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640.01 EMPLOYMENT RELATIONSHIP- STATUS OF PERSON AS EMPLOYEE.

*NOTE WELL: "[W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, the court must determine whether a party is an employee or an independent contractor as a matter of law."<sup>1</sup>*

*This instruction is appropriate only when there is a genuine issue as to whether an individual is an employee or an independent contractor. Typically, this instruction would follow the issue of the employee/independent contractor's negligence and would be considered only if the jury has answered that issue "Yes" in favor of the plaintiff.*

The *(state issue number)* issue reads:

"Was *(state name of employee/independent contractor)* an employee of the defendant?"

[You will answer this issue only if you have answered issue *(state issue number)* "Yes" in favor of the plaintiff.]<sup>2</sup>

On this issue the burden of proof is on the plaintiff.<sup>3</sup> This means that the plaintiff must prove, by the greater weight of the evidence, that *(state name of employee/independent contractor)* was an employee of the defendant.

A person performing services for hire is either an employee or an independent contractor. A person is an employee rather than an independent contractor when the hiring party retains the right and power to control the method, manner and means by which the details of the work are performed<sup>4</sup> rather than the right simply to require certain definite results.<sup>5</sup>

In determining whether the defendant retained the right and power to control the method, manner and means by which *(state name of employee/independent contractor)* performed the details of *his* work, you may consider several factors.<sup>6</sup> An employee, for example, usually:

(Give one or more of the following factors as indicated by the evidence.)

[is not engaged in an independent business, calling or occupation]

[does not have independent use of *his* special skills, knowledge or training in the performance of the work]

[does work on an hourly wage or salary basis rather than for a fixed price, a lump sum or upon a piece rate basis]

[is subject to discharge if *he* adopts one method of doing the work rather than another]

[regularly performs services for the person for whom the work is being done]

[is not free to use such assistance as *he* thinks proper]

[does not have full control over those assisting in the work]

[does not select *his* own time for working]

[*state any other applicable factor arising from the evidence*]

These factors are to be considered by you along with all of the other evidence in determining whether the defendant had the right and power to control the method, manner and means by which (*state name of employee/independent contractor*) performed the details of *his* work. The existence or nonexistence of one or more of these factors is not necessarily controlling.<sup>7</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*state name of employee/independent contractor*) was an employee of the defendant, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1 [Johnson v. News & Observer Pub. Co.](#), 167 N.C. App. 86, 88, 604 S.E.2d 344, 346 (2004).

2 Insert this sentence when the issue of the employee/independent contractor's negligence has been submitted to the jury and answered "Yes" in favor of the plaintiff.

3 If, in a rare case, it is the defendant who makes the employee contention, this instruction must be varied accordingly.

4 See [Youngblood v. North State Ford Truck Sales](#), 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988), and [Hayes v. Elon College](#), 224 N.C. 15, 16, 29 S.E.2d 137, 140 (1944) (stating that "[t]he vital test [of one being an independent contractor] is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details."). An independent contractor is subject to his employer only "as to the results of his work." [Johnson](#), 167 N.C. App. at 89, 604 S.E.2d at 347; see also [Little v. Poole](#), 11 N.C. App. 597, 602, 182 S.E.2d 206, 209-10 (1971) (noting that "[a] life insurance agent who is employed solely to bring about contractual relations between his principal and others on his own initiative, without being subject to the principal's direction as to how he shall accomplish results, is ordinarily held to be an independent contractor.>").

5 See [Rhoney v. Fele](#), 134 N.C. App. 614, 616-17, 518 S.E.2d 536, 539 (1999) (The test is "whether the party for whom the work is being done *has the right to control the worker with respect to the manner or method of doing the work*, as distinguished from the right merely to require certain definite results conforming to the contract." (citations omitted) (emphasis in original)).

6 See [Hayes](#), 224 N.C. at 16, 29 S.E.2d at 140 (Factors to be considered in determining whether one is an independent contractor include whether one "(a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time."); see also [Bentley v. Jonathan Piner Constr.](#), \_\_\_ N.C. App. \_\_\_, \_\_\_, 802 S.E.2d 161, 165 (2017) (citing the eight-factor test promulgated in [Hayes](#) and re-emphasizing the principle that these factors must be considered along with all other circumstances in determining whether one is an independent contractor).

7 See [Johnson](#), 167 N.C. App. at 89-90, 604 S.E.2d at 347 (stating that "none of [the Hayes] factors is determinative, nor is the presence of all required to indicate an independent contractor relationship. The Hayes factors are considered along with the other circumstances of the employment relationship to determine whether the one employed possesses that degree of independence to require his classification as an independent contractor rather than an employee.").

"Although a contract may designate that an employer-independent contractor, rather than an employer-employee relationship exists, the terms of the contract are not controlling. "[In re Estate of Redding v. Welborn](#), 170 N.C. App. 324, 330, 612 S.E.2d 664, 669 (2005); see also [Johnson](#), 167 N.C. App. at 89, 604 S.E.2d at 347 (stating that "[a]n employer cannot exonerate himself from his legally imposed liability to a third party for injury resulting from the tortious acts of his employee simply by contracting with the

Page 4 of 4

N.C.P.I.-Civil 640.01

EMPLOYMENT RELATIONSHIP-STATUS OF PERSON AS EMPLOYEE.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

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employee that he is to be free from the employer's control." (citing *Yelverton v. Lamm*, 94 N.C. App. 536, 540, 380 S.E.2d 621, 624 (1989)).