

LANDMAN: INDEPENDENT CONTRACTOR OR EMPLOYEE?

UPDATE ON MICHIGAN LAW

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- **Controlling Law: Michigan Employment Security (“MES”) Act, MCL 421.1 et seq.**

General Rule:

Section 42 (5):

On or after January 1, 2013, services are employment if the services are performed by an individual who the agency determines to be in an employer-employee relationship using the 20-factor test announced by the IRS in revenue ruling 87-41... An individual from whom an employer is required to withhold federal income tax is prima facie considered to perform services in employment under this act.

Landman Exception: (effective as of August 26, 2014)

421.43 Services excluded from term “employment.”

Sec. 43. Except as otherwise provided in section 42(6), the term “employment” does not include any of the following: . . .

(v) Service performed by an individual as an oil, gas, or mineral landman under a contract with a private person or private entity if substantially all remuneration, including payment at a daily rate paid in cash or otherwise for the performance of the service, is directly related to the individual’s completion of the specific tasks contracted for rather than the number of hours worked, and if the contract provides that the individual is an independent contractor and not an employee with respect to the contracted service.

As used in this subdivision, “landman” means an individual who is engaged in 1 or more of the following:

(i) Negotiating the acquisition or divestiture of oil, gas, or mineral rights.
(ii) Negotiating business agreements that provide for the exploration for, transportation of, or development of oil, gas, or minerals.

(iii) Determining the ownership of oil, gas, or minerals through research of public and private records.

(iv) Reviewing the status of the title to, and curing title defects and deficiencies associated with, the ownership of oil, gas, or minerals.

(v) Managing rights or obligations derived from the ownership of interests in oil, gas, or minerals.

(vi) Interacting with regulatory agencies in support of activities relating to exploring for and producing oil, gas, or minerals, including unitizing or pooling interests in oil, gas, or minerals.

➤ So to qualify for the landman exception, one needs to:

1- Be paid by task (even if on a day rate) not just paid for X hours per week, and

2- Ensure your contract says independent contractor

➤ No written contract? Likely no protection for you.

➤ This “exception” only helps with state tax matters, not federal tax

- Federal Tax – Still the same

- Test: The “**Economic Reality Test**”

- 1- Whether the employer will incur liability if the relationship terminates at will;

- 2- Whether the work performed is an integral part of the employer’s business;

- 3- Whether the employee depends primarily upon the wages from that employer for payment of living expenses;

- 4- Whether the employee furnishes his or her own equipment and materials;

- 5- Whether the employee holds himself out to the public as able to perform the tasks of a given nature;

- 6- Whether the work involved is customarily performed by an individual as an independent contractor;

- 7- Also look at:

- a. Control over work,

- b. Payment of wages;

- c. Maintenance of discipline; and
 - d. The right to hire and fire employees.
- All factors are to be weighed together as a whole.
- ***Okay, what does that mean in the real world??***
- Have a written contract that addresses these factors.
 - Make sure the landman retains control of the performance of the work in the contract.
 - Consider separate contracts for separate plays/ clients.
 - Update contract from time to time.
 - Landman can present his or her own contract if the company doesn't have one or a good one.
 - Office use
 - Insurance
 - Reimbursements
- Formation of a simple LLC
 - Time
 - Costs
 - Impact on how you do business
 - Tax impact
 - Yearly filings

Questions??