

# Independent Contractors: South Carolina State Q&A

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This is a Q&A guide to state law on independent contractor status for private employers in South Carolina. This Q&A addresses how independent contractors are classified under state law, including the various tests to evaluate worker status, penalties for misclassification, and practices to avoid misclassification. Federal, local, or municipal law may impose additional or different requirements.

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## Independent Contractor Basics

### 1 Summarize how the issue of independent contractors is analyzed under state law.

There is no single, established definition of independent contractor under South Carolina law. It is a fact-intensive analysis in which courts rely primarily on a right to control test to determine employment classifications. The control test generally assesses whether the employer has the right to direct and control the work of the individual. South Carolina courts look to a variety of factors to determine whether the right to control is present, and no one factor is dispositive.

### 2 Is the term independent contractor defined by statute, regulation, or case law (not including any required elements)? If so, what is the definition? Please cite the appropriate authority.

#### Common Law

The definition of an independent contractor has been developed by case law in South Carolina as one who:

- Exercises independent employment.
- Contracts to do a piece of work according to his own methods.
- Is not subject to the control of his employer except for the result of the work.

(*Chavis v. Watkins*, 180 S.E.2d 648, 649 (S.C. 1971).)

Courts use a four factor right to control test to determine whether a worker is an employee or independent contractor (see Question 4: Common Law).

#### Workers' Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50

South Carolina's Workers' Compensation Law does not define the term independent contractor. However, courts apply a four factor right to control test to determine employment status (see Question 4: Common Law).

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

South Carolina's Wage Payment and Payment of Post-Termination Claims to Sales Representatives Acts do not define the term independent contractor. However, courts apply a four factor right to control test to determine employment status (see Question 4: Common Law).

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

South Carolina uses the common law rules applicable in determining the employer-employee relationship to determine whether an individual is an employee entitled to unemployment compensation (S.C. Code Ann. § 41-27-230(1)(b); see Question 4: Common Law). South Carolina's Employment Security Law defines employment as "any service performed by any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" (*Kilgore Grp. v. S.C. Emp't Sec. Comm'n*, 437 S.E.2d 48, 49 (S.C. 1993)).

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

For state taxes, the definition of employee is based on the four factor right to control test (*Kilgore*, 437 S.E.2d at 49).

In *Winstead v. United States*, the Fourth Circuit held that the only relevant factor in determining whether a worker is an employee or an independent contractor for tax withholding purposes is who pays the worker's wages (109 F.3d 989, 991-92 (4th Cir. 1997); see Question 4: Common Law).



**For each type of independent contractor, please describe the benefits of using an independent contractor over an employee to perform work.**

**Workers' Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50**

Independent contractors in South Carolina do not have a right to workers' compensation benefits (see *Wilkinson v. Palmetto State Transp. Co.*, 676 S.E.2d 700, 705-06 (S.C. 2009); *Shatto v. McLeod Reg'l Med. Ctr.*, 753 S.E.2d 416, 419 (S.C. 2013)).

If the Workers' Compensation Board, the Internal Revenue Service, or any other state or federal entity rules that a worker originally classified as an independent contractor is actually an employee, the fact that the employee is an illegal alien does not prevent him from receiving workers' compensation benefits (*Curiel v. Envtl. Mgmt. Servs.*, 655 S.E.2d 482, 484 (S.C. 2007)).

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

Independent contractors are not covered by the South Carolina Wage Payment Act (S.C. Code Ann. §§ 41-10-10 to 41-10-110; *Adamson v. Marianne Fabrics Inc.*, 391 S.E.2d 249, 250-51 (S.C. 1990)). However, depending on the circumstances, independent contractors may be covered under the Payment of Post-Termination Claims to Sales Representatives statute (S.C. Code Ann. §§ 39-65-10 to 39-65-80).

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

The Department of Employment and Workforce is responsible for the collection, accounting, and auditing functions of South Carolina's Unemployment Insurance (UI) tax program. Employers that employ independent contractors are **not** liable for UI tax contributions on those individuals. The department decides whether a worker's employment status is that of an employee or an independent contractor. (S.C. Code Ann. §§ 41-27-210, 41-27-220, 41-27-230, 41-27-235, and 41-27-260.)

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

There are no laws regarding independent contractor tax benefits.

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## Independent Contractor Tests

**4** **What tests are used to evaluate whether a worker is an independent contractor? Please describe each test and explain when each is used.**

**Common Law**

South Carolina courts determine independent contractor classification using the “right to control” test. This test does not focus on whether an employer actually exercises control over the work of the individuals, but whether “there exists the right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment.” (*Anderson v. West*, 241 S.E.2d 551, 553 (S.C. 1978).) The court looks at four factors:

- Direct evidence of the right to, or exercise of, control.
- The furnishing of equipment.
- The right to fire.
- The method of payment.

(*Porter v. Labor Depot*, 643 S.E.2d 96, 102-03 (S.C. Ct. App. 2007); See *Lewis v. L.B. Dynasty*, 770 S.E.2d 393, 395 (2015).)

**Workers’ Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50**

See Common Law.

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

See Common Law.

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

See Common Law.

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

See Common Law.

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## Administration and Enforcement

**5** **For each independent contractor type, what entity administers and enforces independent contractor classification?**

**Workers’ Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50**

The South Carolina Workers’ Compensation Commission administers and enforces independent contractor classification for workers’ compensation.

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

The South Carolina Department of Labor, Licensing, and Regulation administers and enforces independent contractor classification under South Carolina wage and hour law.

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

The South Carolina Department of Employment and Workforce administers and enforces independent contractor classification for collection of unemployment taxes.

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

The South Carolina Department of Revenue administers and enforces independent contractor classification for tax collection other than unemployment tax.

**6 How are independent contractor classifications selected for misclassification evaluation by each enforcement agency (for example, by random selection or by complaint by a worker or both)?**

**Workers' Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50**

Misclassification evaluations are typically triggered when an alleged independent contractor who claims to be an employee files a claim for benefits. The Workers' Compensation Commission enforces the law regarding classification of independent contractors. IRS tax audits of employers may also reveal misclassification issues.

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

The South Carolina Department of Labor, Licensing, and Regulation determines the issue of misclassification. IRS tax audits of employers may also reveal misclassification issues.

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

Misclassification evaluations are typically triggered when an alleged independent contractor who claims to be an employee files a claim for benefits. The Department of Employment and Workforce enforces the law regarding classification of independent contractors and has the right to randomly investigate employers for adherence to the law. IRS tax audits of employers may also reveal misclassification issues.

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

The South Carolina Department of Revenue determines the issue of misclassification and has the right to randomly investigate employers for adherence to the law. IRS tax audits of employers may also reveal misclassification issues.

**7 Please describe how aggressively independent contractor classification is enforced by each agency.**

Generally, agencies in South Carolina tend to react to complaints more than they initiate investigations independently.

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## Avoiding Penalties for Misclassification

**8 For each independent contractor type, is there a safe harbor available for employers that unintentionally misclassify workers as independent contractors? If so, please describe it.**

No safe harbor provisions exist under South Carolina law for unintentional misclassification of workers as independent contractors.

**9 For each independent contractor type, can employers request a determination of worker status to assist them in determining whether to classify particular workers as independent contractors? If so, please describe:**

- a. How an employer would make the request.
- b. The process and timeframe for a response.
- c. The possible benefits and risks of making the request.

South Carolina does not have a process for requesting a determination of worker status.

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**Please describe the penalties for improper classification for each independent contractor type.**

**Workers' Compensation Law: S.C. Code Ann. §§ 42-1-10 to 42-19-50**

There are no penalties solely for misclassifying a worker. However, employers must "insure and keep insured" their employees (S.C. Code Ann. § 42-5-20; *Harrell v. Pineland Plantation, Ltd.*, 523 S.E.2d 766, 773 (S.C. 1999)).

Employers who fail to keep workers' compensation coverage for their employees are subject to a penalty of \$1 for each employee when the insurance becomes due and for each day after the due date, with a total fine of at least \$10 and at most \$100 per day (S.C. Code Ann. § 42-5-40).

Employers who fail to secure payment of compensation may be found guilty of a misdemeanor and subject to either or both:

- Fines not less than \$100 or more than \$1,000.
- Imprisonment for at least 30 days or more than six months.

**Wage and Hour Law: S.C. Code Ann. §§ 41-10-10 to 41-10-110**

If an employer failed to pay wages because it misclassified an employee as an independent contractor, the employee may recover in a civil action:

- An amount equal to three times the full amount of the unpaid wages, plus costs.
- Reasonable attorneys' fees as the court may allow.

(S.C. Code Ann. § 41-10-80(C).)

Any civil action for the recovery of wages must be commenced within three years after the wages become due (S.C. Code Ann. § 41-10-80(C)).

**Unemployment Law: S.C. Code Ann. §§ 41-27-10 to 41-41-50**

There is no specific penalty for misclassifying employees. However, an employer is subject to monetary penalties for failing to:

- Make proper contributions and payments to the unemployment trust fund (S.C. Code Ann. § 41-31-370(A), (B)).
- File or submit quarterly contribution and payment reports (S.C. Code Ann. § 41-31-350).

An employer is subject to a fine of 10% of the contributions due for failure to file a quarterly report, with a minimum fine of at least \$25 and at most \$1,000 (S.C. Code Ann. § 41-31-350). For more information, see the South Carolina Department of Employment and Workforce website.

**Taxation Law: S.C. Code Ann. §§ 12-2-5 to 12-67-160**

Possible penalties for misclassifying an employee as an independent contractor include paying back taxes, including interest and penalties, for state payroll taxes, among others.

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## Other State-Specific Requirements

**11) Must independent contractor agreements include any particular language that is not required under federal law? If so, please insert that language and explain the requirement.**

There is no particular language that must be included in an independent contractor agreement under South Carolina law. To determine worker status, courts and state agencies consider the factual circumstances of the relationship and examine the factors of the right to control test (see Question 4).

**12) Please describe any other variance in how independent contractors in your jurisdiction are treated compared to under federal law.**

There are no additional variances between South Carolina law and federal law.

**13) Is there a state law specific to gig economy or transportation network companies? If so, please summarize that law's requirements.**

**Transportation Network Company Act: S.C. Code Ann. §§ 58-23-1610 to 58-23-1720**

South Carolina regulates transportation network companies (TNCs) under the Transportation Network Company Act. The law defines a TNC as a person, corporation, partnership, sole proprietorship, or other entity that uses a digital network, platform, or internet-enabled application in South Carolina to:

- Connect passengers with TNC drivers.
- Provide transportation for compensation using the TNC driver's vehicle.

(S.C. Code Ann. § 58-23-1610(1).)

The law does not specifically address whether TNC drivers are employees or independent contractors.

The South Carolina Office of Regulatory Staff administers this law (S.C. Code Ann. § 58-23-1710(A)).