

Employer Definitions for Use with WorkInTexas.com

Employer: The U.S. Department of Labor Employment and Training Administration defines an employer as a person, firm, corporation, or other association or organization, which:

1. currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States; and
2. has an employer relationship with respect to employees as indicated by the fact that it hires, pays, fires, supervises, and otherwise controls the work of such employees.

An association of employers is considered an employer if it has all of the attributes of an employer set forth in this definition. Such an association, however, is considered as a joint employer with the employer member if either shares in exercising one or more of the definitional attributes. For more details on what constitutes an eligible employer, see U.S. Department of Labor Code of Federal Regulations, 20 CFR §651.10.

Note: Federal contractors associated with the military are considered employers, even if the jobs are located outside the United States.

Multilevel Marketing: Independent, unsalaried salespeople of multilevel marketing plans (MLM) are often referred to as distributors (or associates, independent business owners, dealers, franchise owners, sales consultants, consultants, independent agents, etc.), represent a parent company, and are awarded a commission based on the volume of product sold through each of their independent businesses or organizations. Independent distributors develop their organizations by either building an active customer base that buys directly from the parent company, or by recruiting a “downline” of independent distributors who build their own customer base, thereby expanding the overall organization. Additionally, independent distributors can earn a profit by retailing products they purchased from the parent company at wholesale price. For MLM plans to be legal, individuals must earn more from product sales than from recruitment of downline independent distributors, and must be able to get a refund of not less than 90 percent of upfront payments for unused, resalable product. For more information, the Attorney General of Texas describes MLM or “network marketing” at length on its Web site at <http://www.oag.state.tx.us/consumer/bizops.shtml>.

Note: The Federal Trade Commission warns that the practice of earning commissions from recruiting new members, a practice also known as pyramiding, is illegal in most states. Additionally, under the Texas Deceptive Trade Practices Act, it is illegal to promote a pyramid scheme. Besides being a civil deceptive trade practice, pyramid promotion is a state jail felony punishable by imprisonment in a state jail for up to two years and by a fine of up to \$10,000.

Independent Contractor: A contractor is any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his or her own means and methods, without submitting to the control of the other persons in respect to

all the details. Recognized tests for determining when a person is acting as an independent contractor are, among others, the:

1. independent nature of the business;
2. obligation to furnish necessary tools, supplies, and materials to perform the job; and
3. right to control the progress of the work except for the final result.

Pitchfork Land & Cattle Co. v. King 162 Tex. 331, 346 S.W.2d 598 (1961).

Additionally, the Texas Workforce Commission uses *Employment Status – A Comparative Approach*, 40 TAC §821.5, to help distinguish between independent contractors and employers: <http://info.sos.state.tx.us/fids/200700686-1.pdf>.

Business Opportunity: Under the Texas Business and Commerce Code, Chapter 51, Business Opportunity Act, a business opportunity is regulated by the law if:

1. it requires the buyer to make an investment to start the business;
2. the seller promises the buyer will earn or is likely to earn a profit exceeding the initial investment; and
3. the seller will:
 - provide locations or help find locations for the use or operation of the products, equipment, supplies, or services on premises that are not owned or leased by the buyer or the seller;
 - provide a sales, production, or marketing program (this does not apply to franchise start-ups); or
 - buy back or is likely to buy back products, supplies, or equipment purchased or a product made, produced, fabricated, grown, or bred by the buyer using in whole or in part the product, supplies, equipment, or services the seller initially sold or leased or offered for sale or lease to the buyer.

The seller must provide the following to the buyer at least 10 days before the buyer signs a contract or makes a financial investment:

- names and addresses of all persons affiliated with the seller in this particular business;
- copy of the seller's current financial statement;
- complete description of the services the seller agrees to perform for the buyer;
- if training is promised, a complete description of the training, length of training, and cost of travel or lodging during training;
- if services are promised, the full nature of services and agreements to be made with the owners or managers of business locations; and
- full disclosure of any adjudication resulting from a bankruptcy or civil suit involving fraud or embezzlement within the past seven years.