

COURIERS: INDEPENDENT CONTRACTORS OR EMPLOYEES?

A STATE-BY-STATE SURVEY OF UNEMPLOYMENT COMPENSATION LAWS

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Introduction

The purpose of this report is to survey the rules governing the status of couriers as either independent contractors or employees for purposes of state unemployment compensation laws.¹ This report includes a description of the environment in which most couriers operate, a summary of the general approaches taken by the states to analyze whether couriers are independent contractors or employees, and recommended “best practices” to maximize the likelihood that couriers may be treated as independent contractors. The Appendix is a state-by-state compendium of applicable laws and, when available, regulations and court decisions.

Unlike the federal employment tax laws, state unemployment compensation statutes are written with the goal of including as many workers as reasonably possible within the definitions of “employee” or “employment.” As stated in the Massachusetts statute, the law “shall be construed liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family.” Mass. G.L., Chapter 151A, §74. Understanding this purpose—to provide financial assistance to workers—is critical to understanding that, in many states, workers who are treated as independent contractors by the Internal Revenue Service will be considered employees. In contrast, only rarely, if at all, would workers treated as employees for federal tax purposes be treated as independent contractors by a state.

¹ This report provides general information concerning the laws, etc., governing whether couriers are employees or independent contractors for purposes of state unemployment compensation laws. However, it is not a substitute for legal advice regarding a particular company, unemployment tax assessment, or claim for benefits. Businesses requiring such advice should consult a lawyer familiar with the issues.

Courier operations

For purposes of this report, we have assumed that the typical courier² owns the vehicle he uses, and that the vehicle is a sedan, pick-up truck, van, or box truck, typically less than 10,000 pounds gross vehicle weight. Couriers driving such vehicles need not hold a commercial drivers license (“CDL”).

Signage on the courier’s vehicle is often magnetic, or there may be no signs at all. Some jurisdictions require permanent signs to be painted on the vehicles.

Couriers receive assignments in one of two ways: (1) through a fixed route of multiple deliveries, for a fixed price, so that (absent cancellations) the driver knows the route and the fee he will receive at the beginning of the day, or (2) based on individual dispatches relaying a particular customer’s requirements. In general, 55 to 60 percent of the fee received by the company is paid to the driver. Prices for courier deliveries are established by the company.

Drivers treated by the company as independent contractors are responsible for providing the vehicle and communication equipment, including renting a two-way radio, Nextel cell phone, and/or two-way pagers, from the company, as well as for buying his or her own fuel. To the extent the driver needs dollies, hand trucks, or other equipment for transporting packages, those are generally supplied by the company.

Companies typically bill clients weekly or monthly. The courier company receives payment from the customer, then settles with drivers weekly or biweekly, in arrears. When a customer fails to pay, the company suffers the loss (because the driver is paid even though the customer failed to pay), unless failure to pay is due to nonperformance by the driver. In this case, the driver suffers the loss.

Drivers treated as independent contractors are sometimes required to have an independent business license, and are required to have their own personal liability insurance on their vehicles. However, this insurance typically does not cover commercial use of the vehicle.

Some companies use third party service providers to contract with and pay couriers, and providing certain occupational accident coverage to drivers. These companies are then responsible for issuing Form 1099-MISC to report the compensation paid to the driver.

² In this report, “courier” refers to the individual driver, not the company.

Overview of state laws

The 50 states and the District of Columbia generally use either of two standards to determine whether a worker is an employee or an independent contractor for unemployment compensation law purposes. These rules, the “ABC” rule and the common law rule, are discussed in general terms below. For each state, the law, any applicable regulations or rules, and summaries of relevant cases and rulings are included in the Appendix to this report.

“ABC” Rule: 19 states have adopted the “ABC” rule, so called because it is usually stated in three paragraphs of the law, all three of which must be satisfied in order for the worker to be treated as an independent contractor. New Jersey is typical:

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

The “ABC” rule applies even if the worker would be an independent contractor under the common law “right to control” rule, and generally requires a greater degree of independence for the worker before the state agency or court will conclude that the worker is not an employee. Thus, a worker is significantly more likely to be treated as an employee under the ABC rule than under the common law rule.

Most commonly, but not always, a courier will fail to satisfy the “C” paragraph—engagement in an independently established trade or business. The reason is that the courier is usually dependent on one company for “his” customer base. In fact, the courier has only one customer—the company. Although the courier makes deliveries for many businesses, the businesses are customers of the company, not the courier.

Six states use a variation of the ABC rule, the “A and C” rule. Using the “A and C” rule will usually not affect the result, because the “B” factor is usually satisfied—the services are performed away from the company’s place of business—and the “C” factor is the one most often not satisfied.

One state, Virginia, uses an “A, and B or C” rule. While this is more favorable to couriers, because the “C” test does not have to be satisfied, it has little practical significance because Virginia has two other special rules (discussed below), and most couriers should be able to benefit from either or both of them.

Common law rule: 24 states and the District of Columbia use the common law rule to determine whether a worker is an employee or independent contractor. Under this rule, the worker is an independent contractor if the company has the right to control only the result to be accomplished by the worker’s services, and not the details and means by which that result is accomplished. Thus, for example, the courier company can dictate the timely delivery of the cargo to the customer, but not the details and means—*e.g.*, route to follow or particular vehicle to use—by which the delivery is accomplished.

In these states, a courier is more likely to be treated as an independent contractor, than he would be in an “ABC” state, but this result is by no means certain. For example, although the courier has a substantial investment in a vehicle, if the vehicle is a sedan, van, or other vehicle that is easily used for personal use, and if he actually uses the vehicle for substantial personal use, the court or administrative agency may disregard that investment, and rule that the courier is an employee because he has no substantial investment, and therefore no significant risk of profit or loss.

Other states

Several states, in addition to their general rules, have enacted statutes enumerating particular factors that will be considered, and sometimes for particular occupations. Florida (a common law state) also has a statute specifically addressing couriers, which should result in couriers being treated as independent contractors in most cases. Although Maryland has a general “ABC” rule, it also has a relatively favorable special rule for “messenger services.” Michigan’s special vehicle lease/operator rule dictates the conclusion that the driver is an employee. This probably reflects the state’s strong unions. In contrast, Nebraska treats lessor-drivers for motor carriers as independent contractors.

Illinois and Virginia have separate rules for truckers that generally apply to all trucks, not only tractor-trailers. Virginia also has a special rule that treats a “contract courier carrier driver” as an independent contractor if the company submits a ruling to that effect from the Internal Revenue Service.

Wisconsin and Wyoming have their own lists of factors that are similar, but not identical, to the 20 factors the IRS and many of the common law states use in analyzing whether a worker is a common law employee.

Summary chart

The following chart shows, in summary form, which rule each state would generally apply in determining whether a courier is an employee or an independent contractor. However, because some states have special rules (marked by an asterisk) and case law that specifically address couriers or other similar occupations, readers should refer to each state's law, regulations, and/or cases that appear in the Appendix.

<u>State</u>	<u>Rule</u>
Alabama	Common law
Alaska	ABC
Arkansas	ABC
Arizona	Common law
California	Common law
Colorado	A and C
Connecticut	ABC
Delaware	ABC
District of Columbia	Common law
Florida	Common law*
Georgia	ABC
Hawaii	ABC
Idaho	A and C
Illinois	ABC*
Indiana	ABC
Iowa	Common law
Kansas	Common law
Kentucky	Common law
Louisiana	ABC
Maine	ABC
Maryland	ABC*
Massachusetts	ABC
Michigan	Common law*
Minnesota	Common law
Mississippi	Common law
Missouri	Common law
Montana	Common law
Nebraska	ABC*
Nevada	Common law
New Hampshire	ABC
New Jersey	ABC
New Mexico	ABC
New York	Common law
North Carolina	Common law
North Dakota	Common law

Ohio	Common law
Oklahoma	Common law
Oregon	A and C
Pennsylvania	A and C
Rhode Island	Common law
South Carolina	Common law
South Dakota	A and C
Tennessee	ABC
Texas	Common law
Utah	A and C
Vermont	ABC
Virginia	A, and B or C*
Washington	Common law
West Virginia	ABC
Wisconsin	Common law*
Wyoming	Common law*

Appendix

The Appendix to this report provides more detailed information for each state. It is designed to provide general information for courier company personnel, to enable them to structure their arrangements with courier drivers in manner most likely to result in classification of the driver as an independent contractor. In addition, when a company is required to defend an audit, or opposes a claim for unemployment benefits because the courier is an independent contractor, the statutes, regulations, and case notes in the Appendix will enable the company’s lawyer to research the issue much more quickly.

Recommended business practices

In light of the tendency of most state unemployment compensation agencies and courts to presume that workers are employees, and to require businesses to satisfy a substantial burden of proof before ruling that a worker is not an employee (*i.e.*, that he is an independent contractor), courier companies should structure their arrangements with couriers to afford the courier the maximum freedom possible, consistent with the company’s business requirements. Companies that believe they are already at this point should consider having their courier agreements and operations reviewed by a third party who might bring an outsider’s unbiased perspective to the process.

In particular, implementing a carefully adhering to the following practices will tend to avoid the result that couriers are treated as employees:

1. The company uses written contracts clearly specifying the terms of its agreement with the courier. (That the agreement specifies that the courier is an independent contractor is of little independent significance. States will make their determinations based on the substantive terms of the agreement and the company’s

operational practices.) In order to take advantage of Maryland’s “safe harbor” for messenger service drivers, the contract must “expressly and prominently” state that the driver knows he is responsible for paying estimated federal and state income and Social Security taxes, that the Social Security tax the driver must pay is higher than the tax he would pay otherwise, and that the work is not covered employment.

2. The courier owns the vehicle, or leases it from an independent third party, and the lease is not contingent on the courier performing services for the company.

3. The courier is required to purchase or rent any ancillary equipment required in order to accomplish deliveries, e.g., dollies or hand trucks. If bought or rented from the company, the price must be at fair market or fair rental value.

4. The courier is paid based on deliveries accomplished, and not by the hour or other time period. The courier is not paid if the customer doesn’t pay due to the courier’s failure to deliver or late delivery.

5. Subject to applicable insurance requirements, the courier is free to substitute another driver to complete deliveries.

6. The courier pays for all vehicle expenses (fuel, maintenance and repair, insurance, etc.), tolls, tickets, etc., even if some, e.g., tolls, may be passed through to the customer.

7. The courier is free to set his own hours, and to accept requests for deliveries through multiple courier companies (to the extent permitted by law) or directly from their own customers (provided they fulfill all accepted delivery requests).

8. The courier may accept or reject available dispatch requests or daily routes, and is not otherwise penalized for rejecting a route or dispatch request.

9. The courier is not required to wear a company uniform (but he may be required to carry company or other identification for security purposes).

10. The courier is not required to sign a non-compete agreement. The company may require couriers to sign a confidentiality or nondisclosure agreement that includes provisions prohibiting the courier from using the company’s confidential information, e.g., its customer list, for his own benefit.

11. Training is limited, and relates to company business practices, customer relations, and safety issues—*i.e.*, topics that “benefit” the couriers.

12. The courier is not required to follow up or report on leads provided by the company, or to attend frequent or regular meetings.

13. Subject to customer requirements, the company does not specify particular routes that couriers must follow, or the order in which deliveries must be made. However, the company may suggest routes to avoid road construction, other congestion, or unsafe areas.

14. The company has a determination letter from the IRS that its couriers are not employees for federal income, Social Security, and unemployment tax purposes. While having a determination letter from the IRS does not ordinarily guarantee that a state will also treat the couriers as employees, in Virginia it is conclusive, and in states that use the common law test, the courts and administrative agencies may find such a determination very persuasive. A determination letter is obtained by filing IRS Form SS-8, "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding." Companies that want to obtain a determination letter should review Revenue Ruling 87-41, 1987-1 C.B. 296 (general discussion of the 20 factors) and Revenue Ruling 76-226, 1976-1 C.B. 322 (truck drivers as independent contractors), before doing so, and should work with an attorney experienced in the issue to ensure that driver agreements, leases, and other documentation properly establish and support the driver's independent contractor status.

Conclusion

In general, state unemployment compensation laws are interpreted and applied in a manner that tends to favor the workers intended to be protected by the laws. Thus, claims examiners and hearing officers within the state unemployment compensation agencies will tend to find that workers are employees more frequently than their colleagues in the Internal Revenue Service. In the majority of states that have enacted the "ABC test," companies will usually find it very difficult to treat most couriers as independent contractors, because they cannot demonstrate that the couriers are engaged in an independent trade or business. However, companies that know the governing rules in their state and that structure their arrangements with couriers appropriately may, especially in states that use the common law test, increase the likelihood that the couriers will be treated as independent contractors.