

IS INDEPENDENCE SELF-EVIDENT?

*By: Attorney Kevin L. Connors
DuffyConnors*

How many times, whether in the last year or over the course of your tenure as a savvy workers' compensation practitioner, have you received a Claim Petition, alleging a work-related injury occurring in the alleged course and scope of employment, against an insured, who then proceeds to tell you that the injury was never reported, as the claimant is not an employee, as the insured contends that the claimant is an independent contractor, for whom no payroll-based premium has ever been collected?

Certainly, this has happened more than once, and no matter how many times it has happened, you are nevertheless stuck with balancing the insured's perception of what an independent contractor really is, against the potentially unfavorable determination by a workers' compensation judge, who, more characteristically, views this question as one simplified to the existence, or not, of workers' compensation insurance coverage, in the absence of any formal contract or agreement between the insured and the Claimant, clearly delineating that the Claimant is, in fact, and, under contract, an independent contractor.

MATRIX

It is a factual and procedural matrix that insurance carriers are often forced to litigate, as the lines of defense in this universe are drawn over communications and representations made on several different levels, to include, between the insured and the worker, be it employee or independent contractor, the insured and the insuring agent and broker, the insuring agent or broker and the insurance carrier, the insurance carrier and the insured seeking whatever insurance coverages are necessary for the operation of their business, in which case the entity seeking insurance typically helps complete and submit applications for coverage, and must make disclosures sufficient for the insuring agent and/or carrier to understand not only the operation of the business, but the potential risks that the business might be exposed to, in the course of its operations, in order to make sure that the proper coverages are in place, with the required limits, in avoidance of an injury or accident disrupting or interfering with the operation of the business.

At each step in this process, it is possible for the information or data to be misinterpreted and, no less true, it is also possible for the information to be intentionally and/or negligently misrepresented, in which case there can either be insufficient coverage, or coverage for which an adequate policy premium has never been rated to the fateful detriment of the Carrier eventually paying the claim.

CONTROL

All of this turns on what facts or factors distinguish an employee from an independent contractor, and what kind of questions should the parties affected by this question be asking, and what factors should everyone be looking at, in order to determine the *central* dispositive word in any analysis of this issue, being very simply, CONTROL, in all of its manifestations, being, no less true, a reflection of absolute dependence, and a negation of all independence.

This puzzling paradigm is more problematic in several distinct industry groups, to include almost all lines of construction, delivery services, maintenance, landscaping, janitorial, transportation and

logistics, and like industries where the line between control and independence is blurred or ambiguous.

4 ELEMENTS

Since all of us have, at one time, been faced with this claim, in which there is a dispute as to whether an employment relationship ever existed, we are familiar with the general parameters to be analyzed when addressing this issue, and we know that the existence of four key factors, as indicated below, typically are sufficient to induce an aura of employment, flowing out of a true master-servant nexus, where the master, or employer, not only has the right to execute the following, but never waives or releases those rights, in the context of this special relationship, to include:

- The right to hire the worker;
- The right to fire the worker;
- The right to control the worker; and,
- The right to direct the manner in which the worker performs the work.

The above are the inviolate province of the employer, and are indicative, no matter what other trappings might be present, in terms of the payment or non-payment of certain benefits, the withholding or not of certain taxes, of a feudal master-servant relationship, shackled by the servant-employee's surrender to the master-employer's will.

Sounds simple enough, but how does that work when the company alleged to be the employer and the injured worker alleging employment are not saying the same things, in terms of the control issue, putting aside any potential for self-serving statements intended to induce or limit coverage.

STATUTES

At common law, and now by virtue of statute, specifically most workers' compensation statutes, and certainly Pennsylvania's Workers' Compensation Act, definitions have clearly been assigned to the employee and employer, with the common law and statutory definition of an employee is that of a servant, who performs services, for a valuable consideration, while the employer is defined as the master, and with the master assigning, directing, and controlling the work to be performed, in exchange for the payment of wages or salary, considered to be consideration, irrespective of value, although value is typically driven by market forces, as well as, in some instances, by public policy.

Conversely, an "independent," and, yes, it is by default that we refer to the worker as being a "contractor," so that the contracting company or entity is not trapped into calling the worker an "employee", is designated to be a "contractor," so that the term ripens as that of an "independent contractor," which term of art, under our Pennsylvania Workers' Compensation statute is defined as "a contractor engaged in independent business, other than that of supplying laborers or assistants, in which he serves persons other than the employer, and is also defined as one "who subcontracts all or part of any contract," such that the contractual bridge between contractor and subcontractor is no longer "at will." The key differentiation between an employer-employee and a contractor-subcontractor relationship is the ability of the employer to be able to fire the employee "at will," without breach of contract ramifications, that would necessarily occur in a contractor-subcontractor relationship, if erected, as it should be, on a written contract between the contractor and subcontractor.

However, by virtue of our vast experience in compensation matters, we recognize the blurred lines between the parties' initial expectations, and what the parties believe their expectations must have been, in the post-injury apocalypse, with both direction and control being contested, to achieve a desired end, that being claim acceptance if injured, and claim denial, if sued.

EMPLOYEES

Since the employer-employee relationship is erected on a bedrock of servitude, overlaid with direction and control, factors that are often considered as evidencing direction and control include the employer providing the employee with the tools to work with, the employer training the employee to perform the work, the employer directing the employee to perform the work or service, the employer controlling the manner in which the employee performs the work or service, the employer dictating when the employee must perform the work or service, and the employer having total control over the employee's work product or service, as well as the absolute right to fire the employee for not performing the work in the manner directed by the employer, or not providing the product or service demanded by the employer.

INDEPENDENTS

Conversely, key factors suggesting independent contractor status include, there being a written contract, often titled as a subcontract, delineating the scope and content of the work or project under contract, the type of occupation or business for which the independent contractor is being retained, whether the tools to perform the work are provided by the independent contractor, as opposed to the person or entity hiring the contractor, whether the payment to the independent contractor is for the time to perform the work, in which case if the payment is for work by the hour, the day, or the week, payment by time worked can be considered to be an indicia of employment, irrespective of whether taxes or benefits have been deducted, whether the independent contractor is simply paid by the job, more likely a factor in determining an independent contractor relationship, and whether the work being performed is part of the regular business of the person or entity hiring the independent contractor, in which case, it is more likely that the contractor will be considered to be an employee, again irrespective of tax and benefits consequences.

Again, the key factor in determining whether the contractor is independent, turns on who has control over how the work is performed.

IRS

Since this issue has become one of some significance to tax authorities, the Federal IRS has actually developed twenty separate factors that it looks at, in analyzing whether the contract is predicted on independence, or is control-based, as the IRS reserves the right to investigate this issue, for tax capture and tax-avoidance purposes.

The twenty factors considered by the IRS are, as follows:

- *No instructions*: independent contractors are not required to follow, nor are they furnished with, any instructions to perform a job;
- *No training*: independent contractors do not receive training by the hiring firm or entity, as the contractors use their own methods and manner to perform their work;
- *Other workers can be hired*: independent contractors are retained to provide a result and usually have the right to retain others to do the actual work;
- *Independent contractor's work is not essential*: a company's success or continuation of work does not depend on the service of outside independent contractors;
- *No time clock*: independent contractors set their own work hours;

- *No permanent relationship*: independent contractors do not have a continuing relationship with the hiring company or entity. Although the relationship can be frequent, it must be at irregular intervals, on call, or whenever the work is available;
- *Independent contractors control their own workers*: independent contractors do not hire, supervise, or pay assistants at the direction of the hiring company or entity. If assistants are hired, it is at the independent contractor's sole discretion;
- *Other jobs*: independent contractors are always permitted, dependent upon time and other factors, to pursue other gainful work;
- *Location*: independent contractors control where they work, and if they work on the premises of the retaining company or entity, it is not under that company's direction or supervision;
- *Order of work*: independent contractors determine the order and sequence in which they perform their work;
- *No interim reports*: independent contractors are retained for the final result only. They should not be asked for progress or interim reports;
- *No hourly pay*: independent contractors are paid by the job, and not by time. Payment by the job can include periodic payments based on a percentage of the job completed. Payment can be based on the number of hours needed to do the job multiplied against a fixed hourly rate. Payment methods should be determined before the job or contract commences;
- *Multiple firms*: independent contractors often work for more than one company or entity at a time;
- *Business expenses*: independent contractors are generally responsible for their own business expenses;
- *Own tools*: independent contractors furnish their own tools. Independent contractors can use equipment, borrowed or leased, from the retaining company or entity, although the lease cannot be for a nominal amount in avoidance of actual consideration;
- *Significant investment*: independent contractors should be able to perform their work without the retaining company or entity's facilities (equipment, office furniture, machinery, etc.). The independent contractor's investment in their trade must be real, essential and adequate;
- *Services available to the public*: independent contractors make their services available to the general public by one or more of the following:
 - Having an office and assistance;
 - Having business signs;
 - Having a business license;
 - Listing their services in a business directory: or,
 - Advertising their services.

Very limited exceptions exist, under our IRS guidelines, with the IRS allowing exemptions for situations where the hiring company consistently treated its workers as independent contractors, the hiring company has filed all required IRS forms for this exemption, and the hiring company has a reasonable basis for treating its workers as independent contractors, either because of prior rulings or reported cases, or because of an industry-wide practice.

PROBLEMS

Since we are, for the most part, trying to work backwards, from the reported claim back to the initial hiring or contract, we are often handicapped, in our analysis, when the two parties do not begin working together, by using clearly defined titles and definition, such as employee, or independent contractor. This can be problematic when one party is best-served by, for strategic or tactical purposes, to characterize the relationship in the light most litigiously favorable to it.

In workers' compensation proceedings, companies claiming that their workers are independent contractors face enormous procedural challenges before workers' compensation judges, as judges view, in the absence of any formal contract, the designation of an "independent contractor", as simply a device or technique for avoiding procuring workers' compensation insurance coverage, and, no less true, avoidance of taxes and other employer-paid benefits, such as health insurance, pension, etc., with workers' compensation judges more often than not, finding that the injured claimant is an employee, and not an independent contractor, as the injured worker is then covered by the workers' compensation insurance coverage that every company presumably procures, in satisfaction of their statutory obligations under the Act.

No less problematic than workers' compensation judges more often finding employment over independence, other questions arise, including:

- Who or what is being insured?
- Is insurance adequate for the risk being written?
- Does the failure to insure contractors as potential employees implicate payroll/premium fraud?
- Who decides: independent contractor/employee?
- How do you manage the potential risk that the ultimate question, as to a worker being an employee versus an independent contractor, will be determined by a workers' compensation judge, with very limited rights of appeal, as to questions of law?

And not insignificant liability exists, in the course of addressing this topic, which liabilities seems to swell with uncertainty in the pressure of mounting claims, and the inability of companies and workers to clearly delineate the scope and purpose of their relationship, from the outset.

If direction and control exist, it likely walks, talks, and is paid like an employee.

If there is no direction or control, it is likely an independent contractor, not entitled to workers' compensation benefits, by virtue of there being no work-related injury occurring in the course and scope of employment.

CHECKLISTS

For the casual readers of our newsletter, we suggest consideration of the following not-intended-to-be exhaustive checklists, when confronted with these kinds of ambiguous claims pitting control versus independence:

Independent Contractor Checklist

Factors to consider to determine if worker(s) equal independent contractor(s):

- No employment application;
- No written contract of hire;
- No employment documentation, including no proof of identification, proof of citizenship, and/or proof of tax declaration;
- No training manual;
- No employee handbook;
- No on the job training;

- No job description;
- No time clock;
- No time sheet;
- No pay for time worked;
- No reporting requirements;
- No hourly pay;
- No instructions or orders as to what work is to be performed, or how work is to be performed;
- No reimbursement for travel or other business expenses;
- No tools provided;
- Contractor services are advertised to the general public;
- Contractors advertise their business services in a business directory;
- Contractors possess trade/skill-dependent license;
- Contractors make real investment in business operation and continuation, in terms of equipment facilities, etc.;
- Contractors have a profit and loss;
- Contractors have oral/written contract/subcontract for job/work being performed;
- Contractors cannot be fired/terminated, without potential liability for breach of contract;
- Contractors use independent judgment in performance of work/job;
- Contractors have personal/corporate reputations; and,
- Contractors agree to perform specific job/services for agreed-in-advance prices or rates.

Employee Checklist

- Contractors responsible for/liable to own workers/employees/assistants;
- Employer advertises for employees;
- Employer pre-screens employees, through application process, checks references, does background checks, requires pre-employment physical examinations;
- Employer offers oral/written “contract-of-hire”, describing the job, duties, parameters, salary, policies, associated benefits;
- Employer retains the right to fire the employee, hired “at will”, for any reason, not limited to poor job performance, subject to the termination being non-discriminatory;
- Employer controls employee work hours, employee salary, employee job duties, employee reviews, and employee discipline;
- Wages/salary based on time worked, and not driven by assignment or project;
- Employer holds proprietary interest in all work completed by employee;
- Employer provides on-the-job orientation/training;
- Employer requires documentation of identification, citizenship, and prior work history/experience;
- Employer provides employee handbook/manual, detailing employer business operation, and benefits of employment;
- Yes, deductions for Federal and State taxes indicate employment, although the absence of deductions for taxes need not negate employment;
- Work construction/work orders given by employer;

- Employer review, on whatever timetable;
- Employee promotions, with change in position, duties, title, and/or salary;
- The right to discipline the employee, for job performance, and/or violation of employer policies;
- Attendance records maintained;
- Personal and sick leave provided;
- Vacation provided;
- Compensation for holiday leave;
- Right to control what work is performed;
- Right to control how the work is performed; and,
- Right to suspend work.

Potential Independents

- Volunteers;
- Construction contractors;
- Owner-operator truck drivers;
- Hairstylist/barbers;
- Disc jockeys;
- Construction estimators;
- Instructors;
- Installers;
- Commercial/residential cleaning services;
- Delivery couriers (not Fed Ex or UPS); and,
- Certain “skilled” professionals, working independently or through “temp” agencies, including attorneys, doctors, nurses, insurance agents/adjusters, accountants, actors, writers, taxicab/limousine driver, caterers, case managers.

CLOSING

Certainly, these types of disputes must be carefully analyzed on a case-by-case basis; with the issue often being subject to converse interpretations, such that these kinds of claims become all too fact-dependent, empowering judges to be the ultimate arbitrators of the “truth”, a result not always consistent with reality.

Questions concerning the practical implications of the day-to-day administration of workers’ compensation claims should be directed to our Workers’ Compensation Department.

The views and opinions expressed in this article are purely those of the author. Articles may not be reprinted without the expressed written permission of the author.