

DISTINGUISHING BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

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At common law, the right to control the manner and means in which work is performed is the principal test in determining whether an individual is an employee or an independent contractor. Gaffney v. Department of Employment Services, 540 N.W.2d 430, 434 (Iowa 1995). 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 that result, that individual is an independent contractor. Meredith Publ'g Co. v. Iowa Employment Sec. Comm'n, 6 N.W.2d 6, 12 (Iowa 1942).

The following elements generally must be established to prove an employer-employee relationship:

1. The right of selection, or to employ at will;
2. The responsibility for the payment of wages by the employer;
3. The right to discharge or terminate the relationship;
4. The right to control the work;
5. Is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed

Wernimont v. Wernimont, 686 N.W.2d 186, 190 (Iowa 2004). The above five elements are not controlling in every situation. The importance of the elements bearing on the existence of an employment situation varies.

- ◆ In cases presenting a choice between categorizing a person as an employee or an independent contractor, the primary focus is on the extent of control by the employer over the details of the alleged employee's work.

- ◆ In contrast, when the question concerning the nature of the employment relationship arises in the context of a borrowed servant situation, the primary focus is on the intent of the parties; if the five factors are considered at all, it is merely as an aid in determining whether there is a contract of employment between the employee and the second employer.

- ◆ If the issue turns on whether the person is a “gratuitous employee” the most important element is the responsibility for payment of wages.
- ◆ **The parties’ intent, even if not the primary factor, is always a consideration.**

Iowa Mutual Insurance Co. v. McCarthy, 572 N.W.2d 537 (Iowa 1997); Wernimont, 686 N.W.2d at 190.

Factors tending to show employer-employee relationship:

1. The employer’s right to control and direct the performance of the service;
2. The right to terminate the relationship without penalty;
3. The tools, equipment, and place of work are furnished by the employer;
4. Proof of fixed wages computed on a weekly or hourly basis;
5. Employee included on tax filings by employer;
6. Intent of the parties to have an employer-employee relationship.

Factors tending to show independent contractor relationship:

1. Proof that an individual is subject to the direction of another merely as to the result of the work and not as to the means and methods for accomplishing the result (no right to control the progress of the work, except as to final results);
2. Discharge or termination will constitute breach of contract with potential damages;
3. The work involves performance of a specific job or piecework at a fixed price;
4. Proof of a distinct trade, occupation, business or professional service offered to the public who seeks the benefit of that training or experience;
5. The right to employ assistants with the exclusive right to supervise their activity and completely delegate their work;
6. The obligation to furnish own necessary tools, supplies, and materials;
7. Set time period for which workman is employed;
8. Work not part of the regular business of the employer;
9. Intent of the parties to have an employer - independent contractor relationship.

The Case of Two Employers

These factors again come into play when determining whether an employment relationship exists between an employee and an employer where the employee was initially hired by a temp agency.

The leading case addressing whether a temporary worker was an employee of the temporary agency or the client is Parson v. Proctor & Gamble Mfg. Co., 514 N.W.2d 891, 893 (Iowa 1994). In Parson, the injured employee, Debra Parson, was hired by Kelly Temporary Services to serve as a temporary worker at Proctor & Gamble's plant in Iowa City, Iowa. Parsons was injured while working and received workers' compensation benefits from Kelly's insurer. P&G filed a motion for summary judgment concluding that Parson was its employee and that the claim was barred by § 85.20.

The Iowa Supreme Court stated that the threshold determination in deciding whether a worker fell into the workers' compensation scheme was "whether the worker entered into a contract of hire, express or implied." The question of whether a contract of hire exists is ordinarily one of fact. Moreover, there is a presumption that a general employer continues as the sole employer. Given this significant burden, the court in Parson found P&G failed to establish as a matter of law that plaintiffs had a deliberate and informed intent to enter into an employment relationship with P&G. The factors supporting this position identified by the court included:

- Kelly had the primary right to select the employees who worked for P&G.
- Kelly and not P&G determined the wages the Kelly workers received for labor performed on P&G premises. Kelly was responsible for the time cards, paychecks and provided the workers W-2 income tax forms.
- The right to discharge Kelly workers rested with Kelly.
- Kelly had control over the work of its workers at the P&G plant. Kelly's supervisor checked in on the Kelly workers and served as an administrator and liaison between P&G and the Kelly workers.

In contrast, in Willms v. Associated Materials, Inc. 2004 WL 2578969 the Iowa Court of Appeals found that a temporary employee was an employee of the temp agency and the client. In Willms, Plaintiff was placed by a temp agency, Advance Services, at Alside as a temporary worker. He was injured by a forklift and filed suit against Alside. Alside denied liability arguing Willms' action was barred by the exclusive remedy provision of Iowa's workers' compensation law. While the district court noted that Willms was paid by Advance Services, did not receive health insurance or retirement benefits which were available to permanent Alside employees, and Willms stated he subjectively intended to remain an employee of Advance Services, both the district and appellate court found that Willms intended to enter into an employment relationship with Alside. The appellate court in making its decision agreed with the factors identified by the district court as follows:

- Willms was interviewed by Alside's Human Resource Manager before he began his work at the plant. Alside could reject a person referred by a temporary employment agency.
- Willms could potentially become a full-time employee of Alside depending on how he worked out.
- When Willms first went to work for Alside, he was introduced to the work requirements by Alside personnel and then trained by Alside representatives.
- It was Alside's supervisors who directed Willms' (and all temporary employees') work in the same way as permanent employees.
- It was Alside's supervisors who assigned hours for the temporary workers (including overtime) and gave warnings for any employee (temporary or permanent) for misconduct.
- Alside kept track of the time worked by Willms.
- Alside at all times, had the ability to decide whether to terminate Willms' employment.
- Advanced Services had no representatives on site at Alside and provided no control whatsoever as to Willms' duties and responsibilities.
- Willms' and other "temporary" employees were treated the same as permanent employees. There was no difference in dress or uniform. There was no difference in shift assignments. All the workers worked together and with each other. The workers were not segregated while at work or off duty. All workers followed the same rules and regulations and all were included in company extracurricular events.
- Alside had no express contract with Advance Services which provided the temporary employment company was considered an independent contractor.