are primarily concerned with what is done under the contract and not with what the contract says"); C.R.S. § 8-4-121 (voiding any agreement, written or oral, that waives or modifies applicable wage rights).

[2] The § 101(5) definition applies to a number of Colorado statutes and rules under those statutes, including: (1) the various statutes authorizing Division wage and hour enforcement and interpretation, including the Industrial Relations Act, Wage Act, and Minimum Wage Act (C.R.S. Title 8, Articles 1, 4, 6); (2) paid sick leave under the Healthy Families and Workplaces Act (Title 8, Article 13.3, Part 4); (3) rights under the Protected Health/Safety Expression and Whistleblowing Law (Title 8, Article 14.4); and (4) given the pervasive adoption and application of the § 101(5) definition across much of Colorado labor law, presumptively any other labor standards statutes or rules that do not specify a different definition — for example, the Equal Pay for Equal Work Act (C.R.S. Title 8, Article 5) and Job Application Fairness Act (C.R.S. § 8-2-131).

Other areas of law use similar but not identical definitions, including unemployment insurance, workers' compensation, taxes, and Denver wage ordinances. For details, consult the relevant agency, or a professional advisor.

How to Determine When a Worker Called an "Independent Contractor" Is Actually an "Employee"

- A common question is whether a worker actually is an "employee" covered by labor law, even though the hiring business called them an "independent contractor" — sometimes in a written agreement, sometimes verbally — and recorded their pay with tax form 1099 for contractor pay, not W-2 for employee pay.

- **Applying the basic definition**: Of the two parts of the "employee" definition (that a worker is an "employee" if "[A] performing labor or services [B] for the benefit of an employer"),

  [A] "**labor or services**" typically isn't in question, since contractors are hired for labor or services,[3] so

  [B] "**benefit of an employer**" is the key question, informed by any relevant facts, including the two (degree of "control" and what the business's "primary work" is) that the statute, § 101(5), notes may be relevant to whether labor or services benefit an employer. Any business benefits from labor or services it pays for, but the question is **what kind of benefit**, and **who draws the primary economic benefit**:

  1) Did the business **benefit** from the labor or services more:
     a) **as an employer** does – commonly with **meaningful control**, or for its **primary work**? *or*
     b) **as a customer** does – commonly with **limited control**, or for tasks **other than** its primary work?
  2) Did the **economic** benefit of the work go primarily:
     a) **to the business** – in the manner that an **employer** benefits from the work of its employees, not just in the manner that a **customer** benefits from the services it pays for? *or*
     b) **to the worker** – in the manner that a **business** benefits from paying customers, not just in the manner that an **employee** benefits from receiving wages?

- **Analyzing "Control"**:
  - The key question is whether a business had **limited** control like a typical knowledgeable **customer** (choosing end products, deadlines, limited quality control, etc.), or **greater** control like an **employer** has.
  - Look to how much **authority** to control a worker a business had, not just how much it **used** its authority. For example, authority to discipline is relevant, even if discipline was never needed.
  - Consider **all relevant facts**; no one fact alone determines the outcome. It typically helps to consider the **degree** that a business **did, or had authority** to:[4]
    1) instruct **when, where, and how much** to work — rather than just **general timing** or **deadlines**;
    2) direct or train **how to perform** work — rather than just explain **goals** or **desired end products**, relying on the **worker's own skill** or ongoing learning;
    3) **supervise and monitor** the work, including **productivity, time, location**, etc. — rather than just limited observation of **progress**, or for **quality control**;
    4) **enforce policies or standards** — rather than just require **lawful** activity, respect for property, etc.;
    5) retain **opportunity for profit or loss** (such as by **setting prices** customers pay, paying by **time**, or retaining the **investment** in the project) — rather than the worker having that opportunity (such as by receiving **flat rate** pay regardless of time, or **investing** their own funds);
    6) hold out workers as **representing** the business — whether verbally, by requiring uniforms, etc. — rather than workers having websites, business cards, etc., with their own personal or trade name;

[3] Whether activity is "labor or services" may be an issue in situations *other than* employee/contractor, such as a student *intern* claiming their activity was actually the kind of "labor or services" that *employees* do for their employer's benefit.

[4] The numbering of this list doesn't imply a rank-ordering of importance, that all factors are equally relevant in all cases, or that this list is exhaustive in terms of what factors should be considered in any given employment situation.

7) retain **decision-making on changes in plans** — rather than let the **worker independently**, for example, decide on and execute changes to the planned work (*e.g.*, changing the materials to be used), or **directly** receive and respond to any feedback from the business's customers.

8) **discipline** the worker, or **terminate at will** — rather than having the limited remedies of a contracting party, such as to terminate only for breaches by the worker.[5]

- **Analyzing "Primary Work"**:
  - Consider **all relevant facts**; no one fact alone determines the outcome. It typically helps to consider:
    1) how the business **defines** its work — including how it **presents** itself to the public;
    2) to what degree the work is **important** to the business;
    3) to what degree the work occurs **regularly** or only **occasionally**; and
    4) to what degree the work is a source of **revenue**.
  - The question is "the **degree** to which" a worker performs a business's primary work, not just a simple yes or no. For example:
    A) A worker who doesn't directly generate goods, services, or sales, but does work **necessary to support the revenue-generating work** of the business, still "performs work that is the primary work" of the business to a **high degree**.[6]
    B) A worker whose work doesn't fit into (A) above, but is **necessary to the broader operation** of the business — for example, daily janitorial work necessary for a business's building to be a functioning worksite — "performs work that is the primary work" of the business to a **limited degree**.
    C) A worker whose work is **useful but not necessary** to operating the business — for example, a cafeteria that a business offers to employees who have other meal options (bringing their own food, eating off-site, etc.) — does **not perform the primary work** of the business.
- **Analyzing the Exception**: If the facts show the worker "performed labor or services for the benefit of an employer," commonly based on analyzing the "control" and "primary work" factors, then the worker is an "employee" unless the business **proves both requirements of the exception** — that the worker was:

  [A] "**primarily free from control and direction**" — typically under the **same facts as the "control"** analysis above; **and**

  [B] "**customarily engaged** in an **independent trade**, occupation, profession, or business" — typically looking to the degree to which a worker is
  1) **actually** "**engaged** in ... independent" work **for others**, not working primarily for one employer,[7] and
  2) in **work that is a** "**trade**, occupation, profession, or business" — rather than, for example, labor not requiring as much training or learning.

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[5] *See Colo. Custom Maid*, ¶¶ 13, 19 ("simply the right to terminate a service contract without liability is an important factor in ... whether the individual is free of control and direction" of an employer, since the right to discharge "immediately involves the right of control"); *Indus. Comm'n of Colo. v. Bonfils*, 241 P. 735, 736 (1925) (applying unemployment statute) ("By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work").

[6] An example: *iina Research*, DLSS Claim No. 4191-20, Hearing Decis. No. 21-106 (Oct. 7, 2021) (though not directly revenue-generating production work, farm manager / chief operating officer performed work that was a critical component of the business process by managing farm operations, making such work a part of the farm's "primary work").

[7] Of course, working for more than one business doesn't *automatically* show the worker is "engaged in ... independent" work as a contractor is. A worker can have two or more "employee" jobs for different employers — for example, two part-time jobs, or a full-time job plus moonlighting in a part-time job. Or a worker can have one "employee" job plus separate independent contractor work — for example, a full-time construction worker taking handyman jobs on weekends.

Example: Is Pat, an electrician working on-site on production machines at a factory, an:

(a) **employee** of the **service recipient**, the hat-making factory Hats Are Terrific, Inc. ("HAT")?

(b) **employee** of the **service provider** they work for, Machinery/Appliance Technicians, Inc. ("MAT")?

(c) **independent contractor** not employed by any other business?[8]

In these 3 situations, is Pat an:	a) Employee of HAT?	b) Employee of MAT?	c) Independent contractor?	*Explanation:*
(1) MAT hires Pat, then assigns and supervises Pat's work at HAT. HAT hires and pays MAT for the work; MAT informs HAT when each work task is done.	**No**	**Yes**	**No**	MAT draws the primary economic benefit from Pat's work, which it controls and is the primary work (electrical services) of its business.
(2) MAT hires Pat to work at HAT several days a week, and: - HAT, not MAT, assigns Pat's work: machine maintenance on all days Pat is on-site; plus — as needed, on a less regular basis — both machine repairs and setup of new machines. - Once Pat started at HAT, MAT interacts with Pat and HAT only in monthly check-in phone calls.	**Yes**	**No**	**No**	HAT benefits more as an employer of Pat than as a customer of Pat. - HAT's degree of control is relatively high, despite one limit: Pat is retained for expert skills, so HAT's direction and evaluation don't include specific details of how to do the work. - Pat performs HAT's primary work to a relatively high degree: not just sporadic expert setup / repair work, but also maintenance that is regularly needed for, and assures the functioning of, the core production equipment. MAT serves more as a mere placement agency than employer, finding labor for HAT without retaining any meaningful control over that labor.
(3) MAT isn't involved: - Pat serves several businesses directly. HAT doesn't use Pat for regular machine maintenance, which HAT staff do since that work is relatively less specialized than the sporadic expert repairs and machine setup HAT uses Pat for. - On average Pat is on-site roughly ⅕ of work days: 2-4 setup/repair jobs a month of ½-2 days each.	**No**	[not applicable]	**Yes**	Pat's independent business draws the primary economic benefit — while HAT benefits more as a customer of Pat than as an employer of Pat: - Machine/repair setup is more specialized than regular maintenance HAT does itself (indicating a low degree of control), and is needed only sporadically (indicating a low degree to which Pat performs HAT's primary work). - Even if the degree of primary work is higher, the exception is satisfied: Pat is both in an independent trade and primarily free of control.

For More Information: Visit the Division website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[8] This example does not consider whether, with different facts, HAT and MAT could *both* be "employers" of Pat. *Salinas v. Comm'l Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) ("joint employer" test used in federal and Colorado wage law).