

Sampling of Relevant Employment Definitions
Underground Economy in the Construction Industry Joint Task Force
August 1, 2007

Employment Security Department (ESD)

RCW 50.04.100, Employment.

"Employment", subject only to the other provisions of this title, means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

Except as provided by RCW 50.04.145, personal services performed for an employing unit by one or more contractors or subcontractors acting individually or as a partnership, which do not meet the provisions of RCW 50.04.140, shall be considered employment of the employing unit: PROVIDED, HOWEVER, That such contractor or subcontractor shall be an employer under the provisions of this title in respect to personal services performed by individuals for such contractor or subcontractor.

RCW 50.04.140, Employment — Exception tests.

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

- (1) (a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
 - (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
 - (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.
- (2) Or as a separate alternative, it shall not constitute employment subject to this title if it is shown 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 or her contract of service and in fact; and
 - (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

- (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

Additional potential exceptions:

- RCW 50.04.145, Employment -- Services performed for contractor, when excluded.
- RCW 50.04.148, Employment -- Services performed by musician or entertainer.
- RCW 50.04.150, Employment -- Agricultural labor.
- RCW 50.04.155 Service performed in agricultural labor for farm operator or crew leader.
- RCW 50.04.160, Employment -- Domestic service.
- RCW 50.04.165, Employment -- Corporate officers -- Election of coverage.
- RCW 50.04.170, Employment -- Maritime service.
- RCW 50.04.180, Family, Employment.
- RCW 50.04.205, Services performed by aliens.
- RCW 50.04.206, Employment -- Nonresident alien.
- RCW 50.04.210, Employment -- Foreign governmental service.
- RCW 50.04.220, Employment -- Service covered by federal act.
- RCW 50.04.223, Employment -- Massage practitioner.
- RCW 50.04.225, Employment -- Barber and cosmetology services.
- RCW 50.04.230, Employment -- Services of insurance agent, broker, or solicitor, real estate broker or real estate salesman, and investment company agent or solicitor.
- RCW 50.04.232, Employment -- Travel services.
- RCW 50.04.235, Employment -- Outside salesman paid by commission.
- RCW 50.04.240, Employment -- Newsboy's service.
- RCW 50.04.245, Employment -- Services performed for temporary services agency, employee leasing agency, or services referral agency.
- RCW 50.04.255, Employment -- Appraisal practitioner services.

RCW 50.04.265, Employment -- Indian tribes.
RCW 50.04.270, Employment -- Casual labor.

Department of Labor and Industries (L&I)

Industrial Insurance: RCW 51.08.180, "Worker" — Exceptions.

- (1) "Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as a separate alternative, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.
- (2) For the purposes of this title, any person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not a worker when:
 - (a) Contracting to perform work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;
 - (b) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;
 - (c) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and
 - (d) The work which the person, firm, or corporation has contracted to perform is:
 - (i) The work of a contractor as defined in RCW 18.27.010; or
 - (ii) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.
- (3) Any person, firm, or corporation registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW including those performing work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is a

worker when the contractor supervises or controls the means by which the result is accomplished or the manner in which the work is performed.

- (4) For the purposes of this title, any person participating as a driver or back-up driver in commuter ride sharing, as defined in RCW 46.74.010(1), is not a worker while driving a ride-sharing vehicle on behalf of the owner or lessee of the vehicle.

Industrial Insurance: RCW 51.08.185, "Employee."

"Employee" shall have the same meaning as "worker" when the context would so indicate, and shall include all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions.

Industrial Insurance: RCW 51.08.195, Employer and worker — Alternative exception.

As a separate alternative to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and
- (3) 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 service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

WISHA: RCW 49.17.020, Definitions

- (5) The term "employee" means an employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his personal labor for an employer under this chapter whether by way of manual labor or otherwise.

Department of Revenue

WAC 458-20-105, Employees distinguished from persons engaging in business.

- (1) The Revenue Act imposes taxes upon persons engaged in business but not upon persons acting solely in the capacity of employees.
- (2) While no one factor definitely determines employee status, the most important consideration is the employer's right to control the employee. The right to control is not limited to controlling the result of the work to be accomplished, but includes controlling the details and means by which the work is accomplished. In cases of doubt about employee status all the pertinent facts should be submitted to the department of revenue for a specific ruling.
- (3) Persons engaging in business. The term "engaging in business" means the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in business.

If a person is:

- (a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;
- (b) Entitled to receive the gross income of the business or any part thereof;
- (c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;
- (d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;
- (e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;

- (f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;
 - (g) A party to a written contract, the intent of which establishes the person to be an independent contractor;
 - (h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).
- (4) Employees. The following conditions indicate that a person is an employee.
- If the person:
- (a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;
 - (b) Is employed to perform services in the affairs of another, subject to the other's control or right to control;
 - (c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;
 - (d) Has no liability for losses or indebtedness incurred in the conduct of the business;
 - (e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;
 - (f) Is treated as an employee for federal tax purposes;
 - (g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this section.
- (5) Full-time life insurance salespersons. Chapter 275, Laws of 1991, effective July 1, 1991, provides that individuals performing services as full-time life insurance salespersons, as provided in section 3121 (d)(3)(B) of the Internal Revenue Code, will be considered employees. Treatment as an employee under this subsection (5) applies only to persons engaged in the full-time sale of life insurance. The status of other persons, including others listed in section 3121(d) of the Internal Revenue Code, will be determined according to the provisions of subsections (1) and (2) of this section (see WAC 458-20-164 for the proper tax treatment of insurance agents, brokers, and solicitors).

- (6) Operators of rented or owned equipment. Persons who furnish equipment on a rental or other basis for a charge and who also furnish the equipment operators, are engaging in business and are not employees of their customers. Likewise, persons who furnish materials and the labor necessary to install or apply the materials, or produce something from the materials, are presumed to be engaging in business and not to be employees of their customers.
- (7) Casual laborers. Persons regularly performing odd job carpentry, painting or paperhanging, plumbing, bricklaying, electrical work, cleaning, yard work, etc., for the public generally are presumed to be engaging in business. The burden of proof is upon such persons to show otherwise. However, refer to WAC 458-20-101 and 458-20-104 for registration and reporting requirements for such activities.
- (8) A corporation, joint venture, or any group of individuals acting as a unit, is not an employee.
- (9) Booth renters. For purposes of the business and occupation tax a "booth renter," as defined in RCW 18.16.020(19), is considered engaged in business and not an employee. A "booth renter" is any person who:
 - (a) Performs cosmetology, barbering, esthetics, or manicuring services for which a license is required pursuant to chapter 18.16 RCW and
 - (b) Pays a fee for the use of salon or shop facilities and receives no compensation or other consideration from the owner of the salon or shop for the services performed.
 - (c) See WAC 458-20-118 for the proper treatment of amounts received for the rental or licensing of real estate and WAC 458-20-200 for the proper treatment of amounts received for leased departments

Internal Revenue Service

26 U.S.C. § 3121

....

(d) Employee

For purposes of this chapter, the term "employee" means—

- (1) any officer of a corporation; or
- (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or. . . .

26 C.F.R. § 31.3121(d)-1 Who are employees.

(a) *In general.*

....

- (2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart whether or not he is an employee under any of the other tests.
 - (3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.
 - (4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.
 - (5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see §31.3121(b)-3).
- (b) Corporate officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.
- (c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
- (2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is

not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. 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 the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

- (3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Independent Contractor is not defined by ESD or L&I. One statutory definition is found for the Department of Financial Institutions at RCW 19.146.010(9) and states:

- (9) "Independent contractor" or "person who independently contracts" means any person that expressly or impliedly contracts to perform mortgage brokering services for another and that with respect to its manner or means of performing the services is not subject to the other's right of control, and that is not treated as an employee by the other for purposes of compliance with federal income tax laws.