

Independent Contractor Audits

5 Pro Tips for Making the IC Call

Little®

Compliance **HR**



Joe Panza

Vice President of Product
Management & Operations
ComplianceHR
panza@compliancehr.com

Introducing the Navigator Suite

ComplianceHR SmartScreen



COVID-19 Screening

Efficiently screens your employees and tracks results as they return to work, while helping you ensure privacy and 50-state compliance.

+ Manage Employees

🔍 Track Results

COVID-19 Resource Center



COVID-19 Resource Center

Quickly delivers answers to the most pressing employment-related COVID-19 topics such as health and safety, leaves of absence and more.

🔍 Use FAQ Rapid Reference

🔍 View Resource Documents

PolicySmart



Be Confident. Stay Compliant.

PolicySmart's simple templates and checklists make it easy to create and maintain your policies. Ensure you never miss an update with our intuitive news and notifications about regulatory changes.

🔍 View Policy Documents

🔍 View Policy News

⚙️ Configure Jurisdictions

Navigator IC



Independent Contractor Assessment

Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

+ Create New Evaluation

🔍 View Evaluations

▶ IC Agreement

Navigator OT



Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

+ Create New Review

🔍 View Reviews

🔍 View Evaluations

Navigator Leave



Leave Compliance

Generates state and federal compliant forms, and quickly delivers federal and state-specific leave requirements (and paid sick leave or "PSL") through Rapid Reference tools.

+ Create New Form

🔍 View Forms

▶ Use PSL Rapid Reference

▶ Use Rapid Reference

Navigator Pay Practices



Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

▶ Find Minimum Wage

▶ Use Rapid Reference

Navigator Onboarding



Onboarding Document Production

Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

+ Create New Document

Register for a Demo to Try the Navigator Suite Free for 14 Days

Compliance **HR**

Joe Panza
Vice President
Product Management & Operations
ComplianceHR
Panza@compliancehr.com

Tammy McCutchen
Senior Affiliate
Resolution Economics
Strategy Advisor
ComplianceHR

Independent Contracting

Continuing Legal Risks and the ComplianceHR Solution

Littler Compliance **HR**

© 2021 ComplianceHR

Resources

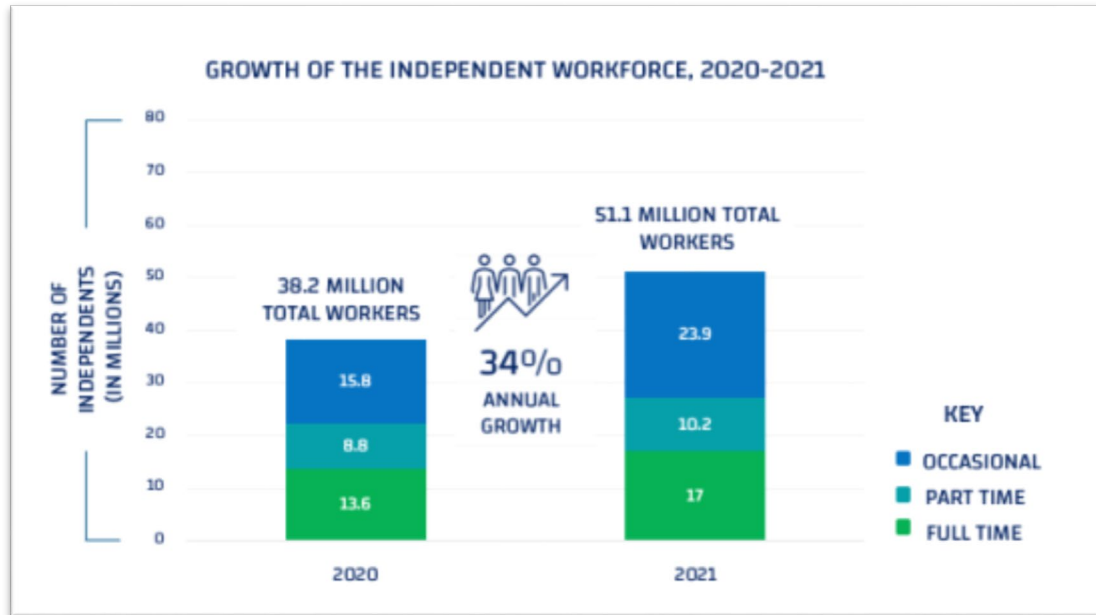
- Feedback Form
- State-By-State CLE Guide
- Presentation Materials

Enter your question

POWERED BY **ON24**



MBO Partners, 11th Annual Report On State of Independence in America



About two-thirds (68%) of full-time independent workers say that working independently is more secure than having a traditional job.



63%

of workers (up from 59% in 2020) say that working independently was their choice completely

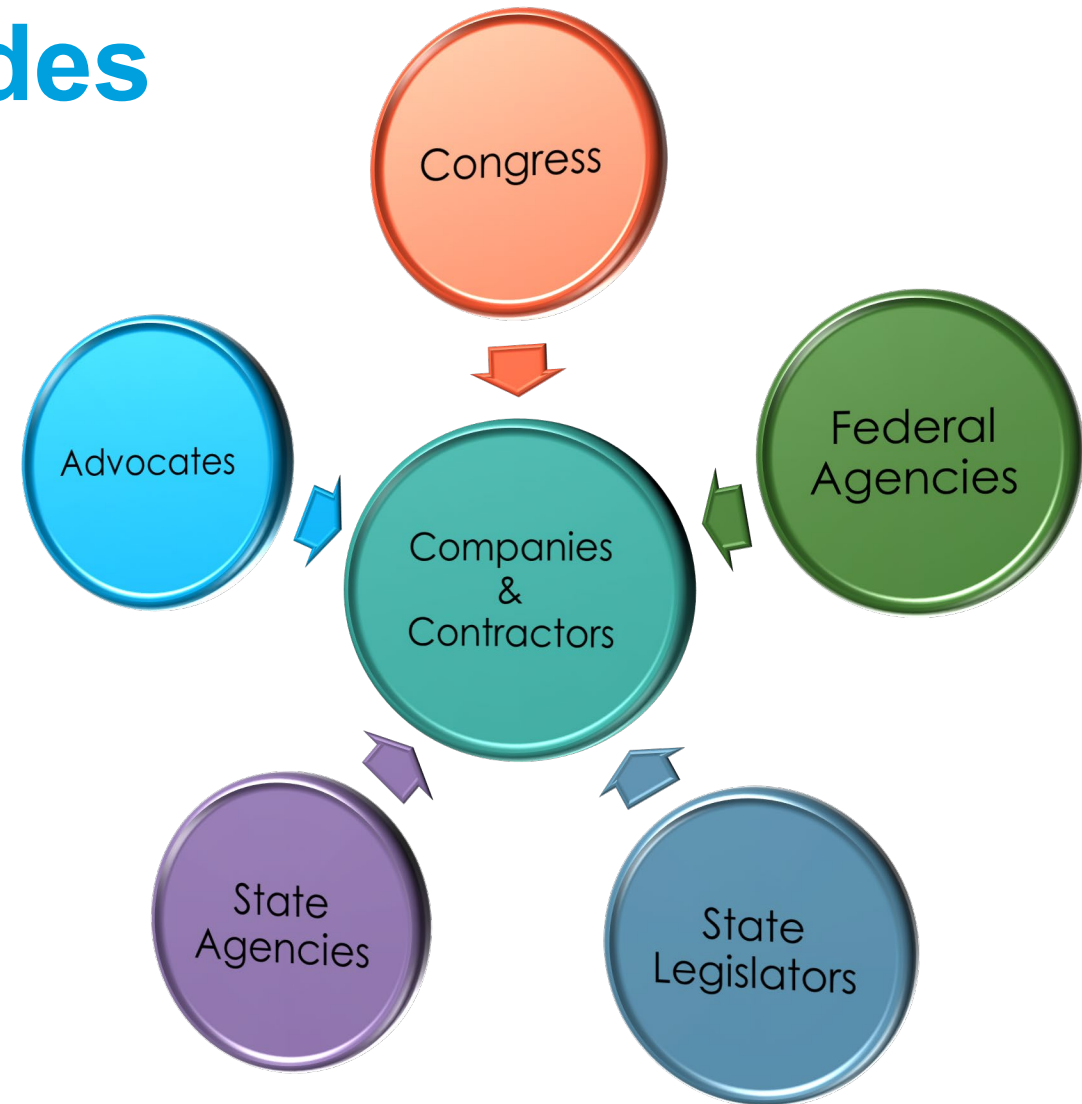


77%

are highly satisfied, the highest level of satisfaction in our 11 years of data

Independent Work Under Pressure From All Sides

Federal and state legislators, federal and state agencies, unions, plaintiffs' attorneys and other employee advocates – remain focused on restricting independent work



Employee or Independent Contractor?





Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of **1,900 reported court decisions** and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers

The screenshot displays two overlapping windows from the Compliance HR platform. The background window is titled "RISK BY JURISDICTION" and provides a breakdown of risk levels for Federal and Indiana laws. The foreground window is titled "Your Questionnaire" and shows a form for "Agreement Details" with several dropdown menus.

RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

Federal

Under the facts provided, it is **moderately likely** that Nicole Smith LLC will be found to be an employee.

Indiana

Under the facts provided, it is **highly likely** that Nicole Smith LLC will be found to be an employee.

You have indicated that Nicole Smith LLC will be working in Indiana. At least one of the "ABC" or similar test, rather than a multi-factor balancing test. Under a traditional ABC

Compliance HR

Your Questionnaire

Please complete the questionnaire below as requested by **Joe Panza**. This questionnaire relates to Abc Inc.'s relationship with **Nicole Smith**.

Your answers are saved automatically as you proceed. You can return to your questionnaire later by using the button on your dashboard.

Agreement Details

Is Nicole Smith LLC required to personally perform the work?
No, Nicole Smith LLC can hire employees or subcontractors

What applies to Nicole Smith LLC's employees or subcontractors?
Select all that apply
None of the Above

Will Abc Inc. provide Nicole Smith LLC, it's employees or it's subcontractor's employees



Tammy McCutchen

Strategic Adviser,
ComplianceHR

tammy@compliancehr.com

- Former Administrator, US-DOL, Wage & Hour Division
- A leading authority of federal and state wage and hours law
- Primary architect of DOL's overtime exemptions regulations & ComplianceHR's Navigator IC and Navigator OT applications

Answering Your Questions

Q & A Box on your screen
(questions are confidential –
visible to presenters only)



What You'll Receive

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation
3. Your demo and consultation





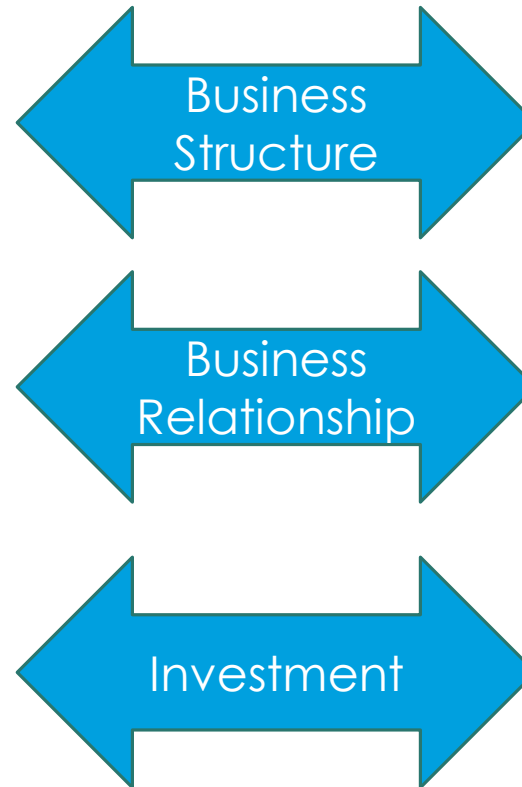
Agenda

- Misclassification Red Flags
- Targeting Contractors for Review
- Facts Needed to Make the Call
- Navigating the Legal Tests

General Rules for Compliance

Intendent Contractor

- A business offering services to the public with employees and facilities
- The contract is for the duration of the project, and the IC has time to work for others
- The IC makes a significant investment in its business, including paying for its own expenses, equipment, training



Employee

- An individual who does not have an independent business organization
- The relationship is continuous, and the individual is not allowed to work for others
- The company provides the tools and equipment, and reimburses the individual for business expenses

General Rules for Compliance

Intendent Contractor

- Paid by the project/task; terminated only for contract breach; may subcontract
- Work is not integral to the company's business and can be performed by the IC's employees
- The IC controls when, where and how the work is performed, and the sequence and hours of work



Employee

- Paid a salary or by the hour; may be terminated at will; cannot incur a loss
- Work is essential to the company's business and/or is performed by its own employees
- The company provides training and instruction on how to perform the work, and sets the work location and hours

**Pro Tip #1:
Eliminate Red Flags**

Fix the Easy Calls



- Contractors who used to be your employees
- Contractors who perform the same work as employees
- Contractors who perform full-time work or work only for your company
- Contracts with non-compete clauses
- Contracts that provide hourly pay

**Pro Tip #2:
Audit High Risk Contractors**

Build Your Suspect Pool



Review accounts payable, 1099s, IC contracts, and email access

- Highest paid contractors
- Contractors who use their social security numbers
- Contractors who have worked a long period of time
- Contractors who have emails on your system
- Contractors in high-risk states
- Contractors performing high-risk work

**Pro Tip #3:
Interview Both Company &
Contractor**

Interview Questions

To the Company

- Is the work core to the company's business?
- How long is the engagement
- Are we providing training? Equipment?
- What are the financial terms?
- Who controls when, where and how work is performed?

To the Contractor

- How is your business structured?
- Do you maintain business insurance?
- Do you have employees? How many?
- Do you have a business office? Where?
- Do you have other clients? How many?
- How do you market your services?

Role Play: Company Manager

Financial Details

What is the dollar value of this engagement?

Unknown because AAA Cleaning will be paid on an hourly basis for an undetermined amount

Select the option that best describes how AAA Cleaning will be paid by Littler Alumni:

Per hour

Will AAA Cleaning be paid out of the same payroll accounts as employees?

Yes No

Who will bear the cost of any losses or damages caused by AAA Cleaning (for example, expenses exceeding the contract amount or the cost of replacing damaged equipment)?

Littler Alumni AAA Cleaning

Other than not being paid, are there any **other economic risks** for AAA Cleaning to incur a loss?

Yes No

Scheduling & Location

Will AAA Cleaning's work hours be set by Littler Alumni?

Yes, Littler Alumni will set specific hours for AAA Cleaning

Under the terms of engagement, how much control can Littler Alumni assert over the **order** of work in which AAA Cleaning will perform the work?

No control

Will Littler Alumni control where AAA Cleaning can perform the work under this engagement?

Yes, because the work cannot be performed elsewhere

Role Play: Contractor

Contractor Information

Do you do any of the following? [More information](#)

Select all that apply

Maintain a business location accessible by the public, Have a web page

How many employees does your company have?

Over 10

Do you provide your employees with any of the following?

Select all that apply

Workers' compensation benefits, Unemployment insurance

Which best describes your expected relationship with Littler Alumni during this engagement?

How many other clients have you performed work for during the last six months?

No other clients

Financial Details

What is the dollar value of this engagement?

Unknown because I will be paid on an hourly basis for an undetermined amount of time.

What percentage of you income this year will come from Littler Alumni?

91% to 100%

Select the option that best describes how you will be paid by Littler Alumni:

Per hour

Who will bear the cost of any losses or damages caused by (for example, expenses exceeding the contract amount or the cost of replacing damaged equipment)?

Littler Alumni I will bear the cost

Other than not being paid, are there any [other economic risks](#) for you to incur a loss?

Yes No

Have you already made [significant investment](#) in your business?

Yes No

Employee or Contractor?

Compliance **HR**

Your Navigator IC Report

Overall Risk Level



Under the facts provided, it is **moderately likely** that AAA Cleaning will be found to be an employee.

Compliance **HR**

RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

Federal



Under the facts provided, it is **moderately likely** that AAA Cleaning will be found to be an employee.

California



Under the facts provided, it is **moderately likely** that AAA Cleaning will be found to be an employee.

▲ Please take note that the risk analysis provided above offers a conservative result by taking into consideration the ABC test required under AB 5. This app does NOT consider if certain exceptions under AB 5 may counsel applying a less conservative test. If you believe this contractor may be able to qualify for one of the exceptions under the law, consider reaching out to [Littler's AB 5 Taskforce](#) for more information. See the Legal Summary below for more information regarding the various legal exceptions.

You have indicated that AAA Cleaning will be working in California. At least one of the legal tests for independent contractor status in California is an "ABC" or similar test, rather than a multi-factor balancing test. Under a traditional ABC test, for example, all of the following requirements must be met in order for AAA Cleaning to be regarded as an independent contractor:

- AAA Cleaning is free from control and direction by Littler Alumni;
- The services to be performed by AAA Cleaning are either outside the usual course of Littler Alumni's business or will be performed outside of Littler Alumni's place of business; and
- AAA Cleaning is customarily engaged in an independently established trade, occupation, profession or business.

Some states have fewer requirements (A & C, for example), and other states have additional or different requirements. The answers that you have provided indicate that AAA Cleaning is **moderately unlikely** to meet one or more of the required elements of the independent contractor test in California. For more information about each jurisdiction's test, please see the Summary of Independent Contractor Laws that is attached to the report as well as the Jurisdictional Risk Levels.

Compliance **HR**

LOWERING YOUR RISK

You may be able to lower your risk score by taking the following steps.

Continuing Working Relationship with the Company

Independent contractors generally do not have an ongoing relationship with the engaging company. Contractors are engaged to perform work on distinct projects for a specific period of time. In contrast, employees are typically hired for an indefinite time period. The longer the company's relationship with the contractor, the more risk that the contractor will be found to be a misclassified employee. Multiple or renewed agreements for the same work or the same project also is an indication that the contractor may be misclassified.

Littler Alumni may be able to reduce its risk score by: (1) entering a new contract for each distinct project, (2) ensuring previous engagements with AAA Cleaning were for different and distinct projects, and (3) limiting the length of its contracts to a year or less.

The Contractor's Economic Dependence on the Company

An independent contractor is not economically dependent on the engaging company; it operates independently of the engaging company. The success of the contractor's business is not dependent on its continued relationship with the company. An independent contractor's business will continue to exist independently of and apart from the contract, and will survive the termination of the contract. Littler Alumni may be able to reduce its risk score by ensuring that the dollar value of this engagement will not be a high percentage of AAA Cleaning's business.

Method of Payment

An employee is usually paid by the hour or on a salary basis. An independent contractor is usually paid a flat amount for the task, job or project. In other words, employees are paid based on the amount of time they work, while independent contractors are paid based on the results of their work. Also, while employees are paid from payroll accounts, independent

Pro Tip #4:

Use the Strictest Legal Test

More than 100 Different Tests Could Apply

States Laws Adopting the IRS 20-Factor Test

Alabama	Unemployment, Tax
Arizona	Tax
Arkansas	All
Connecticut	Tax
Delaware	Tax
District of Columbia	Tax
Florida	Tax, Wage & Hour
Georgia	Tax
Hawaii	Tax, Workers' Comp
Idaho	Tax
Illinois	Tax
Indiana	Tax
Iowa	Tax, Unemployment
Maryland	Tax
Massachusetts	Tax
Michigan	Tax
Minnesota	Tax, Unemployment
Mississippi	Tax
Missouri	Tax
Nebraska	Tax
New York	Tax
North Carolina	Tax, Unemployment
Pennsylvania	All except Workers' Comp
Rhode Island	Unemployment, Wage & Hour
Tennessee	Tax
Texas	Unemployment, Tax
Utah	Tax
Virginia	Tax
West Virginia	Tax
Wisconsin	Tax

State Laws Adopting the Traditional ABC Test

Alaska	Unemployment
Colorado	All (A&C prongs only)
Connecticut	Wage & Hour, Unemployment
Delaware	Unemployment
Hawaii	Unemployment (A&C prongs only)
Idaho	EEO, Unemployment, Wage Payment
Illinois	MW & OT (A&C prongs only), Unemployment
Indiana	Tax (A&C prongs only)
Kansas	Unemployment
Maryland	Unemployment, Wage Payment
Massachusetts	Unemployment
Nebraska	Unemployment, Wage & Hour
New Hampshire	Unemployment
New Jersey	Unemployment (A&C prongs only)
New Mexico	Unemployment, Wage & Hour
Pennsylvania	Unemployment (A&C prongs only)
South Dakota	Unemployment, Tax, Wage & Hour
Utah	Unemployment (may also include Tax)
Vermont	Unemployment
Washington	Unemployment
West Virginia	Unemployment

State Laws Adopting the FLSA Economic Reality Test

Alaska	Wage & Hour
District of Columbia	Wage & Hour
Florida	EEO, Wage & Hour
Illinois	MW & OT
Iowa	MW & OT
Louisiana	Unemployment
Michigan	EEO, Wage & Hour
Ohio	Wage & Hour
Pennsylvania	Wage & Hour
Tennessee	Workers' Comp
Washington	Wage & Hour

State Laws Adopting Other Multi-Factor Conjunctive Test

Alaska	Workers' Comp
Florida – Workers' Comp	Workers' Comp
Georgia – Unemployment, Workers' Comp	Workers' Comp
Louisiana – Workers' Comp	Workers' Comp
Maine – All	All
Michigan – Workers' Comp	Workers' Comp
Nevada – All (two alternative tests, including the traditional ABC test)	All
New Hampshire – Wage & Hour, Workers' Comp	Workers' Comp
Oregon – Unemployment, Tax, Workers' Comp	Workers' Comp
Texas – Workers' Comp	Workers' Comp
Utah – Workers' Comp	Workers' Comp
Vermont – Workers' Comp	Workers' Comp
Washington – Unemployment, Workers' Comp	Unemployment, Workers' Comp
West Virginia – Workers' Comp	Workers' Comp
Wisconsin – Unemployment, Workers' Comp	Unemployment, Workers' Comp
Wyoming – Unemployment, Workers' Comp	Unemployment, Workers' Comp

States Adopting the Narrow ABC Test

California	All
Massachusetts	Wage & Hour

State Laws Adopting The Common Law "Control" Or Other Balancing Test

Alabama	Common Law
Alaska	Workplace Safety
Arizona	All except Tax
Connecticut	EEO, Workers' Comp
District of Columbia	EEO, Wage & Hour, Workers' Comp
Florida	EEO, Unemployment, Workers' Comp
Hawaii	EEO, Unemployment
Idaho	Workers' Comp
Illinois	Workers' Comp
Indiana	Workers' Comp
Iowa	Wage Payment
Kansas	EEO, Unemployment, Wage Payment, Workers' Comp
Kentucky	EEO, Unemployment, Wage & Hour, Workers' Comp
Louisiana	EEO, Unemployment, Wage & Hour, Workers' Comp
Maryland	EEO, Wage Payment
Massachusetts	Wage & Hour, Workers' Comp
Minnesota	EEO, Unemployment, Wage & Hour, Workers' Compensation
Mississippi	EEO, Wage & Hour, Workers' Comp
Montana	All
Nebraska	EEO, MW & OT, Workers' Comp
Nevada	Workers' Comp
New Jersey	EEO, Tax, Workers' Comp
New Mexico	Tax, Workers' Comp
New York	EEO, Unemployment, Wage & Hour, Workers' Comp
North Carolina	EEO, Unemployment, Wage & Hour, Workers' Comp
North Dakota	EEO, Tax, Unemployment, Workers' Comp
Ohio	EEO, Unemployment, Wage & Hour, Workers' Comp
Oklahoma	All
Oregon	EEO, Wage & Hour
Pennsylvania	Workers' Comp
Rhode Island	Wage & Hour, Workers' Comp
South Carolina	All
South Dakota	EEO
Texas	EEO
Vermont	EEO
Virginia	EEO
Washington	EEO
West Virginia	EEO
Wisconsin	EEO
Wyoming	EEO

IRS Test

Behavioral Control

- When and where to do the work
- What tools or equipment to use
- What workers to hire or use
- Where to buy supplies or services
- Who does what work
- What order or sequence to follow

Financial control

- Business expenses
- Worker's investment
- Payment Method
- Worker's services are publicly available
- Worker's risk of profit or loss

Type of Relationship

- Written contracts describing the intended relationship
- Whether employee-type benefits are provided
- Permanency of relationship
- Are services provided a key aspect of the company's business

FLSA Economic Reality Test

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Darden Common Law Test

1. The skill required
2. The source of the instrumentalities and tools
3. The location of the work
4. The duration of the relationship between the parties
5. Whether the hiring party has the right to assign additional projects to the hired party
6. The extent of the hired party's discretion over when/how long to work
7. The method of payment
8. The hired party's role in hiring and paying assistants
9. Whether the work is part of the regular business of the hiring party
10. Whether the hiring party is in business
11. The provision of employee benefits
12. The tax treatment of the hired party

State Law Tests

- May be multi-factor balancing tests or conjunctive tests with multiple required elements
- Some state laws create a presumption of IC status, but other states have a presumption of employee status

The “ABC” Conjunctive Test

- A. The contractor is free from control and direction by the company;
- B. The services to be performed by the contractor are either outside the usual course of the company’s business or will be performed outside of the company’s place of business; **and**
- C. The contractor is customarily engaged in an independently established trade, occupation, profession or business.

California AB5

- A. The individual is free from control and direction by contract and in fact
- B. The service is performed outside the usual course of the company's business
- C. The individual is customarily engaged in an independently established trade, occupation, profession or business

State Laws Adopting Other Multi-Factor Conjunctive Test

Alaska	Workers' Comp
Florida – Workers' Comp	Workers' Comp
Georgia – Unemployment, Workers' Comp	Workers' Comp
Louisiana – Workers' Comp	Workers' Comp
Maine – All	All
Michigan – Workers' Comp	Workers' Comp
Nevada – All (two alternative tests, including the traditional ABC test)	All
New Hampshire – Wage & Hour, Workers' Comp	Workers' Comp
Oregon – Unemployment, Tax, Workers' Comp	Workers' Comp
Texas – Workers' Comp	Workers' Comp
Utah – Workers' Comp	Workers' Comp
Vermont – Workers' Comp	Workers' Comp
Washington – Unemployment, Workers' Comp	Unemployment, Workers' Comp
West Virginia – Workers' Comp	Workers' Comp
Wisconsin – Unemployment, Worker's Comp	Unemployment, Workers' Comp
Wyoming – Unemployment, Workers' Comp	Unemployment, Workers' Comp



Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of **1,900 reported court decisions** and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers

The screenshot displays two overlapping windows from the Compliance HR platform. The background window is titled "RISK BY JURISDICTION" and provides a breakdown of risk levels for Federal and Indiana laws. The foreground window is titled "Your Questionnaire" and shows a form for "Agreement Details" with several dropdown menus.

RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

Federal

Under the facts provided, it is **moderately likely** that Nicole Smith LLC will be found to be an employee.

Indiana

Under the facts provided, it is **highly likely** that Nicole Smith LLC will be found to be an employee.

You have indicated that Nicole Smith LLC will be working in Indiana. At least one of the "ABC" or similar test, rather than a multi-factor balancing test. Under a traditional ABC

Compliance HR

Your Questionnaire

Please complete the questionnaire below as requested by **Joe Panza**. This questionnaire relates to Abc Inc.'s relationship with **Nicole Smith**.

Your answers are saved automatically as you proceed. You can return to your questionnaire later by using the button on your dashboard.

Agreement Details

Is Nicole Smith LLC required to personally perform the work?
No, Nicole Smith LLC can hire employees or subcontractors

What applies to Nicole Smith LLC's employees or subcontractors?
Select all that apply
None of the Above

Will Abc Inc. provide Nicole Smith LLC, it's employees or it's subcontractor's employees

**Pro Tip #5:
Restructure or Reclassify**

Reduce Risk by Restructuring the Relationship

- Engage the contractor through a third-party
 - Require third-party comply with state and federal laws
 - Require third-part to indemnify your company against lawsuits and violations
- Review your IC agreements
 - Adopt standard contracts
 - State clearly that the contractor is not an employee
 - Compensate by the project and reimburse only for travel expenses
 - Eliminate non-compete clause
 - Contract terminated only for breach
 - Contract ends on a date certain

Questions?



Littler[®]

Compliance **HR**

Request Your Free Demonstration



Presentation Button



freetrial@compliancehr.com



Q & A Request, provide your email address



Joe Panza
panza@compliancehr.com

Thank you!



Tammy McCutchen
tammy@compliancehr.com

Littler[®]

Compliance **HR**