

# C.R.S. 8-70-115

## Copy Citation

Statutes current through Chapter 49 from the 2023 Regular Session and effective as of March 31, 2023. The text of this section is not final. It will not be final until compared to, and updated from, the text provided by the Colorado Office of Legislative Legal Services later this year.

- [Colorado Revised Statutes Annotated](#)
- [Title 8. Labor and Industry \(§§ 8-1-101 — 8-87-105\)](#)
- [LABOR III - Employment Security \(Arts. 70 — 82\)](#)
- [Article 70. Definitions- General Provisions \(§§ 8-70-101 — 8-70-143\)](#)

## 8-70-115. Employment - federal unemployment tax act.

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(1)

(a) "Employment", subject to other provisions of this subsection (1), includes any service performed prior to January 1, 1972, which was employment as defined in this subsection (1) prior to such date and service performed after December 31, 1971, by an employee as defined in section 3306 (i) of the "Federal Unemployment Tax Act" and any service performed after December 31, 1977, by an employee, as defined in subsection (o) of section 3306 of the "Federal Unemployment Tax Act", including service in interstate commerce.

(b) Notwithstanding any other provision of this subsection (1) and notwithstanding the provisions of section 8-80-101, service performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service, if exercised pursuant to the requirements of any state or federal statute or regulation, shall not be considered.

(c) To evidence that such individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may either show by a preponderance of the evidence that the conditions set forth in paragraph (b) of this subsection (1) have been satisfied, or they may demonstrate in a written document, signed by both parties, that the person for whom services are performed does not:

(I) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document;

(II) Establish a quality standard for the individual; except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(III) Pay a salary or hourly rate but rather a fixed or contract rate;

(IV) Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(V) Provide more than minimal training for the individual;

(VI) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(VII) Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;

(VIII) Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and

**(IX)** Combine his business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.

**(d)** A document may satisfy the requirements of paragraph (c) of this subsection (1) if such document demonstrates, by a preponderance of the evidence, the existence of such factors listed in subparagraphs (I) to (IX) of paragraph (c) of this subsection (1) as are appropriate to the parties' situation.

**(2)** Where the parties use a written document pursuant to paragraph (c) of subsection (1) of this section, such document may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties, where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by the independent contractor or some other entity, and that the independent contractor is obligated to pay federal and state income tax on any moneys paid pursuant to the contract relationship.

**(3)** Where the parties use a written document pursuant to paragraph (c) of subsection (1) of this section, and one of the parties is a professional whose license to practice a particular occupation under the laws of the state of Colorado requires such professional to exercise a supervisory function with regard to an entire project, such supervisory role shall not affect such professional's status as part of the independent contractor relationship.

**(4)** To improve the process of determining the classification of an individual for purposes of this section, including any audits performed pursuant to section 8-72-107, the department shall:

**(a)** Develop guidance for employers on the factors specified in paragraph (c) of subsection (1) of this section;

**(b)** Clarify the process by which an employer or individual may submit further information in response to a determination by the department and prior to an appeal;

**(c)** Establish an individual to serve as a resource for employers by providing guidance on:

**(I)** The proper classification of workers;

**(II)** Audit findings; and

**(III)** Options for curing or appealing an audit;

**(d)** Establish internal methods to improve the consistency among auditors; and

**(e)** Establish an independent review of a portion of audit and appeal results at least twice a year to monitor trends and make improvements to the audit process.

## History

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**Source: L. 90:**Entire section added, p. 592, § 3, effective April 3; entire section R&RE, p. 1766, § 10, effective June 8. **L.**

**91:**Entire section amended, p. 1366, § 1, effective May 18; entire section amended, p. 1343, § 1, effective June 5. **L.**

**2016:**(4) added,(SB 16-179), ch. 275, p. 1138, § 2, effective August 10.

### ▼ Annotations

### Research References & Practice Aids

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#### Hierarchy Notes:

C.R.S. Title 8, Labor III, Art. 70

## State Notes

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## Notes

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### **Editor's note:**

Amendments to this section by House Bill 91-1279 and Senate Bill 91-238 were harmonized.

## ANNOTATION

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### **Law reviews.**

For article, "The Independent Contractor Versus the Employee -- Tax Consequences", see 18 Colo. Law. 1091 (1989). For article, "Independent Contractors in Colorado", see 34 Colo. Law. 53 (Dec. 2005).

### **Annotator's note.**

Since the substantive provisions of this section are identical to former § 8-70-103 (10)(a), relevant cases construing that provision have been included under this section.

### **This section is not unconstitutional**

as an impairment of obligation of contracts between operator and drivers of concrete delivery trucks. *Weitzel Redi-Mix, Inc. v. Indus. Comm'n*, 728 P.2d 364 (Colo. App. 1986).

This section is not unconstitutional because real estate salesmen and insurance agents are statutorily exempted. *Nat'l Claims Assoc. v. Div. of Emp.*, 786 P.2d 495 (Colo. App. 1989).

### **Workers are deemed covered by the Colorado Employment Security Act unless**

they are free from control and directions in their work and are also engaged in an independent, but related, trade or business. *Metro Denver Maint. v. Dept. of Labor*, 738 P.2d 49 (Colo. App. 1987).

### **The definition of "employment", appearing in this section, is broad and inclusive,**

and it cannot be so construed as to limit the meaning to the relationship of master and servant without violating the legislative intent. *Indus. Comm'n v. Nw. Mut. Life Ins. Co.*, 103 Colo. 550, 88 P.2d 560 (1939).

### **Whether a common-law employer-employee relationship (master-servant) exists is not determinative**

of whether an employee is covered by this act. *Metro Denver Maint. v. Dept. of Labor*, 738 P.2d 49 (Colo. App. 1987).

### **No improper delegation**

to the division to define what constitutes covered employment. *Allstate Prod. v. Dept. of Labor*, 782 P.2d 880 (Colo. App. 1989).

### **As used in this section, “service” means**

an active participation in, and not a passive connection with, some given operation, so merely owning or residing on a farm upon, or in connection with, which an individual performs no service whatsoever, ipso facto, does not make an employee self-employed as a farmer. *Dellacroce v. Indus. Comm’n*, 111 Colo. 129, 138 P.2d 280 (1943).

### **The term “employment” includes a broader concept of employment than the common law doctrine embodied in federal law.**

*Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47 (Colo. App. 1987).

### **“Is free from control and direction in the performance of the service”**

language of subsection (10) does not preclude consideration of future control. *Weld County Kirby Co. v. Indus. Comm’n*, 676 P.2d 1253 (Colo. App. 1983).

Terms “control and direction” mean an overall right to control the actions of an employee. *Indus. Comm’n v. Nw. Mut. Life Ins. Co.*, 103 Colo. 550, 88 P.2d 560 (1939); *Rent-a-Mom v. Indus. Comm’n*, 727 P.2d 403 (Colo. App. 1986).

Employer’s right to terminate contractual relationship is one factor in determining whether “control” exists and cannot be sole factor in determining if employment relationship exists. *Rent-a-Mom v. Indus. Comm’n*, 727 P.2d 403 (Colo. App. 1986).

### **The term “customarily engaged in”**

is not unconstitutionally vague. *Allstate Prod. v. Dept. of Labor*, 782 P.2d 880 (Colo. App. 1989).

### **This section places the burden of proof on the putative employer to demonstrate that both conditions set forth in subsection (1)(b) exist.**

Under this section, services performed by an individual for another are deemed to be “employment” unless the putative employer can demonstrate that (1) the individual is free from control and direction in the performance of the service, both under the contract and in fact, and (2) the individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. *Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office*, 129 P.3d 1094 (Colo. App. 2005); *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

### **Determination of whether an employer has met its burden of proving the requirements set forth in this section is a question of fact,**

and the commission’s order may be set aside if there is no substantial evidence to support it. *Rent-a-Mom v. Indus. Comm’n*, 727 P.2d 403 (Colo. App. 1986); *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47 (Colo. App. 1987); *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

### **There are two ways in which a putative employer may satisfy the “control and direction” and “independent trade” conditions of subsection (1)(b).**

The putative employer may present general evidence demonstrating both conditions. Alternatively, it may produce a written document that satisfies all the applicable factors set forth in subsection (1)(c). *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

**In determining whether an employer may classify an individual as an independent contractor rather than an employee for the purposes of unemployment benefits,**

this section does not require a showing that the services provided by a putative employee are provided for the benefit of the putative employer. The test in subsection (1)(b) requires that the employer show the worker is free from the control and direction in the performance of the service and that the worker is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. CCM v. Indus. Claim Appeals Office, 2019 CO 43, 441 P.3d 1005.

In applying this test, the court determined that the services provided were not that of an independent contractor. CCM v. Indus. Claim Appeals Office, 2019 CO 43, 441 P.3d 1005.

**A writing need not necessarily satisfy all nine factors enumerated in subsection (1)(c)**

to create the rebuttable presumption of an independent contractor relationship. The writing must satisfy those factors that are applicable or potentially applicable. Long View Sys. Corp. USA v. Indus. Claim Appeals Office, 197 P.3d 295 (Colo. App. 2008).

**In determining whether one is acting under the control of another**

for the purposes of this section, the court primarily is concerned with what is done under a contract and not what the contract says. Jackson Cartage, Inc. v. Van Noy, 738 P.2d 47 (Colo. App. 1987).

**In the absence of a large or bold-faced type disclosure, pursuant to subsection (2),**

a contract may still incorporate information that an independent contractor is not entitled to unemployment insurance or other employee benefits. If a contract's only deviation from the statute is that the disclosures are not in large or bold-faced type, but the correct information is emphasized via the totality of the circumstances test, the contract is valid. Varsity Tutors v. Indus. Claim Appeals Office, 2017 COA 104, 488 P.3d 258.

**Stockbroker, unable to perform functions without the supervision of a broker-dealer and prohibited by employer from performing similar functions for others, was engaged in covered employment for purposes of this section.**

Claim of Woloson, 796 P.2d 1 (Colo. App. 1989).

**The common law control test used to distinguish servants from independent contractors is the same as that used to distinguish independent contractors from employees under the "Workers' Compensation Act of Colorado",**

so the cases under article 40 of title 8 are relevant to article 70 of title 8. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993).

**Control and direction over a putative employee by a third party.**

The plain language of subsection (1)(b) does not support a conclusion that control and direction over a putative employee by someone other than the putative employer renders the situation one of employment, unless the person providing control and direction is shown to be an agent of the putative employer. Long View Sys. Corp. USA v. Indus. Claim Appeals Office, 197 P.3d 295 (Colo. App. 2008).

**Company was held liable to pay unemployment compensation taxes**

for claims adjusters, vocational rehabilitation counselors, and medical benefits coordinators because there was insufficient evidence that such persons are engaged in an independent business, and such persons are not statutorily exempted. Nat'l Claims Assoc. v. Div. of Emp., 786 P.2d 495 (Colo. App. 1989).

**Whether a worker is in covered employment depends upon the nature of the services performed**

and some services by a worker may constitute covered employment and other services by the same worker may not. *Black Sheep, Inc. v. Div. of Emp.*, 804 P.2d 871 (Colo. App. 1990).

**Services found to be covered employment.**

Facts showing that petitioner had the right to terminate workers and that workers were paid by petitioner at a rate established by him to perform specified services on material that was provided by him constituted substantial evidence to support the commission's finding that workers were within the statutory definition of covered employment. *Allen Co. v. Indus. Comm'n*, 735 P.2d 889 (Colo. App. 1986), *aff'd*, 762 P.2d 677 (Colo. 1988).

Services provided by claimant as a direct seller of consumer products at a location other than a permanent retail establishment constituted employment for purposes of the Colorado Employment Security Act when contract between employer and claimant did not provide that the employee was not to be treated as an employee for federal payroll withholding tax purposes as required by subsection (11)(l). *Autry Bros., Inc. v. Cross*, 773 P.2d 248 (Colo. App. 1989).

**The following do not demonstrate general control but are designed to ensure that the end result is accomplished:**

Giving floor plans to workers, retaining the right to inspect all work, and requiring workers to obtain company approval of any additional work requested by customers if they wish to be paid for such work. *Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993).

**A requirement that workers be covered by workers' compensation insurance is not evidence of an employment relationship**

because independent contractors may be deemed to be employees under article 41 of title 8 and because such a requirement is common. *Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993).

**Setting ethics guidelines and the times at which workers must report to work and call customers to schedule installations**

does not constitute control over the means and methods of installing floor covering and does not evidence an employment relationship. *Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993).

**Artists represented by talent agency do not perform a service for that agency.**

Artists do not perform acting and modeling services at the command of or for the benefit of a talent agency, so the talent agency is not the employer of the artists it represents. *Div. of Unemployment Ins. v. Indus. Claim Appeals Office*, 2015 COA 149, 361 P.3d 1150.

**Whether an individual is customarily engaged in an independent business is a question that can only be resolved by applying a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer;**

there is no dispositive single factor or set of factors in making the determination. *Indus. Claim Appeals Office v. Softrock Geological*, 2014 CO 30, 325 P.3d 560; *W. Logistics v. Indus. Claim Appeals Office*, 2014 CO 31, 325 P.3d 550.

**It is reasonable to infer that a worker maintains an independent business if a written agreement demonstrates that an employer doesn't require a worker to work exclusively for such employer.**

If other evidence demonstrates that such inference isn't accurate, then the worker is entitled to unemployment compensation. *Home Health Care Prof. v. Colo. Dept. of Labor*, 937 P.2d 851 (Colo. App. 1996).

**Musicians not independent contractors pursuant to subsection (1)(b).**

Musicians who were free to play other musical engagements, who worked mainly out of their homes, who did not maintain business addresses or telephone numbers, and who earned 95 to 99% of their income as musicians with the band in question were not customarily engaged in independent trades, occupations, professions, or businesses related to the services they performed with the band, despite a “memorandum of understanding” that satisfied the advisements required by subsection (1)(c). *Barge v. Indus. Claim Appeals Office*, 905 P.2d 25 (Colo. App. 1995).

### **Applied**

in *Insul-lite Window & Door Mfg. v. Indus. Comm’n*, 723 P.2d 151 (Colo. App. 1986); *Locke v. Longacre*, 772 P.2d 685 (Colo. App. 1989).

## Research References & Practice Aids

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### **Cross references:**

For the legislative declaration in SB 16-179, see section 1 of chapter 275, Session Laws of Colorado 2016.