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Tests in determining whether one is an independent contractor

[Cumulative Supplement]
The reported case for this annotation is Murray's Case, 130 Me. 181, 154 A. 352, 75 A.L.R. 720 (1931).

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The ultimate test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. 14 R. C. L. p. 67; annotation in 19 A.L.R. 226; § 6. In other words, whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performance of the work.

It is not the fact of actual interference or exercise of control by the employer which renders one a servant rather than an independent contractor, but the existence of the right or authority to interfere or control. 14 R. C. L. p. 68; annotation in 19 A.L.R. 226, § 7. And see the reported case (Re Murray, ante, 720).

As stated in 14 R. C. L. p. 68: "The fact that the employer has actually exercised control is properly considered as tending to show that he has a right to control. And, on the other hand, the fact that during the performance of the work the employer has exercised no control may be considered as tending to show that he has no right to control. But the mere fact that the employer was present and made suggestions or requested the contractor to hurry the work has no probative force in determining that question." In this connection, see the annotation in 20 A.L.R. 684, § 16.

A frequently applied definition is thus formulated in 14 R. C. L. p. 67: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work." A number of other definitions and criteria are stated in the annotation in 19 A.L.R. 226, §§ 1–4.

In this as in many other instances, however, the cases demonstrate the futility of attempting a concise definition which is sufficiently specific and concrete to furnish a useful guide in deciding cases, and at the same time is comprehensive enough to be applicable to all cases. No hard and fast rule can be formulated to determine when one undertaking to do work for another is an independent contractor and when he is a servant, but each case must be determined upon its own facts. Re Murray (reported herewith) ante, 720. There are many wellrecognized and fairly typical indicia of the status of independent contractor, but the presence of one or more of them in a case is not necessarily conclusive of this status.

The right of the person employed to control the progress of the work, except as to final results, is an essential feature of the status of independent contractor. Yet this right need not be absolute, to the exclusion of any interference or control by the employer, in order for the status to subsist. Stipulations in a contract authorizing the employer to exercise a certain measure of control over the work do not prevent the relationship from being one of employer and independent contractor, where the provisions go no further than to enable the employer to secure the proper performance of the contract. See the annotation in 20 A.L.R. 684, § 4. It will be seen from §§ 5 to 8 of that annotation that provisions that the work shall be under the supervision and subject to the approval of the employer or his agent, or that the work shall be done according to plans and specifications furnished by the employer or in accordance with instructions from the owner, are held not to affect the independence of the contract. Instances in which the exercise of certain measures of control by the employer has been held not to negative the independence of the contract are stated in § 17 of the same annotation. Stipulations which have been held to invest the employer with powers of control over the details of the performance of the work, and which are therefore inconsistent with the status of independent contractor, are considered in §§ 10 to 13 of that annotation; and acts of the employer which have been held to have the same effect are treated in § 18 thereof.

The mode of payment for the work, whether by time or by job or piece, is an important element to be considered in determining whether or not a person is an independent contractor, but it is not necessarily controlling. 14 R. C. L. p. 74. The modern cases

look to the broader question whether the person is in fact independent or subject to the control of him for whom the work is done. Ibid. See the annotation in 20 A.L.R. 684, § 25.

Thus, the fact that a salesman receives his compensation on a commission or percentage basis, while a circumstance to be taken into consideration in determining whether or not he is an independent contractor, is not a decisive test. See the annotation in 61 A.L.R. 223, on the status of such salesman. This view seems to be reflected also in the cases collected in the annotation in 55 A.L.R. 291, on the question whether one doing work on a "cost plus" basis is an independent contractor, or a servant or agent.

Other tests and pertinent circumstances in determining whether or not one is an independent contractor, though not necessarily controlling, are the following:

— whether the contractor or employee follows an independent business or calling and performs work for anyone he wishes, 19 A.L.R. 226, §§ 8, 9;

— whether he is required to perform the work himself, or has the right to use the labor of others, 20 A.L.R. 684, § 23;

— whether he, or the employer, has the right to hire and discharge workmen employed by the former, or to supervise their activities, 20 A.L.R. 684, §§ 29, 30;

— whether wages of the contractor's servants are paid by the contractor or the employer, 20 A.L.R. 684, § 32;

— whether the contractor is required to furnish labor, materials, and appliances for the work, 20 A.L.R. 684, §§ 33–36;

— whether the employer has surrendered or retained control of the premises on which the work is performed, 14 R. C. L. p. 70; 20 A.L.R. 684, § 37;

— the time for which the workman is employed, Re Murray (reported herewith) ante, 720;

— the right of the employer to discharge the employee or otherwise terminate the employment, 20 A.L.R. 684, §§ 26–28;

— that the contractor is a stockholder, director, or auxiliary of the employing company, 20 A.L.R. 684, §§ 41–42a;

— that the employing and contracting companies are virtually identical, 20 A.L.R. 684, § 50;

— the financial irresponsibility of the person employed, 20 A.L.R. 684, § 22;

— arrangements with regard to medical treatment of contractor's servants or with regard to insurance against liability, or the contractor's obligation to indemnify the employer against loss or damage resulting from the performance of the work, 20 A.L.R. 684, §§ 38–40.

The distinction between independent contractors and agents is discussed in the annotation in 19 A.L.R. 226, §§ 15–20. The distinction between the former and partners is treated in § 22 of the same annotation. This extended annotation is devoted to the general subject of the relationship of employer and independent contractor.

The status of particular classes of persons in this connection, such as architects, physicians and surgeons, teachers, lessees, persons operating tugs, etc., is treated in the annotation in 19 A.L.R. 1168. This annotation deals exhaustively with the specific circumstances, contracts, and kinds of work under which the relationship of employer and independent contractor is predicable.

The elements bearing upon the quality of a contract, and the nature and terms of the contract, as affecting the character of one as independent contractor, are treated in the extended annotation in 20 A.L.R. 684.

Other annotations on closely related subjects are the following:

— nurses as independent contractors, 60 A.L.R. 303;

— teamsters as independent contractors, 42 A.L.R. 607;

— truckmen as independent contractors, 43 A.L.R. 1312;

— one transporting children to or from school as an independent contractor, 66 A.L.R. 724.

The liability of an employer for injuries inflicted by an automobile driven by or for a salesman or collector, as affected by the question whether he was a servant or an independent contractor, including a consideration of what facts and circumstances render him an independent contractor or a servant, is treated in an annotation in 17 A.L.R. 621, supplemented in 29 A.L.R. 470, and 54 A.L.R. 627.

The liability of a property owner, under the Workmen's Compensation Law, for injury to workmen engaged in building or repairing a structure, as affected by the distinction between an employee and an independent contractor, including the determination of the question whether a particular workman was an independent contractor or an employee, is treated in an annotation in 15 A.L.R. 735.

The general subject of the nonliability of an employer in respect of injuries caused by the torts of an independent contractor is covered in an annotation in 18 A.L.R. 801. Various qualifications of the general principle suggested by the title of that annotation are treated in the following annotations: That in 23 A.L.R. 984, on the liability of an employer as predicated on the ground of his being subject to a nondelegable duty in regard to the injured person; that in 23 A.L.R. 1016, on non-delegable duty of employer in respect of work which will, in the natural course of events, produce injury unless certain precautions are taken; that in 23 A.L.R. 1084, on non-delegable duty of employer with respect to work which is inherently or intrinsically dangerous; that in 29 A.L.R. 736, on the liability of an employer for acts or omissions of independent contractor in respect of positive duties of former arising from or incidental to contractual relationships; that in 30 A.L.R. 1502, on the liability of an employer as predicated on the ground of his personal fault, notwithstanding the fact that he engages an independent contractor, with especial reference to § 5 (30 A.L.R. 1502 et seq.) on the employer's control of or interference with the work as affecting his liability; and that in 31 A.L.R. 1029, on the extent of the employer's liability after he has assumed control of the subject-matter of the stipulated work.

CUMULATIVE SUPPLEMENT

Under the Wagner and Taft-Hartley Acts, lessor-drivers of motor vehicles used in interstate business of lessee-common carriers had right to bargain, through their representatives, with the carriers on subject of minimum rental and other lease terms. National Labor Relations Act, § 7, as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 157. Local 24 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312, 82 Ohio L. Abs. 397, 43 L.R.R.M. (BNA) 2374, 36 Lab. Cas. (CCH) P 65161 (1959).

Where there was no fact issue unresolved for jury, it would have been improper to have sent any issue purportedly as an issue of fact to the jury. Schiemann v. Grace Line, Inc., 269 F.2d 596 (2d Cir. 1959).

Independence in control of operation is element which distinguishes independent contractor from mere agent of general contractor. Blaber v. U. S., 212 F. Supp. 95 (E.D. N.Y. 1962).

Analysis of degree of control exercised by newspaper publishers over the manner and means of performance by rural carriers furnishes the basic means of discerning whether carriers are independent contractors or employees. National Labor Relations Act, § 2(3) as amended 29 U.S.C.A. § 152(3). N. L. R. B. v. A. S. Abell Co., 327 F.2d 1, 55 L.R.R.M. (BNA) 2261, 48 Lab. Cas. (CCH) P 18731 (4th Cir. 1964).

Party who contracted to perform certain work for partnership according to his own means and methods and free from control by partnership of details was an independent contractor and not an employee of partnership. Kelly v. Phoenix Assur. Co. of New York, 225 F. Supp. 562 (D. Md. 1964).

Company which designed, engineered and constructed manufacturing plant and office for owner with only number of square feet specified by owner and which was in complete possession and control of construction site at all times during construction period was an independent contractor and not an agent or servant of owner and owner was not liable for alleged negligence of subcontractor resulting in injury to general contractor employee who fell through hole in roof. Bruemmer v. Clark Equipment Co., 341 F.2d 23 (7th Cir. 1965).

If facts establish relationship of principal and agent, intention of parties is immaterial, and character of relation is not affected by agreement between parties that agency does not exist or that some other relation does exist. King v. Earley, 274 Ala. 116, 145 So. 2d 831 (1962).

Governing test in determining whether person is employee or independent contractor is whether employer had right to control conduct of person doing work. Meek v. Brooks, 237 Ark. 717, 375 S.W.2d 671 (1964).

In determining whether one is an employee or an independent contractor, the Workmen Compensation Act is to be given liberal construction in favor of the workman, and any doubt is to be resolved in favor of his status as an employee rather than as independent contractor. Ark.Stats. § 81"1301 et seq. Hollingsworth & Frazier v. Barnett, 226 Ark. 54, 287 S.W.2d 888 (1956).

In compensation proceeding by carpenter injured while working on houses in subdivision, against individual under whose supervision he performed services and against owner of subdivision, evidence supported commission findings that individual under whom claimant performed services was merely foreman for subdivision owner who retained and exercised right of control and supervision over work so that owner and claimant were in relationship of master and servant and not independent contractor. West v. Smith, 225 Ark. 365, 282 S.W.2d 597 (1955).

In determining whether injured workman was employee or independent contractor, Workmen Compensation Act must be liberally construed in workman favor, and any doubt must be resolved in favor of his status as employee Acts 1939, Act 319. Parker Stave Co. v. Hines, 209 Ark. 438, 190 S.W.2d 620 (1945).

Unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders; the hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order. Cal. Code Regs. tit. 8, § 11010 et seq. Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1, 83 Cal. Comp. Cas. (MB) 817, 27 Wage & Hour Cas. 2d (BNA) 1271, 168 Lab. Cas. (CCH) P 61859 (Cal. 2018).

Most important factor of agency or employee relationship, as distinguished from that of independent contractor, is right to control manner and means of accomplishing result desired. Housewright v. Pacific Far East Line, Inc., 229 Cal. App. 2d 259, 40 Cal. Rptr. 208 (1st Dist. 1964).

Generally speaking, whether a person is an independent contractor or an agent is determined by the same rules as those applicable in determining whether he is an independent contractor or an employee. Rogers v. Whitson, 228 Cal. App. 2d 662, 39 Cal. Rptr. 849 (1st Dist. 1964).

Where mill operators did not control logger work methods but only furnished tractor and paid for timber cut, logger was independent contractor, whose knowledge could not be imputed to mill operators. West Ann.Labor Code, § 3353. Sills v. Siller, 218 Cal. App. 2d 735, 32 Cal. Rptr. 621 (3d Dist. 1963).

No substantial evidence would support conclusion or inference of negligence, on part of manufacturer and assembler of school bus, causing accident, approximately six years after sale of bus, when drive shaft separated and damaged air line operating air brake system, causing brake failure. West Ann.Vehicle Code, §§ 26300, 26306, 26450, 26451. Ulwelling v. Crown Coach Corp., 206 Cal. App. 2d 96, 23 Cal. Rptr. 631 (2d Dist. 1962).

The fact that a franchisor establishes mandatory operating standards to ensure uniformity and quality among its franchises does not amount to day-to-day supervisory control over the franchisee, as would support a finding of an agency relationship. Ga. Code Ann. § 10-6-1. New Star Realty, Inc. v. Jungang PRI USA, LLC, 816 S.E.2d 501 (Ga. Ct. App. 2018).

When a person employing may prescribe what shall be done, but not how it is to be done or who is to do it, the person so employed is a contractor and not a servant; and fact that work is to be done under direction and to satisfaction of certain persons representing employer does not render the person who contracted to do the work a servant. Nash v. Meguschar, 228 Ind. 216, 91 N.E.2d 361 (1950).

Generally, persons occupying status of independent contractors are not included within terms employee, workmen or others of similar import, as used in compensation acts, in absence of any provision requiring such inclusion. Crane v. Pangere & Logan, 121 Ind. App. 97, 95 N.E.2d 216 (1950).

Resort must be had to common law for meaning of term independent contractor in Workmen Compensation Act not defining such term. I.C.A. § 85.61, subd. 3, par. c. Taylor v. Horning, 240 Iowa 888, 38 N.W.2d 105 (1949).

Where subcontractor did not intend to apply payments to any particular items on open account, supplier properly imputed payment to oldest items, which were for materials not used by subcontractor on prime contractor project, and payments should not have been deducted from judgment in solido against subcontractor, prime contractor and surety on theory that they were applicable to items for materials subsequently purchased and used in prime contractor project. LSA"C.C. art. 2166. Levingston Supply Co. v. Basso, 164 So. 2d 141 (La. Ct. App. 1st Cir. 1964).

In action for injuries sustained by plaintiff when automobile in which he was passenger skidded into collision with oncoming truck while endeavoring to avoid hitting vehicle which defendant had turned into highway ahead of automobile after allegedly ignoring stop sign at intersection, evidence sustained verdict for plaintiff. Garrison v. Ryno, 328 S.W.2d 557 (Mo. 1959).

An independent contractor is person contracting with another to do something for him, but not controlled nor subject to right of control, by such other with respect to contractor physical conduct in performance of undertaking. Hartwig-Dischinger Realty Co. v. Unemployment Compensation Com'n, 350 Mo. 690, 168 S.W.2d 78 (1943).

An independent contractor is a person contracting to do something for another but not controlled nor subject to right of control by employer as to contractor physical conduct in performance of undertaking. Bass v. Kansas City Journal Post Co., 347 Mo. 681, 148 S.W.2d 548 (1941).

Where sheet metal company employees installed fireplace heater, the insulated flue pipe and metal casing around flue pipe and no employee of contractor engaged by owner to install heater participated in or was present during installation, sheet metal company legal status with respect to installation was that of independent subcontractor. Listerman v. Day & Night Plumbing & Heating Service, Inc., 384 S.W.2d 111 (Mo. Ct. App. 1964).

Where general contractor was charged with control over work to see that it was done according to plans furnished by architects, but he had no control over excavating contractor employees, their payment, or method of excavating, fact that general contractor exercised certain measure of control did not remove excavating subcontractor from his status as independent contractor and make him general contractor agent so as to render general contractor liable for alleged negligence in excavating causing fall of telephone cables. Southwestern Bell Tel. Co. v. Rawlings Mfg. Co., 359 S.W.2d 393 (Mo. Ct. App. 1962).

On issue as to manufacturer liability for compensation for death of workman who had been requested by truck loader employee to assist in loading of trailers with manufacturer products, evidence sustained finding that loader was an independent contractor and that decedent had thus not been an employee of manufacturer. 1941 Comp. § 57-901 et seq. Nelson v. Eidal Trailer Co., 58 N.M. 314, 270 P.2d 720 (1954).

An "independent contractor" is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. Restatement (Second) of Agency § 2(3). Talbott v. Roswell Hosp. Corp., 2005-NMCA-109, 118 P.3d 194 (N.M. Ct. App. 2005).

No employment contract existed between designer and supplier which contracted with buyer of designer products to furnish materials and place of work for designer, and supplier was not a third party beneficiary. Arkin v. Fogarty, 20 A.D.2d 701, 247 N.Y.S.2d 234 (1st Dep't 1964).

If employer retains control of or right to control mode and manner of doing work contracted, relationship is that of principal and agent or master and servant, but if employer is interested merely in ultimate result to be accomplished, relationship is that of employer and independent contractor. Mularski v. Brzuchalski, 117 Ohio App. 480, 24 Ohio Op. 2d 268, 192 N.E.2d 669 (6th Dist. Lucas County 1961).

An independent contractor is one who is engaged to perform a certain service for another, according to his own manner and method, free from control and direction of his employer in all matters connected with the performance of the service, except as to result or product of the work. Smith Bros. Road Const. Co. v. Palmer, 1964 OK 26, 389 P.2d 495 (Okla. 1964).

Where pulpwood dealer obtained loans from paper company to purchase tracts of timber and agreed to sell company pulpwood for certain amount a cord, and dealer contracted with producer to cut and haul wood for commission to be paid by dealer, and company rented truck to producer to use in the work, and producer paid for gasoline and oil and wages of laborers, producer was not an employee of the company within meaning of the compensation law, but was an independent contractor. Code 1942, § 7035"2(b). Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948).

In determining whether relationship is that of master and servant or contractee and independent contractor, each case must be determined on its own facts and all features of the relationship are to be considered. Steen v. Potts, 75 S.D. 184, 61 N.W.2d 825 (1953).

The principal test for determining whether a person is an independent contractor or an employee is the right of the person employed to control the progress of the work except as to final results. McCarthy v. City of Murdo, 68 S.D. 12, 297 N.W. 790 (1941).

The mere placing of terms such as agent or independent contractor in contract does not make them such in law, but surrounding facts and circumstances determine the relationship. U.S. v. Boyd, 211 Tenn. 139, 363 S.W.2d 193 (1962).

There is no uniform rule by which an independent contractor and an agent may be differentiated. Sodexho Management, Inc. v. Johnson, 174 S.W.3d 174 (Tenn. Ct. App. 2004), reh'g denied, (Nov. 24, 2004) and appeal denied, (May 2, 2005).

Absent proof of the right to control the means and details of the work performed, an agency relationship is not shown and only an independent contractor relationship is established. Coleman v. Klöckner & Co. AG, 180 S.W.3d 577 (Tex. App. Houston 14th Dist. 2005), reh'g overruled, (Nov. 17, 2005).

An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other right to control with respect to his physical conduct in the performance of the undertaking. Johnson v. Claiborne, 328 S.W.2d 215 (Tex. Civ. App. Eastland 1959).

If employer will is represented only by a desired result, indication is of independent contractor, whereas if employer exercises control over means of accomplishing result, the indication is toward agent or servant relationship. Thiokol Chemical Corp. v. Peterson, 15 Utah 2d 355, 393 P.2d 391 (1964).

In determining question of whether a person is an agent or an independent contractor, most important single indicium is who has retained right to control details of work. Boehck Const. Equipment Corp. v. Voigt, 17 Wis. 2d 62, 115 N.W.2d 627 (1962).

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