



## Worker's Compensation - Worker Classification

### Is a Worker an "Employee" or an "Independent Contractor"?

Employers are required by law to correctly classify each worker as either an "employee" or "independent contractor" for purposes of the employer's obligations under the law for worker's compensation insurance.

The worker's compensation insurance law uses a definition of "employee" (with exceptions) to separate those individuals (workers) whose employer is obligated to provide worker's compensation benefits (employees) from those whose employer is not obligated to provide worker's compensation benefits (independent contractors).

The Wisconsin Worker's Compensation Act (Act) defines an employee as "every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees" but not including (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer unless the employer elects to cover them."

It is important that you carefully read the definition of "employee" and the exceptions in the worker's compensation law: Wis. Stats. 102.07(4) (a) and 102.07(8).

### Steps to Classify a Worker

If you are an employer or a worker and want to determine how to properly classify a worker as either an employee or an independent contractor for worker's compensation insurance, continue to the worker classification test to begin the process:

**Begin the Process**

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## Definitions

### Any Contract of Hire

A contract of hire means that the person performs services for which he or she is compensated. Compensation is something of value and may be cash or in-kind.

### Domestic Servant

Although neither the statutes nor case law provide a definition of "domestic servant" as it is used in s. 102.07(4) of the Act, the department has consistently ruled that persons hired in a private home to perform general household services such as nanny, baby-sitting, cooking, cleaning, laundering, gardening, yard and maintenance work and other duties commonly associated with the meaning of domestic servant, meet the definition of domestic servant intended by the Act.

### Trade, business, profession or occupation of the employer

*Cornelius v. Industrial Commission*, 242 Wis. 183, 185 (1943) defines a trade or business as an occupation or employment habitually engaged in for livelihood or gain. If a person's employment is in the trade, business, profession or occupation of the employer, he or she is an employee, no matter how casual or isolated the employer's trade, business, profession or occupation may be. For example, typically a home-owner who hires someone to mow his or her lawn is not an employer subject to the Act because being a home-owner is not associated with a trade, business, profession or occupation.



## Worker's Compensation - Worker Classification

Nearly all private and public workers in Wisconsin are employees covered under the Act, including employees who are family members (except for farmers in some cases), minors, part-time employees and corporate officers.

The employer must carry worker's compensation insurance if it:

1. Usually employs three or more persons full-time or part-time. This employer needs insurance immediately upon employing a third person.
2. Has one or more full-time or part-time employees and has paid gross combined wages of \$500 or more in any calendar quarter for work done in Wisconsin.

This employer must have insurance by the 10th day of the first month of the next calendar quarter. (There are four calendar quarters in a calendar year; the 1st quarter is January through March, the 2nd quarter is April through June, the 3rd quarter is July through September; and, the 4th quarter is October through December.)

3. Is a farm (farmer) and employs 6 or more employees (at one or more locations) on the same day for 20 days (consecutive or non-consecutive) during a calendar year. A calendar year is January through December.

This farmer must have insurance within 10 days after the 20th day of employment. Some relatives of the farmer are not counted towards the 6 employees, but will be covered under a policy if one is purchased.

There are a few classes of workers who are covered by federal laws and are not covered by the Act.

- Employees of the federal government (such as postal workers, employees at a veterans administration hospital, or members of the armed forces) are covered by federal laws.
- People who work on interstate railroads are covered by the Federal Employers Liability Act.
- Seamen on navigable waters are covered by the Merchant Marine Act of 1920,
- People loading and unloading vessels are covered by the Longshoremen's and Harbor Worker's Compensation Act.

## Employee Exceptions

The only employee exceptions to the Act's insurance requirement are:

1. Any person whose employment is not in the trade, business, profession or occupation of the employer, also known as an independent contractor;
2. Domestic servants;
3. Some farm employees;
4. Volunteers, including volunteers of non-profit organizations that receive money or other things of value totaling not more than \$10.00 per week;
5. Religious sect members that qualify and are certified for an exemption; and
6. Employees of Native American tribal enterprises (including casinos), unless the tribe elects to waive its sovereign immunity and voluntarily become subject to the Act.

Virtually all other workers and employers are subject to the Act.

Select the appropriate employee exception category to continue to worker classification tests:

**Independent Contractor**

**Domestic Servant**

**Farm Employees**

**Volunteers**

**Religious Sect Members**

**Native American Tribal Enterprises**



## Independent Contractor Determination for Worker's Compensation Purposes

### Independent Contractor - The 9 Part Test

Under s. 102.07(8), Wis. Stats., a person is **required to meet a nine-part test** before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so.

To be considered an independent contractor and not an employee, an individual must meet and maintain **all nine** of the following conditions:

1. Maintain a separate business
2. Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (See note below)
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

**Note:** When requesting a Federal Employer Identification Number (FEIN) from the IRS, you must inform the IRS that you are **required by Wisconsin Worker's Compensation law** to obtain a FEIN. A *social security number cannot be substituted for a FEIN* and does not meet the legal burden of s. 102.07(8).

### Definition of an Independent Contractor

Independent Contractor Definition Under s. 102.07(8), Wis. Stats.