

UTAH EMPLOYMENT LAW QUARTERLY

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UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.



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EMPLOYEE OR INDEPENDENT CONTRACTOR

By: Clayton H. Preece

For various reasons, businesses desire, at times, to classify those that perform work for them as independent contractors and not as employees. While there may be some advantages to engaging independent contractors to perform work for a company, the proper classification of workers as employees or independent contractors is more complex than merely applying the term or checking a box on a tax form. While the pros and cons of the independent contractor relationship are beyond the scope of this article, businesses should be aware of how courts, statutes, and the IRS define and test the classification of a business's relationship to workers.

Employee Defined

Utah courts have defined "employee" to mean "one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties." *Harry L. Young & Sons, Inc. v. Ashton*, 538 P.2d 316, 318 (Utah 1975).

Independent Contractor Defined

In contrast, Utah courts have defined "independent contractor" as "one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion." *Harry L. Young & Sons, Inc. v. Ashton*, 538 P.2d 316, 318 (Utah 1975).

The IRS Test

The IRS applies a test that considers evidence of the "degree of control and independence" of the relationship between the business and the worker. See IRS, Topic 762 – Independent Contractor vs. Employee, (Dec. 30, 2016) <https://www.irs.gov/taxtopics/tc762.html>. Under the IRS test, evidence falls into three general categories, behavioral control, financial control, and the relationship of the parties. (*Id.*)

Behavioral Control. Does the business have a right to direct and control what work is accomplished and how the work is done? (*Id.*) For example, training a worker on how to assemble a widget indicates behavioral control.

Financial Control. Does the business have a right to "direct or control the financial and business aspects of the worker's job? For example, reimbursing a worker for job related expenses indicates financial control.

Relationship of the Parties. What is the nature of the relationship between the business and worker? For example, providing benefits to a worker indicates an employer/employee relationship.

Utah's Presumption of Employee Relationship

In the unemployment context, the Utah Employment Security Act creates a rebuttable presumption that an individual is an employee if that individual is performing services for wages or under any contract of hire, whether written or oral. Utah Code Ann. § 35A-4-204(3).

This presumption may be rebutted when, to the satisfaction of the Unemployment Insurance Division, an employer or employee shows that "(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire of services; and (b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact." *Id.*

It is important to note that Utah courts have been instructed to liberally construe the Employment Security Act in favor of finding an employee relationship and thereby extending unemployment benefits.

Additionally, Utah's Administrative code has established a list of factors to help determine whether a worker is "independently established" and under the "control and direction" of a business, in the unemployment context:

Independently Established

1. **Separate Place of Business.** The worker has a place of business separate from that of the employer.

2. **Tools and Equipment.** The worker has a substantial investment in the tools, equipment, or

facilities customarily required to perform the services. However, “tools of the trade” used by certain trades or crafts do not necessarily demonstrate independence.

3. Other Clients. The worker regularly performs services of the same nature for other customers or clients and is not required to work exclusively for one employer.

4. Profit or Loss. The worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity.

5. Advertising. The worker advertises services in telephone directories, newspapers, magazines, the Internet, or by other methods clearly demonstrating an effort to generate business.

6. Licenses. The worker has obtained any required and customary business, trade, or professional licenses.

7. Business Records and Tax Forms. The worker maintains records or documents that validate expenses, business asset valuation or income earned so he or she may file self-employment and other business tax forms with the Internal Revenue Service and other agencies.

Control and Direction

1. Instructions. A worker who is required to comply with other persons' instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

2. Training. Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner.

3. Pace or Sequence. A requirement that the service must be provided at a pace or ordered sequence of duties imposed by the employer indicates control or direction. The coordinating and scheduling of the services of more than one worker does not indicate control and direction.

4. Work on Employer's Premises. A requirement that the service be performed on the employer's premises indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere.

5. Personal Service. A requirement that the service must be performed personally and may not be assigned to others indicates the right to control or direct the manner in which the work is performed.

6. Continuous Relationship. A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

7. Set Hours of Work. The establishment of set hours or a specific number of hours of work by the employer indicates control.

8. Method of Payment. Payment by the hour, week, or month points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed upon as the cost of a job. Control may also exist when the employer determines the method of payment.

Utah Admin. Code R. R994-303

As shown above, there are numerous factors and considerations that will be weighed should the classification of a worker come into question. Businesses should be careful when classifying workers as independent contractors. Consultation with legal counsel is advisable to ensure that employees are properly classified and any implications of the employment relationship are explained.

BUSINESS BEST PRACTICES RELATING TO INDEPENDENT CONTRACTORS

- If you are engaging or classifying a worker as an independent contractor, carefully consider the nature of the work that will be performed and what instruction or oversight the business will have over the worker.
- Realize that just applying the term “independent contractor” is insufficient as the nature of the relationship is subject to various tests.
- Consult with legal counsel regarding classification of a worker and any implications that classification may have on your business operations.

EMPLOYEE PRIVACY: PUBLIC VERSUS PRIVATE SECTOR

By James W. Stewart

A fundamental distinction exists in the area of “employee privacy” between public sector and private sector employees. Public sector workers, because they are employed by a governmental agency, are entitled to some “right of privacy” under the Fourth and Fourteenth Amendments to the Constitution; i.e, their employer, the governmental agency, is limited in what it can do to them by these constitutional limitations “state action.”

In all but a few states (California, Illinois, South Carolina), private sector employees have no such government conferred constitutional “right to Privacy.” In most states an employee’s right to privacy is not conferred unless their employer creates one by promising privacy explicitly or by implication. When it is claimed that such a promise of privacy has been made, employees often seek redress under several theories, including the following:

- Defamation – including the release of false or inaccurate information by the employer that results in damage to the reputation of the employee.
- Infliction of emotional distress, including subjecting the employee to outrageous conduct that causes severe and debilitating injuries.
- Negligence.
- Invasion of privacy, including unwarranted publicizing of a company’s private affairs and intrusion into the employee’s private affairs.

The key to diminishing the possibility of such problems is to adopt a policy and/or handbook provision which makes clear that employees have no right to the expectation of privacy in anything involving their job or the workplace. Such policies should contain the following:

- While the Company allows employees to use its property, this does not make the use of that property in any way “private” or secret from the employer.
- Employees have no expectation of privacy anywhere on or in Company property, including none in any Company desk, locker, or computer or other electronic equipment.
- The Company also reserves the right from time to time to search the Company premises and property (including all company equipment) as well as personal items and vehicles brought by employees onto Company property.
- Refusals to comply with search requests will subject employees to discipline up to and including discharge.

Special provisions may be required where an employer wishes to monitor employee telephone calls and e-mail. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 and the Electronics Communications Privacy Act of 1986, 18 S.C. § 2510 et seq., prohibits invasions of privacy through interception of oral, wire and electronics communications unless the employer is a party to the conversation and/or there has been consent to the interception. Some states require consent of all parties to the phone conversation.

A further federal exception exists where the employer monitors employee phone calls if the interception of the communication is “in the ordinary course of business.” If this is the practice it should be stated in the handbook provision. Some states require the consent of all parties to the phone conversation.

2017 UTAH LEGISLATIVE SESSION BILLS TO WATCH

The following bills may impact businesses and employment in the State of Utah:

- **H.B. 28 – Public Employees Long-term Disability Act Amendments**

This bill modifies the circumstances when a monthly long-term disability benefit shall be reduced or reimbursed; requires an eligible employee that is under a total disability to inform the Public Employees' Insurance Program of certain information; provides penalties if an eligible employee knowingly misrepresents or fails to disclose certain information; and makes technical changes.

- **H.B. 34 – Employment Security Act Sunset Extension**

This bill extends the sunset date of certain statutory provisions related to the Department of Workforce Services sharing certain information with the Wage and Hour Division of the United States Department of Labor.

- **H.B. 41 – Utah Revised Business Corporation Act Modifications**

This bill amends the provision addressing general standards of conduct for directors and officers; enacts provisions related to business combinations; and makes technical changes.

- **H.B. 56 – Accessible Parking Amendments**

This bill defines terms; establishes criteria for parking in certain accessible parking spaces; creates a windshield placard for use by a person with a disability that requires the use of a wheelchair or other walking-assistive device; and makes technical changes.

- **H.B. 81 – Amendments to Post-Employment Restrictive Covenants.**

This bill addresses consideration and termination of employment as they relate to post-employment restrictive covenants, and restricts the time for bringing an action to enforce post-employment restrictive covenants.

- **H.B. 94 – Occupational and Professional Licensure Review Committee Amendments**

This bill defines terms; modifies the responsibilities of the Occupational and Professional Licensure Review Committee; and makes technical changes.

- **H.B. 103 – Campus Anti-harassment Act**

This bill defines terms; enacts requirements related to how an institution of higher education addresses discriminatory harassment; prohibits an institution of higher education from punishing certain acts of speech that do not constitute discriminatory harassment; creates causes of action related to discriminatory harassment at an institution of higher education; and enacts other provisions related to discriminatory harassment at an institution of higher education.

- **S.B. 57 – Workers' Compensation Related Premium Assessments**

This bill changes certain dates; and makes technical changes.

- **S.B. 102 – Workers' Compensation Dependent Benefits**

This bill modifies the calculation of death benefits paid to one or more dependents of a deceased employee; and makes technical changes.

PRACTICE PROFILES



Kathryn J. Steffey

Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Ms. Steffey has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Ms. Steffey has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.



James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Business Blog at <https://employmentlawyerutah.com> or subscribe to the twitter feed @UTemploylaw.



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