

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 79

TO: R. F. Martin, Director

FROM: R. B. Billings, Senior Attorney

RE: Interpretation of Section 96-8 (g) (1) of the Employment Security Law of North Carolina Since January 1, 1949 – Definition of Employment

In discussing the changes enacted by the General Assembly during this year with respect to the definition of “employment” as contained in the Act, it may be well to recall to our minds the changes with respect to the definition of “employment” as heretofore made by the General Assembly.

Since the enactment of the law in 1936, “employment” has been defined as service performed for remuneration or under any contract of hire, written or oral, express or implied. Until 1945, there was a provision in the law defining “employing unit”, and contained in Section 96-8 (e), which provided that any employing unit which contracted with or had under it any contractor or subcontractor for any employment which was part of its usual trade or business would be deemed to employ each individual in the employ of such contractor or subcontractor for each day during which the individual was engaged in performing such employment unless the employing unit as well as the contractor or subcontractor were employers by reason of Section 96-8 (f) or had become an employer by voluntary election. It was further provided that the employing unit who paid the contributions on the wages of individuals in the employ of the contractor or subcontractor was permitted to recover the same from the contractor or subcontractor.

In addition to the section referred to, the law contained a provision whereby all services performed by an individual for remuneration were deemed to be employment subject to the chapter unless it was shown to the satisfaction of the Commission that the services met certain conditions set forth in what we generally called the “ABC” provisions of the Act. In order for the services to be excluded from employment, the tests set forth in such section required (A) the individual performing the services must be free from control and direction over the performance of such services both under the contract of service and in fact; and (B) such services must be performed outside the usual course of the business for which the services are performed or that the services be performed outside of all the places of business of the enterprise for which the service is performed; and (C) the individual performing the services must be customarily engaged in an independently established trade, occupation, profession, or business.

On March 13, 1945, Section 96-3 (e), wherein an employing unit was deemed to employ individuals performing services in the course of its business for a contractor or subcontractor, was deleted from the law, and Section 96-8(f)(8) was inserted into the law at the time of the repeal of the former provision. This section provided when any employing unit contracted with a contractor or subcontractor for employment which was a part of the usual business of the principal employing unit, that each of the parties; that is, the employing unit or contractor, or subcontractor, became employers under the law if the employing unit would be an employer under Section 96-8 (f) (1) if it were deemed to employ those individuals in the employ of the contractor or subcontractor.

On March 18, 1947, this provision was repealed by act of the General Assembly, leaving in the law as a basis of liability of employers the definition of "employment" as contained in 96-8(g)(1) referred to hereinbefore, and the "ABC" provisions of the law. The contractor's primary purpose of preventing employers from breaking down their businesses into small units and thereby escaping liability under the law. The later contractor provision under 96-8 (f) (8) shifted the burden to a large extent from the employing unit to the party or individual who entered into the contract for employment which was a part of the usual course of the business of the principal.

These provisions in the law, together with the "ABC" provisions, extended coverage under the law, particularly in view of the fact that the Supreme Court of North Carolina is construing the Act recognized the definitions contained in the law itself as the standards to be applied in any given case in determining whether an employer was subject to its provisions. The Court further stated in the opinion in passing upon the status of certain commission insurance salesmen (*U.C.C. v. Jefferson Standard Life Insurance Company*, 215 N.C. 479) that employment as defined in the Act did not mean the relationship existing at common law known as master and servant and held the Act extended coverage beyond such relationship and must be construed liberally, keeping in mind the purposes for which the law was passed; that is, to alleviate the evils of unemployment and to pay benefits to individuals out of work through no fault of their own. In applying the "ABC" tests in the case mentioned, the Court ruled in effect that control as referred to in the "A" test did not have to be detail control of the manner in which services were performed, but that general control by the employer was sufficient, and that if general control existed in a given case, the "A" test was not met by the employer. This same doctrine was followed by other jurisdictions and in numerous instances the rule laid down in the North Carolina case was followed.

The 1949 General Assembly repealed the "ABC" provisions of the Act and placed the definition of employment squarely on the basis of the common law doctrine of master and servant and specifically excluded from coverage under the Act the relationship known at common law as independent contractor. The new amendment also contains a provision that an officer of a corporation is considered an employee under the Act.

This does not mean an officer is an employee per se, but that he may be an employee if he is performing services for the corporation and is receiving remuneration for such services.

The repeal of the “ABC” provisions of the Act and defining employment relationship under the law as that existing under the common law known as master and servant will not automatically relieve the Commission of all difficulties and troubles in its administration of the law. It is likely that as many close cases will arise in the future under the new amendment as have arisen in the past under the old law. The recent amendment changes the employment definition in the law, effective January 1, 1949. Any services performed prior to January 1, 1949, are within the coverage of the Act if such services are within the definition of “employment” as contained in the Act prior to January 1, 1949. The change in the law reads as follows:

“‘Employment’ means service performed prior to January 1, 1949, which was employment as defined in this Chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term ‘employee’ includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.”

It is to be noted the definition includes in the term “employee” an officer of a corporation. This language is similar to that contained in the Federal Unemployment Tax Act, and therefore, should be interpreted in accordance with federal rulings pertaining to the status of officers of corporations. Early rulings of the Bureau of Internal Revenue held that corporate officers except honorary officers should be counted as employees for unemployment compensation tax purposes even though such officers received no compensation nor performed any services. This position was maintained by the Bureau until January 4, 1945, when a ruling was issued to the effect that “officers of a corporation, who as such performed no services and received no remuneration in any form, are not to be considered in their capacity as officers as employees of the corporation for employment tax purposes. Similarly, officers of a corporation, who as such perform some services of a minor or nominal nature, but without consideration or remuneration in any form and who are not entitled to remuneration, will not be considered as employees of the corporation either because

of such services or because of having the status of officers.” It was further held that corporate officers who perform services and receive remuneration are to be counted as employees. In interpreting the present amendment, we think the proper interpretation is that adopted by the Bureau of Internal Revenue with respect to the status of officers under the Federal Unemployment Tax Act. We believe the new amendment means that an officer can be an employee. If he meets the test determinative of the ordinary employment relationship, he is an employee, and the fact that he is also an officer of the corporation does not destroy his status as an employee under the law.

An individual performing services for an employing unit to be within the definition of employment under the present law must be in a relationship with such employing unit to a servant and the employing unit must be in the relationship of master. Any individual who is in the status of an independent contractor is excluded from the definition of employment under the Act. Generally speaking, a master is one who exercises personal authority over another and that other is his servant. Master has been defined as “one who stands to another in such relation that he not only controls the results of the work of the other, but also may direct the manner in which such work will be done.” Deals v. State Workmen’s Insurance Fund, Pa. Super., 200 A. 178, 180.

The distinction between servant or employee and independent contractor has been discussed by the Supreme Court of this state in the case of Haves v. Elon College, 224 N.C. 11, which was heard in the Spring of 1944. The case came before the Court under a claim for workmen’s compensation, and the question presented to the Court was whether certain electricians, including the deceased, were employees or independent contractors. The facts briefly were that the defendant contracted through one Wright with the electricians to rebuild a part of its electric line for a lump sum of \$30.00. The electricians agreed to rebuild the line and complete the job if the defendant (Elon College) would furnish a truck and two helpers. A representative of the college suggested that certain of the poles be shortened rather than trim trees to permit the running of the line. The deceased was killed when he untied certain wires in order to set a pole. The work was then temporarily stopped, and the other electricians obtained other help and completed the job. The general rule laid down by the Court in that cause with respect to whether or not an individual is an independent contractor is as follows:

“The retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.

“Conversely, when one, who exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor.

“The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.”

In the case referred to, the Court set out certain indicia to be looked for in determining whether the relationship of independent contractor existed in a given case. The elements which the Court referred to as ordinarily earmarking a contract creating the relationship of employer and independent contractor, and which should be given weight and emphasis in determining the relationship are: Is the person employed (1) engaged in an independent business, calling, or occupation; (2) to have the independent use of his special skill, knowledge, or training in the execution of the work; (3) doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) not subject to discharge because he adopts one method of doing the work rather than another; (5) not in the regular employ of the contracting party; (6) free to use such assistants as he may think proper; (7) has full control over such assistants; and (8) selects his own time.

The Court further stated that the presence of any one of the elements was not controlling; that the presence of all of them was not required to establish the relationship of independent contractor, but that these elements were to be considered along with all other circumstances in determining whether in fact there exists in the one employed that degree of independence necessary to require his classification as an independent contractor rather than an employee.

In addition to the tests enumerated by the Court in the Hayes case, “The Restatement of the Law of Agency” sets out certain other matters of fact to be considered in determining whether one acting for another is a servant or an independent contractor. These are:

1. The skill required in the particular occupation.

In applying this test where one is doing a certain act which requires a highly specialized skill and special training, it is likelier that such person would be in the status of an independent contractor than a person performing menial labor requiring no skill or training.

2. Whether the employer or the workmen supply the instrumentalities, tools, and the place of work for the person doing the work.
3. The length of time for which the person is employed.

Usually an independent contractor is a person who contracts to do a certain specified job and generally within a given time. Permanency of the relationship existing between the person performing services and the employer for whom the services are performed is evidence that the person doing the services is in the employment of the employer.

4. The method of payment, whether by the time or by the job.

Usually a person who is paid wages by the hour is an employee and a servant and not an independent contractor, whereas the payment to a person for services by the job is some evidence that such person is an independent contractor and not a servant.

5. Whether or not the work is a part of the regular business of the employer.

This factor is closely related to the factors set out in number three above, and where a person is performing work which is a part of a regular business of an employer and continually performing such service for an indeterminate and indefinite time is evidence to be considered in determining whether the relationship of master and servant exists.

6. Whether or not the parties believe they are creating the relationship of master and servant.

This factor is not of too much importance. However, it should be given some weight along with the other facts in a given case. What the intentions of the parties were at the time of entering into the arrangement should be considered along with the other facts, and particularly in close cases in order to determine whether or not the service is being performed by a servant or an independent contractor.

In determining the status of an employing unit under Section 96-8(f) (1), the above conditions or factors should be considered in reaching a determination as to whether a particular individual is not within employment under the law for the purpose of being included in the eight or more individuals performing services within twenty different weeks during the calendar year necessary to bring an employing unit within the coverage of the law. It is well to keep in mind that where an individual is an employee of an employing unit all individuals assisting in the performance of the

services by such employee are deemed to be employees of the employing unit under Section 96-8(e) of the Act. The most important factors to be considered in determining whether a person is or is not in employment under the law seem to be:

First, whether the employer has or has not retained the right of control or superintendence over the employee as to details of the manner in which the service is to be performed. In other words, has the employer not only told the individual performing the services what to do, but has he told him how to do it, or has he the right to tell him how to do it.

Second, whether the services are performed in the usual course of business of the employer and the permanency or impermanency of the relation.

Third, whether the person employed is engaged in an independent business, calling, or profession.

Fourth, whether or not the individual is in the regular employ of the contracting party.

Fifth, whether the person employed is to have the independent use of a special skill, knowledge, or training in the execution of his work.

In making a determination as to whether the relationship of master and servant exists, all of the factual conditions must be considered and a conclusion made based on all the facts and circumstances existing in the case under consideration as to whether in fact there exists in the one employed the degree of independence necessary to require his classification as independent contractor rather than employee.

Adopted as an official Interpretation by the Commission on May 24, 1949.