

## Employee or Independent Contractor? Washington Supreme Court Changes the Rules – Part Two

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In an article posted earlier this week, we wrote about the [Washington Supreme Court's new test](#) for determining whether a worker is an employee entitled to minimum wage and overtime, or an independent contractor entitled only to compensation set by the parties. The article described the “economic-dependence test” in general terms: the worker is an employee if “as a matter of economic reality,” the individual “is economically dependent upon the alleged employer or is instead in business for himself.” *Anfinson v. FedEx Ground Package Sys., Inc.*

The article noted that the Court did not list the factors it would apply to the economic-dependence test, or suggest how to flesh out the general outlines of the test, but merely referred in passing to “competing lists of nonexclusive factors” that some federal courts use. Finally, the article warned that other courts and agencies have different factors for determining whether a worker is an employee or independent contractor.

In this post we will detail the factors used by the federal courts cited in the *Anfinson* decision, as well as the factors applied under other laws.

### Cases cited in *Anfinson*

In supporting its economic-dependence test, the Supreme Court mentioned “competing lists of nonexclusive factors” that some federal courts use, citing *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) and *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979).

*Hopkins* applied these “non-exhaustive” factors:

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- (1) the degree of control exercised by the alleged employer;
- (2) the extent of the relative investments of the worker and the alleged employer;
- (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;
- (4) the skill and initiative required in performing the job; and
- (5) the permanency of the relationship.

### **Real applied these factors:**

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer's business.

### **Other formulations**

The *Anfinson* case applies only to the [Washington Minimum Wage Act](#). Courts and agencies apply different formulations for different laws. Therefore, a worker could be considered either an employee or an independent contractor depending on the law or agency. For example, a worker who qualifies as an independent contractor for federal income tax purposes may be entitled to overtime pay as an employee under the Washington Minimum Wage Act.

A few of those formulations, along with links to source materials, follow below:

[United States Department of Labor](#) (applying the federal Fair Labor Standards Act, governing minimum wage and overtime):

- (1) The extent to which the services rendered are an integral part of the principal's business.
- (2) The permanency of the relationship.

- (3) The amount of the alleged contractor's investment in facilities and equipment.
- (4) The nature and degree of control by the principal.
- (5) The alleged contractor's opportunities for profit and loss.
- (6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- (7) The degree of independent business organization and operation.

[Washington Department of Labor and Industries](#) (covering workers compensation and safety requirements):

(1) Are you hiring someone for more than personal labor? ["Yes" answers tend to favor an independent contractor relationship.]

- Are they bringing employees?
- Are they bringing heavy equipment?

(2) Are you supervising?

- You ARE NOT supervising if you are only scheduling and inspecting the work.
- You ARE supervising if you are telling your worker or a subcontractor's workers how to do the job, assigning tasks, training, keeping time sheets, paying a wage or setting regular hours.

(3) Do they have an established business of their own? ["Yes" answers tend to favor an independent contractor relationship.]

- Supervision: Does the worker perform work free of your direction and control?
- Separate business: Does worker offer services that are different from what you provide?  
Or, does the worker maintain and pay for a place of business that is separate from yours?  
Or, does the worker perform service in a location that is separate from your business or job sites?
- Previously established business: Does the worker have an established, independent business that existed before you hired?

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- IRS taxes: When you entered into the contract, was this person responsible for filing a tax return with the IRS for his or her business?
- Required registrations: Is the worker up-to-date on required Washington State business registrations?
- Maintains books: Does the worker maintain his or her own set of books dedicated to the expenses and earnings of the business?
- Construction trades: If the work performed is in the construction trades, does the worker have an active contractor registration or electrical contractor's license?

[Internal Revenue Service](#) (covering federal income tax responsibilities):

The IRS traditionally applied a 20 factor test enunciated in a 1987 revenue ruling. The IRS since has modified its analysis to cover three factors and a number of sub-factors. They are:

(1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does the job? [These factors tend to favor an employment relationship]

- Type of instructions given (when and where to do the work; what tools or equipment to use; what workers to hire or to assist with the work; where to purchase supplies and services; what work must be performed by a specified individual; what order or sequence to follow when performing the work)
- Degree of instruction (the more detailed the instructions, the more control the business exercises over the worker)
- Evaluation system (measures the details of how the work is performed)
- Training (training on how to do the job, and periodic or on-going training about procedures and methods)

(2) Financial: Are the business aspects of the worker's job controlled by the payer (such as how the worker is paid, whether expenses are reimbursed, and who provides tools/supplies)? [These factors tend to favor an independent contractor relationship.]

- Worker's significant investment in equipment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market (rather than just to one enterprise)
- Method of payment (e.g., flat fee)

(3) Type of Relationship: Are there written contracts or employee type benefits (such as pension plan, insurance, or vacation pay)? Will the relationship continue, and is the work performed a key aspect of the business?

- Written contracts (not controlling)
- Employee benefits (tend to show employee status)
- Permanency of the relationship (indefinite engagement tends to show employer-employee relationship)
- Services provided as key activity of the business (if worker's services are a key aspect of the business, it's more likely an employment relationship)

The IRS uses [Form SS-8](#) in determining whether the worker is an employee or independent contractor for federal income tax purposes.

[Equal Employment Opportunity Commission](#) (covering federal anti-discrimination law, including Title VII of the Civil Rights Act of 1964, list below found at note 67):

- (1) The employer has the right to control when, where, and how the worker performs the job.
- (2) The work does not require a high level of skill or expertise.
- (3) The employer furnishes the tools, materials, and equipment.
- (4) The work is performed on the employer's premises.
- (5) There is a continuing relationship between the worker and the employer.
- (6) The employer has the right to assign additional projects to the worker.
- (7) The employer sets the hours of work and the duration of the job.
- (8) The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- (9) The worker does not hire and pay assistants.
- (10) The work performed by the worker is part of the regular business of the employer.
- (11) The employer is in business.

- (12) The worker is not engaged in his/her own distinct occupation or business.
- (13) The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- (14) The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- (15) The employer can discharge the worker.
- (16) The worker and the employer believe that they are creating an employer-employee relationship.

*This list is not exhaustive.* Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.

[Washington Common Law](#) (covering the responsibility of the principal for the negligence of agents):

- (1) the extent of control which, by the agreement, the principal may exercise over the details of the work;
- (2) whether or not the worker 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 an employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work;
- (6) the length of time for which the worker is engaged;
- (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 principal;
- (9) whether or not the parties believe they are creating the relation of principal and agent; and

(10) whether the principal is or is not in business.

*Hollingbery v. Dunn*, 68 Wash.2d 75, 79-80 (1966).

### **Conclusion**

The conflicting standards imposed by various courts and agencies make it difficult for businesses, non-profits and government entities to determine whether the people engaged to provide services are employees or independent contractors. Foster Pepper's Employment & Labor attorneys can assist.