

## Independent Contractor or Employee?

Contract labor is perhaps the most misused category of workers in the business world. You cannot assume casual labor, temporary or part-time labor, or individuals who sign independent contractor agreements will be considered contract labor. Issuing 1099s and not withholding taxes does not make an individual an independent contractor.

### South Dakota Law

South Dakota Codified Law 61-1-11 states to be considered an independent contractor, a worker must be **both** free from direction and control **and** have an independently established business. Since other state and federal agencies may have slightly different definitions of independent contractors, their criteria may not apply to South Dakota Unemployment Insurance.

The courts have defined both portions of the South Dakota statute. The first portion of the statute concerns control. Although individuals may have freedom of action in the way work can be performed, control can still be exercised through other means such as written or verbal agreements or a contract. What really matters is who has the legal right to control the outcome of the work.

The second portion of the statute concerns whether the individual is customarily engaged in an independently established trade, occupation, profession, or business. The word independently means a trade, occupation, profession, or business must be established independently of, and exist separately from, the services rendered to the alleged employer. The present tense “is” indicates the individual must be engaged in such independent activity at the time of rendering the service to the alleged employer.

### Employee vs. Independent Contractor Criteria

Some criteria that tend to indicate the person is an employee are:

1. Insulated from loss and restricted in the amount of gain
2. Hired for an ongoing period
3. Must follow your instructions on how to do the job
4. Trained by the employer
5. Adhering to work hours set by the employer
6. Working on a regular basis
7. Equipment and supplies provided by employer
8. Do not have an ongoing business of their own

On the other hand, the following criteria are more specific to an independent contractor:

1. Realizing a profit or loss based on their success in performing the work
2. Working when and for whom they choose
3. Providing their own supplies and equipment
4. Having a significant investment in the facility or equipment used for work
5. Making their services available to the general public

## Contract Labor Agreement

If your attorney or accountant draws up a contract labor agreement and the worker signs the agreement, you may think you have complied with the law. This is not so!

By law, a worker cannot sign away their rights to Unemployment Insurance. The worker **must** meet the independent contractor criteria to be considered anything other than your employee.

## For More Information

If you have misclassified workers as independent contractors and a determination is made they are employees, you may be subject to back taxes, penalty, and interest. In addition, you may also be subject for Federal Unemployment Taxes (FUTA).

If you have questions about whether an individual is an employee or an independent contractor and would like to request a written determination, please contact the South Dakota Department of Labor and Regulation at 605.626.2312.

Provided by:  
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