

FLSA 2015-1 general concepts (taken from the main document)

In order to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the **multi-factorial** “economic realities” test, which focuses on **whether the worker is economically dependent** on the employer or in business for him or herself.

All of the factors must be considered in each case, and no one factor (particularly the control factor) is determinative of whether a worker is an employee

Ultimately, the goal is not simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor). **The factors are a guide** to make this ultimate determination of economic dependence or independence.³

The Supreme Court and Circuit Courts of Appeals have developed a multi-factor “economic realities” test to determine whether a worker is an employee or an independent contractor under the FLSA. The **factors typically include**: (A) the extent to which the work performed is an integral part of the employer’s business; (B) the worker’s opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.⁴

[\(End excerpts from FLSA 2015-1\)](#)

BOB NOTE: I think the simple check lists in all three bills that define “independent contractor” will serve as useful initial guides for contractors and the businesses with which they might subcontract. And because most items on those lists reflect the rules of FLSA 2015-1, the items also can be evaluated by the parties by referring to the significant federal case law available. By linking the check lists to the case law, as Vince Illuzzi suggested, perhaps the two-step approach will keep a lot of disputes out of Vermont courts.

A major task we face is deciding if the elimination of the “nature of the business” factor that is so objectionable to some will leave enough strong “factors” of the “economic realities” test to satisfy the FLSA.

H.223 definition of Independent Contractor (compared to FLSA 2015-1)

(BOB NOTE: The items in yellow below are lifted from the main 2015-1 document to illustrate the degree to which H.223 conforms to the FLSA standards.)

21 V.S.A.

S 601(31)(A) Independent contractor means a person that is economically independent of the person's employing unit under the totality of the circumstances based on an assessment of the following circumstances:

- (i) whether the person is free from the direction and control of the employing unit with respect to the means and manner of the services performed, both under the person's contract of service and in fact;
(F) the degree of control exercised or retained by the employer.⁴
- (ii) whether the person operates a separate and distinct business from that of the employing unit and the extent to which the person is performing work that is not a substantial, essential and recurring part of the core services, functions or activities of the employing unit.
(A) the extent to which the work performed is an integral part of the employer's business;
(BOB NOTE: the "nature of the business" court cases cited in FLSA 2015-1 do not say whether any other issues were involved. ALSO, in the following example from the "substantial investment in tools" section of FLSA 2015-1, the "nature of the business" is deemed not dispositive because other factors so clearly indicate independent status.)
Example: A worker **providing cleaning services for a cleaning company** is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company. The worker's investment in cleaning supplies does little to further a business beyond that particular job.
A worker **providing cleaning services** receives referrals and **sometimes works for a local cleaning company**. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. These types of investments may be indicative of an independent contractor.
- (iii) Whether the person's contract of service provides for the performance of specific services for specified amounts of compensation and does not provide that the services will be performed on an ongoing or indefinite basis, and whether the person may realize a profit or suffer a loss under the contract of service;
(E) the permanency of the relationship;
(B) the worker's opportunity for profit or loss depending on his or her managerial skill;)
- (iv) The extent of a person's investment in the resources, assets or equipment necessary to perform the services contracted for; whether the person possesses specialized skills or knowledge necessary to perform the services contracted for; and whether the person has continuing and recurring business liabilities and obligations;
(C) the extent of the relative investments of the employer and the worker;
(D) whether the work performed requires special skills and initiative;
(B) the worker's opportunity for profit or loss depending on his or her managerial skill;)

(BOB NOTE: see "knowledge" above.)

- (v) Whether the person holds itself out as in business for itself and offers its services to the general public;
- (vi) Whether the person is not treated as an employee for purposes of income or employment taxation with regard to the work performed and either:
 - (I) holds or has applied for a federal employer identification number; or
 - (II) has filed business or self-employment tax returns with the federal Internal Revenue Service within the past year or will file business or self-employment tax returns with the federal Internal Revenue Service for the current year.

(B) In considering whether a person is economically independent pursuant to subdivision (A) of this subdivision (31), no single factor in and of itself shall be dispositive.

(C) If multiple persons are performing the same work on a project or jobsite, the determination of whether the person is economically independent of the employing unit shall take into account the relationship between the specific services performed by the person and the circumstances of the project or job in relation to which the person is providing services.

(D) an independent contractor shall purchase workers' compensation coverage for its employees as provided in this chapter.

(BOB NOTE: The items in yellow below are lifted from the main 2015-1 document to illustrate the degree to which H.323 conforms to the FLSA standards.)

H.323 definition of Independent Contractor

(compared to FLSA 2015-1)

21 V.S.A.

S 601(31)(A) Independent contractor means a person that is economically independent of the person's employing unit under the totality of the circumstances based on an assessment of the following circumstances:

- (i) whether the person is free from the direction and control of the employing unit with respect to the means and manner of the services performed, both under the person's contract of service and in fact;
(F) the degree of control exercised or retained by the employer.⁴
- (ii) whether the person performs work that is an integral part of the employing unit's business;
- (iii) **(A) the extent to which the work performed is an integral part of the employer's business; (BOB NOTE: the "nature of the business" court cases cited in FLSA 2015-1 do not say whether any other issues were involved. ALSO, in the following example from the "substantial investment in tools" section of FLSA 2015-1, the "nature of the business" is deemed not dispositive because other factors so clearly indicate independent status.)**

Example: A worker **providing cleaning services for a cleaning company** is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company. The worker's investment in cleaning supplies does little to further a business beyond that particular job.

A worker **providing cleaning services** receives referrals and **sometimes works for a local cleaning company**. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. These types of investments may be indicative of an independent contractor.

- (iv) whether the person's managerial skills affect its opportunity for profit or loss;
(B) the worker's opportunity for profit or loss depending on his or her managerial skill;
- (iv) the nature and extent of the relative investments by the person and the employing unit in the resources, assets or equipment necessary to perform the services contracted for;
(C) the extent of the relative investments of the employer and the worker;
- (v) whether the work performed requires the person to exercise specialized business skills, Judgement and initiative;
(D) whether the work performed requires special skills and initiative;
- (vi) whether the person holds itself out as in business for itself and competes to offer its services to the general public in the open market; and
(BOB NOTE: this indicator of independence is not mentioned in FLSA 2015-1)
- (vii) the degree to which the relationship between the person and the employing unit is permanent or indefinite.
(E) the permanency of the relationship;

(B) In considering whether a person is economically independent pursuant to subdivision (A) of this subdivision (31), no single factor in and of itself shall be dispositive.

(C) If multiple persons are performing the same work on a project or jobsite, the determination of whether the person is economically independent of the employing unit shall take into account the relationship between the specific services performed by the person and the circumstances of the project or job in relation to which the person is providing services.

(D) an independent contractor shall purchase workers' compensation coverage for its employees as provided in this chapter.

H.119 definition of Independent Contractor

(compared to FLSA 2015-1)

(BOB NOTE: The items in yellow below are lifted from the main 2015-1 document to illustrate the degree to which H.119 conforms to the FLSA standards.)

21 V.S.A. S 601(14)(I)

(I) An independent contractor if it can be demonstrated that the independent contractor is free from the essential direction and control of the employing unit, both under the individual's contract and in fact, and the employing unit proves that the individual meets all of the criteria in subdivision (i) and at least two of the criteria in subdivision (ii) of this subdivision (14)(I).

(i) In order for an individual to be an independent contractor, **all of the following criteria** must be satisfied:

- (I) The individual has the essential right to control the means and progress of the work except as to the final results.
(F) the degree of control exercised or retained by the employer.⁴
- (II) The individual is customarily engaged in an independently established trade, occupation profession or business.
(D) whether the work performed requires special skills and initiative;
(E) the permanency of the relationship;
- (III) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by him or her to complete the work.
(C) the extent of the relative investments of the employer and the worker;
(D) whether the work performed requires special skills and initiative; **(BOB NOTE: see "knowledge" above.)**

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- (IV) The individual has the opportunity for profit and loss as a result of the service being performed for the employing unit.
(B) the worker's opportunity for profit or loss depending on his or her managerial skill;
 - (V) The individual hires and pays his or her employees, if any, and supervises the details of the employees' work. **(BOB NOTE: this indicator of independence is not mentioned in FLSA 2015-1)**
 - (VI) The individual makes his or services available to the general public and is able to accept work for entities other than the employing unit, whether or not he or she chooses to do so.
(E) the permanency of the relationship;
- (ii) In order for an individual to be an independent contractor, **at least two of the following criteria** must be met:
- (I) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
(B) the worker's opportunity for profit or loss depending on his or her managerial skill;
 - (II) The parties have a written contract that defines the relationship and gives the individual contractual rights in the event the contract is terminated by the employing unit prior to completion of the work.

Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status.

- (III) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by him or her.

(B) the worker's opportunity for profit or loss depending on his or her managerial skill;

- (IV) The work is outside the usual course of business of the employing unit for which the service is performed.

(A) the extent to which the work performed is an integral part of the employer's business; Courts have found the "integral" factor to be compelling. **(BOB NOTE: the court cases cited do not say whether any other issues were involved. ALSO, in the following example from the "substantial investment in tools" section, the "nature of the business" is deemed not dispositive because other factors so clearly indicate independent status.)**

Example: A worker **providing cleaning services for a cleaning company** is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company. The worker's investment in cleaning supplies does little to further a business beyond that particular job.

A worker **providing cleaning services** receives referrals and **sometimes works for a local cleaning company**. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. These types of investments may be indicative of an independent contractor.

- (V) The individual has elected to file taxes as an independent contractor with the federal Internal Revenue Service.

(BOB NOTE: this indicator is not mentioned in FLSA 2015-1)

