Independent Contractors in the Construction Industry

**Who Is and Isn’t Covered by Workers Comp?**

Employers in the construction industry are often perplexed as to who they should cover with their workers’ compensation insurance policy. Full-time employees are covered, but what about part-time employees, day laborers, leased employees, borrowed employees and occasional volunteer work by a family member? In most states all of these types of employees will be covered by the workers’ compensation insurance policy. However, independent contractors are normally excluded from coverage by the workers’ compensation insurance policy.

The issue that arises most often between independent contractors and construction company employers is when the independent contractor does not have workers’ compensation insurance of his/her own and is injured while working for the employer. When the injury is severe and the independent contractor does not have workers’ compensation coverage, often the independent contractor will try to collect workers’ compensation benefits from the employer’s workers’ compensation insurance company.

**Employers Coverage Denys Claims From Independent Contractors**

The employer’s workers’ compensation insurer will normally deny the claim as the insurer has not collected any premium for the additional exposure of the independent contractor. The independent contractor (and his/her attorney) will often turn to the Workers’ Compensation Board/Industrial Commission and ask the governing authority to rule on whether or not there is coverage for the independent contractor.

The Board or Commission will normally look closely for any reason where they can classify the independent contractor as an employee of the construction company employer. If the employer has not complied with all the requirements of hiring the independent contractor as an independent contractor, the Board or Commission will find the injured worker to be an employee.

**Construction Employers Need to Know Law**

For the construction company employer to protect its self from workers’ compensation claims of independent contractors claiming workers’ compensation benefits, the employer should know the law pertaining to independent contractors in their state. Many states follow the federal government guidelines outlined in the federal Fair Labor Standards Act (FLSA). On the federal level, the U.S. Supreme Court has ruled several times that there is not a single issue that makes a worker an independent contractor as opposed to an employee, but a preponderance of all the information surrounding the independent contractor-employer relationship.

**Federal Fair Labor Standards Act**

Per FLSA, the following issues define whether or not the worker is an independent contractor or an employee:

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 the facilities and equipment
4. The nature and degree of control by the principal
5. The alleged contractor’s opportunities for profit or 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

Generally put:

* If the construction company employer utilizes only one independent contractor to always perform the same type of work, he may be considered an employee.
* If the independent contractor works for no other company, he may be considered an employee.
* If the construction company controls when, where and how work is performed, the worker will be considered an employee.
* If the worker has no exposure to financial loss on a job, he will be considered an employee.
* If the worker maintains a separate business address, he will most likely be considered an independent contractor
* If the worker has a federal identification number for income tax purposes, and does not use a social security number, he is more likely to be considered an independent contractor

**Factors That Do Not Determine Employment Status**

There are some factors that construction-company employers think should be considered in the determination of employment status, but generally the states do not agree. The factors that normally do not make a difference include:

* The location of where the work is performed
* The lack of a formal hiring agreement
* The licensing, or lack thereof, the worker
* The frequency or timing of payment

**Tips to Protect Against Contractor Claiming to be Employee**

Construction companies can protect themselves from an independent contractor claiming to be an employee. The construction company must mandate the independent contractor provide a copy of a policy of workers’ compensation insurance in the name of the independent contractor. The construction company should contact the independent contractor’s insurance agent and confirm the workers’ compensation policy is paid up and has not been cancelled.

Construction company employers should also have a formal contract with the independent contractor stating:

* The work to be performed will be completed by a definite date, but the independent contractor will determine the days and hours actually worked
* The independent contractor will furnish his/her own materials, equipment and tools
* The independent contractor will complete the agreed to work for the set price, regardless of the number of hours/days needed to complete the job and regardless of whether or not the independent contractor makes a profit.
* The independent contractor will maintain workers’ compensation insurance covering all of the independent contractor’s employees until the agreed work is completed to the satisfaction of the construction company
* The independent contractor will determine the means and methods of how the work is performed
* The independent contractor is free to work for other employers before, during and after the work for the construction company