



# Coffee & Conversation: PUA Update

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## Section 2102(a)(3)(A)(ii)(I)(aa)-(kk)

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- (jj) – The individual’s place of employment is closed as a direct result of the COVID-19 public health emergency.
  - If a **business is shut down due to an emergency declaration** or **due to necessary social distancing protocols**, the resulting unemployment of affected individuals would be considered a direct result of COVID-19. While a government-mandated closure is not necessary to satisfy this category, the claimant must be able to self-certify that the business was closed “as a direct result of the COVID-19 public health emergency.”

## Section 2102(a)(3)(A)(ii)(I)(aa)-(kk)

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- If a business has multiple parts and one or some of those parts is shut down due to restrictions imposed by COVID-19, affected staff from the parts of the business that shut down may be eligible for PUA. For example, a business may include both a restaurant and a brewery. If the individual's place of employment is the restaurant and the restaurant is shut down because of the COVID-19 pandemic, even if the brewery continues to operate, the individual who was employed in the restaurant may be eligible for PUA. **An individual who is working reduced hours while his or her place of employment continues to operate does not satisfy the conditions to self-certify under item (jj).**

## Section 2102(a)(3)(A)(ii)(I)(aa)-(kk)

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- (kk) - Self-employed individuals (including independent contractors and gig workers) who experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency, even absent a suspension of services, may self-certify under item (kk).

# Furloughs

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- Mandatory temporary leave of absence from which the employee is expected to return to work or be restored from a reduced work schedule.
- Employers may continue benefits coverage.
- May or may not be eligible for unemployment benefits.

## Reduction in Force (RIF)

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- Elimination of a specific position with no intention of replacing and results in a permanent cut in headcount.
- Layoff may turn into a RIF when a decision is made not to recall employees.

## Layoffs

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- Considered a separation from employment due to lack of work available.
- Employers may recall employees.
- To encourage employees to be available for recall, employers may offer continued benefits for a specific time if the benefit plan allows.
- Eligible for unemployment benefits.

# What Is an Independent Contractor?



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# What Is an Independent Contractor?

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Generally, an independent contractor is a worker who:

- Offers their services to the public for a fee.
- Is not economically dependent on any single company.
- Is **not** an employee.

## What Is an Independent Contractor? (cont'd)

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An independent contractor typically:

- Charges a fee for their services.
- Is engaged only for the term required to perform a specified service or task.
- Retains control over the method and manner of work.
- Retains economic independence and is free to offer their services to more than one company.
- Is responsible for paying their own income, social security, and Medicare taxes.
- Is not covered by most federal, state, or local laws designed to protect employees.

## What Is an Independent Contractor? (cont'd)

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An independent contractor typically does not:

- Receive company-sponsored benefits, such as paid vacation, health insurance, or retirement benefits.
- Perform the same work as the company's employees.
- Have the “indicia” of an employee, such as company uniforms, name badges, or business cards.

## Independent Contractor vs. Employee

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An employee, by comparison, is subject to significant oversight and control by the company and:

- Is paid wages and receives company-sponsored benefits.
- Is employed for a continuous period and performs whatever tasks the company requires.
- Generally pays their income, social security, and Medicare taxes through the amounts their employer is obligated to withhold from their wages.
- Is economically dependent on the employer.
- Is protected by applicable federal, state, and local employment laws.

# Tests for Independent Contractor Status



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# Classification: Overview

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- Do not rely on generalizations or labels to determine employee or independent contractor status.
- Simply referring to a worker as an independent contractor, **even if they agree to that designation**, is not enough.
- Classification depends on:
  - The facts of each case.
  - Application of the appropriate independent contractor tests.
  - Differences in how courts and government agencies interpret those tests.

# Tests for Independent Contractor Status

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- There is no single test to determine independent contractor status for all purposes.
- The various tests include:
  - The Economic Realities Test.
  - The Control Test.
  - Common law and other federal law tests.
  - State law tests.
- **Familiarize yourself with the different federal and state tests that may apply.**

# Economic Realities Test

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- Used to assess independent contractor status under the Fair Labor Standards Act (FLSA).
- Courts look at the totality of the parties' relationship and use a balancing test to evaluate various factors, including:
  - The degree of control the company has over the worker.
  - The relative investment in facilities.
  - The worker's opportunity for profit and loss.
  - The permanency of the parties' relationship.
  - The skill required.
  - Whether the worker's services are integral to the company's business.



# The Control Test: The IRS Standard

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- Used to determine whether a worker is an employee for federal tax purposes.
- Analyzes three aspects of the worker's control or independence:
  - Behavioral control.
  - Financial control.
  - The type of relationship.

# The Common Law Darden Test

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Commonly used in the context of Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Affordable Care Act (ACA), and the Employee Retirement Income Security Act (ERISA).

## The Common Law Darden Test (cont'd)

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The test considers the following factors:

- Skill required.
- Source of supplies and tools.
- Location of the work.
- Duration of the relationship between the parties.
- The company's right to assign additional projects to the worker.
- Extent of the worker's discretion over when and how long to work.
- Method of payment.
- The worker's role in hiring and paying assistants.
- Regular business of the company and whether the work performed is part of that business.
- The company's status as "in business."

# The Common Law 20-Factor Test

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- Previously used by the IRS, this test is commonly used by state agencies making independent contractor determinations.
- The 20 factors are:
  - Instructions.
  - Training.
  - Integration with the company's operations.
  - Services rendered personally.
  - Hiring, supervising, and paying helpers.
  - Continuing relationship.
  - Set hours of work.
  - Full time or exclusive work.

## The Common Law 20-Factor Test (cont'd)

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- Location where services are performed.
- Specifying the order or sequence of work.
- Oral or written reports.
- Payments.
- Business or travel expenses.
- Tools and materials.
- Investment.
- Profit and loss.
- Number of companies with whom the independent contractor works.
- Advertising services to the general public.
- Right to fire.
- Right to quit.

## State Law Tests (ABC Test)

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- State independent contractor tests can impose a more narrow definition than the federal equivalent.
- The most common state test is the ABC Test.
- The ABC Test presumes an employment relationship unless the company shows that:
  - (A) The worker has been and will continue to be free from control or direction over the performance of their work.
  - (B) The work is either outside of the normal course of business for the company requesting the work or performed outside of any of that company's places of business.
  - (C) The worker is customarily engaged in an independently established trade, occupation, profession, or business.

## Special IRS Classifications

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The IRS has determined that three categories of workers are classified as independent contractors for all federal tax purposes:

- Direct sellers.
- Licensed real estate agents.
- Companion sitters.

# Consequences of Misclassification



# Consequences of Misclassification

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The penalties for misclassification can be serious. If a company misclassifies an employee as an independent contractor, it must ensure compliance going forward and may be liable for:

- Back wages and overtime pay.
- Employee benefits, including stock options, retirement benefits, and health plan coverage (or the value of those benefits).
- Disability payments and workers' compensation.
- Tax and insurance obligations.
- Liquidated damages.
- Civil monetary penalties.

# Employment Law Compliance

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Improperly classifying an employee as an independent contractor could lead to claims for:

- Unpaid overtime compensation and reimbursement of work-related expenses.
- Reasonable accommodation and return to work benefits under the ADA and its state equivalents.
- Leaves of absence under the FMLA and its state equivalents.
- Plant closure and mass layoff notice and penalties under WARN and its state equivalents.
- Discrimination under Title VII, ADEA, and other federal, state, and local anti-discrimination laws.

# Tax and Insurance Obligations

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The tax and insurance liabilities for misclassification are significant and can include:

- Years of unpaid federal, state, and local income tax withholdings.
- Social security and Medicare contributions.
- Workers' compensation and unemployment insurance premiums, including federal unemployment taxes.
- Interest and penalties.

# Targets of Enforcement and Litigation

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Industries particularly susceptible to regulatory enforcement for independent contractor misclassification include:

- Construction.
- Transportation and trucking.
- Cable companies.
- Janitorial services.
- Landscaping and nurseries.
- Security services.
- Nursing.
- Child care.
- Home health care.
- Internet services.
- Restaurant and catering services.
- Staffing services.
- Hotels and motels.
- Oil and gas.



Questions?

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Thanks for attending.



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