

Independent Contractors: North Carolina

ROSEMARY GILL KENYON, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN,
WITH PRACTICAL LAW LABOR & EMPLOYMENT

A Q&A guide to state law on independent contractor status for private employers in North Carolina. This Q&A addresses how independent contractors are classified under state law, including the various tests to evaluate worker status, penalties for misclassification and practices to avoid misclassification. Federal, local or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see *Independent Contractors: State Q&A Tool* (<http://us.practicallaw.com/2-505-9584>)).

INDEPENDENT CONTRACTOR BASICS

1. Summarize how the issue of independent contractors is analyzed under state law.

Under North Carolina law, independent contractor status is determined under common law.

There is no definition of independent contractor status for workers' compensation, wage and hour laws or North Carolina income tax withholding.

North Carolina's unemployment insurance statute provides its own definition of independent contractor (*N.C. Gen. Stat. Ann. § 96-1(b)(19)*). Courts have not yet applied this definition in any analysis.

2. Is the term independent contractor defined by statute, regulation or case law (not including any required elements)? If so, what is the definition? Please cite the appropriate authority.

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

The Wage and Hour Act does not define independent contractors. An employee, however, is defined as "any individual employed by an employer" (*N.C. Gen. Stat. Ann. § 95-25.2(4)*). Courts rely on common law principles to determine if there is an employment relationship (see *Horack v. S. Real Estate Co.*, 563 S.E.2d 47, 51 (*N.C. Ct. App.* 2002); *Question 4*).

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

An independent contractor is an individual who:

- Contracts to do work for a person.
- Is not subject to that person's control regarding the way the work is performed and what must be done as the work progresses.

(*N.C. Gen. Stat. Ann. § 96-1(b)(19)*.)

This definition appears similar to the common law test, but courts have not applied it yet.

WORKERS' COMPENSATION ACT: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

The Workers' Compensation Act does not define independent contractors. However, "employee" is defined in detail (*N.C. Gen. Stat. Ann. § 97-2(2)*). Courts rely on common law principles to determine if there is an employment relationship (see *Question 4*).

3. For each type of independent contractor, please describe the benefits of using an independent contractor over an employee to perform work.

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

Independent contractors are not entitled to:

- Minimum wage.
- Overtime pay.
- Vacation pay.
- Wage and hour recordkeeping.
- Other benefits promised to employees.



EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

Employers do not need to pay unemployment insurance taxes or other state payroll taxes for independent contractors or withhold state income taxes on independent contractors. Any benefits an independent contractor receives from other terminated employment relationships are not charged to the employer's account.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

Employers do not need to obtain workers' compensation coverage for independent contractors. Employers are not held liable for independent contractors' injuries under workers' compensation laws (*Youngblood v. N. State Ford Truck Sales*, 364 S.E.2d 433 (N.C. 1988); *Capps v. Se. Cable*, 715 S.E.2d 227 (N.C. Ct. App. 2011)).

However, an employer may be held liable under general tort theories for injuries to independent contractors and may not use the workers' compensation law as a shield or limitation on liability (*Odum v. Nat'l Oil Co.*, 196 S.E. 823 (N.C. 1938)).

INDEPENDENT CONTRACTOR TESTS

4. What tests are used to evaluate whether a worker is an independent contractor? Please describe each test and explain when each is used.

COMMON LAW

The standard for determining employee or independent contractor status is based on the common law right of control test, which considers whether the worker:

- Is engaged in an:
 - independent business;
 - calling; or
 - occupation.
- Has independent use of his:
 - special skill;
 - knowledge; or
 - training.
- Is doing a specified piece of work:
 - at a fixed price;
 - for a lump sum; or
 - on a quantitative basis.
- Is not subject to discharge for his method of work.
- Is not in the regular employ of the other contracting party.
- Is free to hire assistants.
- Has full control over his assistants.
- Selects his own time.

(*McCown v. Hines*, 537 S.E.2d 242, 244 (N.C. Ct. App. 2000); *State ex rel. Emp't Sec. Comm'n v. Huckabee*, 461 S.E.2d 787, 788 (N.C. Ct. App. 1995).)

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

To determine whether an individual is an independent contractor, courts have looked to:

- The degree of control exerted over the person.
- The permanence of the relationship between the person and the employer.

(*Horack*, 563 S.E.2d at 51.)

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

In analyzing unemployment insurance claims, courts have used the common law test (*Huckabee*, 461 S.E.2d at 787; see *Common Law*). However, the unemployment insurance statute was recently amended to add a new definition of independent contractor. This amendment may impact how courts analyze this issue in the future (*N.C. Gen. Stat. Ann. § 96-1(b)(19)*).

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

See *Common Law*.

ADMINISTRATION AND ENFORCEMENT

5. For each independent contractor type, what entity administers and enforces independent contractor classification?

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

The North Carolina Department of Labor Wage and Hour Bureau administers and enforces the Wage and Hour Act, and makes determinations about worker classification.

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

The North Carolina Department of Commerce, Division of Employment Security administers and enforces the unemployment compensation regulatory scheme and makes determinations about worker classification.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

The North Carolina Industrial Commission administers and enforces the workers' compensation laws and makes determinations about worker classification.

6. How are independent contractor classifications selected for misclassification evaluation by each enforcement agency (for example, by random selection or by complaint by a worker or both)?

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

The North Carolina Department of Labor discovers worker misclassifications through wage and hour audits or investigations triggered by formal or informal employee complaints.

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

The North Carolina Department of Commerce, Division of Employment Security learns of worker misclassifications through claims for unemployment benefits filed by independent contractors.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

The North Carolina Industrial Commission becomes aware of worker misclassifications through claims for workers' compensation benefits filed by independent contractors.

7. Please describe how aggressively independent contractor classification is enforced by each agency.**WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25**

The North Carolina Department of Labor (NCDOL) carefully reviews the facts and circumstances surrounding the employment relationship when it learns of potential worker misclassifications. The NCDOL typically discovers these issues from a complaint rather than an audit.

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

The North Carolina Department of Commerce, Division of Employment Security carefully reviews the facts and circumstances surrounding the employment relationship when it learns of potential worker misclassifications.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

The North Carolina Industrial Commission carefully reviews the facts and circumstances surrounding the employment relationship when it learns of potential worker misclassifications.

8. For each independent contractor type, is there a safe harbor available for employers that unintentionally misclassify workers as independent contractors? If so, please describe it.**WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25**

There is no general safe harbor for employers that unintentionally misclassify employees as independent contractors. However, the court has discretion to refrain from awarding liquidated damages if the employer can show that:

- The misclassification was in good faith.
- The employer had reasonable grounds to conclude that the independent contractor classification did not violate wage and hour laws.

(*N.C. Gen. Stat. Ann. § 95-25.22(a1)*.)

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

There is no safe harbor for employers that unintentionally misclassify employees as independent contractors.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

There is no safe harbor for employers that unintentionally misclassify employees as independent contractors.

9. For each independent contractor type, can employers request a determination of worker status to assist them in determining whether to classify particular workers as independent contractors? If so, please describe:

- How an employer would make the request.
- The process and timeframe for a response.
- The possible benefits and risks of making such a request.

WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25

The North Carolina Department of Labor (NCDOL) does not provide a formal determination process. However, the NCDOL lists contact information online.

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

The North Carolina Department of Commerce, Division of Employment Security (NCDES) does not provide a formal determination process. However, the NCDES lists contact information online.

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

The North Carolina Industrial Commission (NCIC) does not provide a formal determination process. However, the NCIC lists contact information online.

10. Please describe the penalties for improper classification for each independent contractor type.**WAGE AND HOUR ACT: N.C. GEN. STAT. ANN. §§ 95-25.1 TO 95-25.25**

Employers may be held liable for:

- Unpaid wages, including unpaid overtime if due (*N.C. Gen. Stat. Ann. § 95-25.22(a)*).
- Liquidated damages up to double the amount of unpaid wages (*N.C. Gen. Stat. Ann. § 95-25.22(a1)*).
- Reimbursement of reasonable attorneys' fees and other costs and expenses (*N.C. Gen. Stat. Ann. § 95-25.22(d)*).

Employers who fail to maintain the required records for employees are also liable for civil penalties of up to \$250 per worker with a maximum of \$2,000 for each investigation by the North Carolina Department of Labor (*N.C. Gen. Stat. Ann. 95-25.23A(a)*).

EMPLOYMENT SECURITY LAW: N.C. GEN. STAT. ANN. §§ 96-1 TO 96-35

There is no direct penalty for misclassification of employees. However, misclassification likely results in a failure to pay the proper unemployment tax contributions. Employers who fail to pay the proper unemployment tax contributions are liable for:

- Taxes not paid.
- A penalty of 10% of taxes due.
- Monthly interest set by the Secretary of Revenue. Interest accrues only on the principal tax.

(*N.C. Gen. Stat. Ann. §§ 96-10(a) and 105-241.21(a)*.)

WORKERS' COMPENSATION LAW: N.C. GEN. STAT. ANN. §§ 97-1 TO 97-101.1

There is no direct penalty for misclassification of employees. However, misclassification likely results in a failure to secure proper coverage for that employee or class of employees. Employers who fail to secure the proper workers' compensation coverage may be liable for:

- Fines of \$1 per employee for each day of non-compliance. For each day of non-compliance, the fine cannot be less than \$50 or more than \$100.
- Compensation due to the injured worker.

Employers may also be found guilty of a:

- Class H felony for the willful refusal to pay compensation.
- Class 1 misdemeanor for neglect to pay compensation.

(N.C. Gen. Stat. Ann. § 97-94(b), (c).)

Injured employees may bring civil actions against employers before the North Carolina Industrial Commission (NCIC) (N.C. Gen. Stat. Ann. § 97-95). Employers may not rely on the workers' compensation law to limit potential liability.

Any individual person who had the ability and authority to bring the employer into compliance but fails to do so may be:

- Found guilty of a:
 - class H felony for willful failure; or
 - class 1 misdemeanor for neglectful failure.
- Subject to a civil penalty from the NCIC of up to 100% of any compensation due to the injured employees during the time the employer failed to comply.

(N.C. Gen. Stat. Ann. § 97-94(d).)

OTHER STATE-SPECIFIC REQUIREMENTS

11. Must independent contractor agreements include any particular language that is not required under federal law? If so, please insert that language and explain the requirement.

There is no particular language that must be included in an independent contractor agreement. The factual circumstances control how a relationship is classified and the language of the agreement does not control. The agreement should describe the nature of the relationship in terms that meet the common law test of an independent contractor (see *Question 4*).

12. Please describe any other variance in how independent contractors in your jurisdiction are treated compared to under federal law.

There are no additional variances between North Carolina law and federal law.

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