CHAPTER 27-02-14
DEFINITION OF EMPLOYMENT

Section
27-02-14-01 Employment Defined

27-02-14-01. Employment defined.

1. Subdivision a of subsection 17 of North Dakota Century Code section 52-01-01 contains three separate and independent tests for determining if the service is employment.

2. The first test relates to the test for determining whether the service of an officer of a corporation is employment with respect to service performed for the corporation. That test is found in paragraph 1 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01. The second test relates to the test for determining whether an individual's service is employment with regard to the test provided for in subdivision e of subsection 17 of North Dakota Century Code section 52-01-01. That test is found in paragraph 2 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01. The third test relates to the test for determining if an individual's service in certain occupational groups is employment if such service is not employment under the test. That test is found in paragraph 3 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01. If an individual's service is employment under any one of these tests, it is to be considered employment for purposes of this section.

3. If the service is employment under one of the tests in subsection 2, the designation or description of the relationship by the parties as anything other than that of employment or of employer and employee is immaterial.

4. Generally, an officer of a corporation is an employee of the corporation and the service performed for the corporation is employment. However, an officer of a corporation who does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not an employee of the corporation. A director of a corporation, in the director's capacity as such, is not an employee and such service is not employment.

5. Any service performed for another for wages or under any contract of hire is deemed to be employment unless it is shown that the individual performing the service is an independent contractor as determined by the "common law" test.

   a. Generally, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what must be done but how it must be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. However, the right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, suggest an employment relationship. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. The fact that the contract must be performed at a specific location, such as a building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. In general, if an individual is subject to the control or direction of another merely as to the result to be

accomplished by the work and not as to the means and methods for accomplishing the result, the individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

b. As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. These twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. These twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying these twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement; that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee. These twenty factors are described below:

(1) Instructions. A person who is required to comply with other persons' instructions about when, where, and how the person is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

(2) Training. Training a person by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

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

(4) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

(5) Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the persons on the job. However, if one person hires, supervises, and pays the other assistants pursuant to a contract under which the person agrees to provide materials and labor and under which the person is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(6) Continuing relationship. A continuing relationship between the person and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

(7) Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

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

(9) Doing work on the premises of the person or persons for whom the services are performed. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the person, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the person is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(10) Order or sequence set. If a person must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the person is not free to follow the person's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

(11) Oral or written reports. A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. By contract, however, parties can agree that services are to be performed by certain dates and the persons performing those services can be required to report as to the status of the services being performed so that the person for whom the services are being performed can coordinate other contracts that person may have which are required in the successful total completion of a particular project.

(12) Payment by hour, week, month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

(13) Payment of business or traveling expenses, or both. If the person or persons for whom the services are performed ordinarily pay the person's business or traveling expenses, or both, the person is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the person's business activities.

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

(15) Significant investment. If the person invests in facilities that are used by the person in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the person is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.

(16) Realization of profit or loss. A person who can 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. For example, if the person is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the person is an independent contractor. The risk that a person will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

(17) Working for more than one firm at a time. If a person performs services under multiple contracts for unrelated persons or firms at the same time, that factor generally indicates that the person is an independent contractor. However, a person who performs services for more than one person may be an employee for each of the persons, especially where such persons are part of the same service arrangement.

(18) Making service available to general public. The fact that a person makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

(19) Right to discharge. The right to discharge a person is a factor indicating that the person is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the person to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

(20) Right to terminate. If the person has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. A contract can be terminated by the mutual agreement of the parties before its completion or by one of the parties to the contract before its completion to prevent a further breach of the contract or to minimize damages. This situation indicates an independent contractor relationship.

6. In addition to service which is employment under paragraphs 1 and 2 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01, other service is employment if it is performed under certain circumstances in the following occupational groups:

   a. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry cleaning services, for his principal.

   b. As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders

from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

The fact that the service falls within one of the enumerated occupational groups, however, does not make such service employment under this subsection unless the contract of service contemplates that substantially all of the services are to be performed personally by such individual; the individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

History: Effective January 1, 1991; amended effective May 1, 1992.
General Authority: NDCC 52-02-02
Law Implemented: NDCC 52-01-01(17)

OBJECTION

THE LEGISLATIVE COUNCIL'S COMMITTEE ON ADMINISTRATIVE RULES OBJECTS TO NORTH DAKOTA ADMINISTRATIVE CODE SECTION 27-02-14-01 RELATING TO THE INTERPRETATION OF THE ABC TEST WHICH DEALS WITH EXEMPTING SERVICES BY INDEPENDENT CONTRACTORS FROM UNEMPLOYMENT COMPENSATION TAXATION.

The committee objects to this rule because:

1. Prior to the 1991 Legislative Session North Dakota Century Code Section 52-01-01(17)(e) provided for the use of the ABC test to determine if an independent contractor was exempt for unemployment compensation purposes.

2. House Bill No. 1378, adopted by the 1991 Legislative Assembly and effective July 17, 1991, replaced the ABC test with the common law test for determining independent contractor status.

3. A representative of Job Service North Dakota testifying before the committee said the agency is in the process of revising North Dakota Administrative Code Section 27-02-14-01 to incorporate the new test. He said, however, Job Service North Dakota would apply the old rule to service performed prior to the effective date of the legislation and the new rule to service performed after the effective date.

4. Adoption of House Bill No. 1378 clearly indicates the Legislative Assembly intends that the common law test, not the ABC test, be used to determine independent contractor status for unemployment compensation purposes and that it is unfair and contrary to legislative intent for Job Service North Dakota to apply the ABC test to cases in which the service was provided prior to the effective date of the legislation.

Section 28-32-03.3 provides that after the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment shall be rendered against the agency for court costs.

History: Effective August 9, 1991.
General Authority: NDCC 28-32-03.3