

Home Care Independent Contractor Classification in New Mexico

FACT SHEET | JUNE 2018

Correct classification of workers as employees is key to securing their legal protections and ensuring fair competition by law-abiding businesses. Rarely are home care workers really running an independent business, despite many job structures that purport them to be.

New Mexico Home Care Workers and Misclassification

New Mexico home care workers help to ensure older adults and people with disabilities can remain independent and living within the community. They provide valuable services and supports, often earning low wages and facing challenging working conditions.

Personal care and home care services are seldom performed by individual independent businesses, but some private home care agencies may mislabel their employees “independent contractors” and deny them basic workplace protections and benefits. In reality, home care workers perform work that is an integral part of a home care agency’s business, but do not invest capital in a business, and generally have little, if any, ability to set their duties, hours and wages, (as true independent contractors would). Agencies and other entities maintain the ability to intervene if the level of services provided does not meet expectations and they typically interact with the consumers to recover payments and set up the care or services needed.

Implications and consequences of 1099 (independent contractor) status

Being classified as an independent contractor has many consequences. If a home care worker is an independent contractor, she is considered to be running her own business and this means she:

- Is responsible for paying the employer- and employee-side of FICA and FUTA, currently 15.3% of pay, along with income tax. W2 employees, in contrast, pay only half of that rate, 7.65%. For someone making \$12.58 per hour, after FICA and FUTA alone, the hourly wage would fall to \$10.66. There are also additional state and federal administrative tax and reporting burdens placed on any worker running her own business, including payment of the gross receipts tax in New Mexico.
- Must pay estimated taxes for her business on a quarterly basis in addition to filing an annual return, and figure out individualized self-employment tax deductions and credits.
- Is not entitled to the protections of minimum wage or overtime pay, compensation for on-the-job injuries, unemployment insurance if she loses her job involuntarily, or protection against discrimination.

A 1099 form is the form that the IRS requires businesses to use to report payment for services of non-employees.

To all other workers who are regular employees, businesses must issue a W-2 form and make proper payroll withholdings for each tax year.

The home care agency's classification is not the final word

Home care workers should rarely, if ever, be classified as independent contractors. Only workers who are truly in business for themselves should be classified as independent contractors. Workers who are paid an hourly wage to provide services through an entity, such as a home care agency, should generally be classified as employees. Many federal courts have found that agencies violate wage and hour law when they misclassify home care workers as independent contractors.¹ The factors that courts consider can be found below (“How do I know if I’m misclassified?”). If an agency misclassifies a home care worker as an independent contractor, she can challenge her status and try to enforce her rights as an employee. She can also ask an agency how it plans to treat workers before applying for a job.

Questions home care workers can ask when seeking employment

Given the important consequences of being classified as an independent contractor, home care workers should find out as much as possible about classification prior to accepting employment. Workers can ask:

- Will I be classified as an employee of the agency (also known as a W2 employee) or as an independent contractor (sometimes referred to as a 1099 worker)?
- What is the hourly rate?
- Do you pay overtime and at what rate?
- Will you pay for travel time in between clients?
- How will you track my time or services?
- Will you reimburse me for supplies, mileage between consumers, or other expenses related to my job? How will you provide Personal Protective Equipment (PPE)?
- Do you provide workers’ compensation insurance and unemployment insurance?

Eligibility for workers’ compensation benefits

Workers should know their rights if they are injured on the job. Employers with three or more employees in New Mexico are required to obtain workers’ compensation insurance to cover employees’ workplace injuries and illnesses, including medical care and lost wages. The “right to control” test is used to determine whether an individual employee is eligible for workers’ compensation benefits.² Under this test, a worker is an employee when the employer has the right to control or in fact controls not only the result the worker achieves, but also the details of how the work is performed or methods the worker must use to perform the work.

Note that New Mexico workers compensation law contains an exclusion for “private domestic servants.”³ The New Mexico Center on Law and Poverty argues this exclusion is likely unconstitutional under the New Mexico constitution.⁴ This means all domestic workers should be covered by a workers’ compensation insurance policy, as long as their employer employs at least three workers. If you are denied workers’ compensation coverage under this domestic servant exclusion, please contact the New Mexico Center on Law and Poverty for assistance (see Resources section).

¹ For example, *Hughes v. Family Life Care, Inc.*, 117 F.Supp.3d 1365 (N.D. Fl. 2015); *Crouch v. Guardian Angel Nursing Inc.*, 2009 WL 3737887, No. 3:07-cv-00541 (M.D. Tenn. Nov. 4, 2009); *Edwards v. Cmty. Enters.*, 251 F. Supp. 2d 1089 (D. Conn. 2003).

² *Harger v. Structural Servs., Inc.*, 1996-NMSC-018, ¶¶ 12-15.

³ New Mexico Statutes 52-1-6.

⁴ The New Mexico Supreme Court held that the other exclusion, for farm and ranch laborers, was unconstitutional. *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029. Its rationale would also apply to “domestic servants.”

How Do I Know If I'm Misclassified?

Most workers, including home care workers, are legally employees under protective workplace laws.

Fair Labor Standards Act's (FLSA) eligibility for minimum and overtime wages

The FLSA generally guarantees the right to minimum wage and overtime for employees, not independent contractors. In a 2015 Administrator's Interpretation⁵, the Department of Labor outlined and provided examples of how to distinguish employees from independent contractors. All the factors are considered as guidance—the ultimate question is whether a worker is dependent on the agency where she works, or, conversely, whether a worker is in business for herself.

A worker is more likely an employee than an independent contractor if:

- A. **The home care services she performs are an integral part of the agency's business:** If the work performed is part of the agency's business model, it is more likely that she is an employee and not an independent contractor running a separate business. Since home care services are the essence of many private home care agencies, this factor will usually weigh in favor of employee status.
- B. **The worker has limited opportunity for profit or loss through her managerial skill:** If a home care worker performs work as assigned by an agency and does not advertise her services, or is unable to take steps to reduce her costs, negotiate a higher rate, or increase the efficiency of her services, this factor also suggests employee status.
- C. **The worker's capital investment in the home care business is relatively small as compared with the agency's:** If the agency's capital investment in overhead, office space, equipment, supplies, or materials is much greater than a worker's individual investment in any supplies needed to do the job, such as gloves and scrubs, and if the worker does not employ other workers, this factor suggests the worker is more likely an employee.
- D. **The worker's job doesn't require specialized skills or independent judgment:** Even if the worker uses some medical skills and has years of experience, this factor weighs in favor of employee status unless the worker is determining the sequence of her work or independently gathering new clients.
- E. **The agency hired the worker on a permanent or indefinite basis:** This factor may point towards employee status even if the worker only works for the agency for a period of several weeks or months. In contrast, if the worker simply gets referrals for home care clients from several agencies and chooses which ones to take, and when and where the worker is going to work, this factor could point towards independent contractor status.
- F. **The agency controls key aspects of the worker's job or has the ability to do so, even if it doesn't supervise the worker closely or on a daily basis:** If a worker is told what hours to work, where, and what duties to perform on the job, the worker is more likely an employee. However, this factor points toward independent contractor status if the worker is free to set her own hours, hire replacements, and negotiate her own wage rate with the client.

⁵ U.S. Department of Labor, Wage and Hour Division, [Administrator's Interpretation No. 2015-1](#), July 15, 2015. Although the guidance has since been removed from the website, it summarizes existing law and may be useful to advocates.

The “ABC test” and eligibility for unemployment benefits

The “ABC Test” is used to determine whether an individual is an employee eligible for unemployment benefits.⁶ It presumes that a worker providing services is an employee, but individuals are properly classified as independent contractors where the entity proves:

- (a) The individual has been and will continue to be free from control or direction over the performance of the services both under the individual’s contract of service and in fact;
- (b) The service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; **and**
- (c) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

If an agency fails to prove even a single part of the ABC test, the workers are employees.

Resources

- Contact New Mexico Direct Caregivers Coalition at 505-867-6046 or visit www.nmdcc.org.
- Contact the National Employment Law Project at cconnolly@nelp.org or visit www.nelp.org.
- For assistance with workers’ compensation coverage, contact the New Mexico Center on Law and Poverty at 505-255-2840.

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⁶ New Mexico Statutes 51-1-42(F)(5).