

SWIF's Independent Contractor Determination Process

Sole proprietors with no employees are not required to carry their own workers' compensation insurance. The basic presumption in these cases is that the sole proprietor is in fact a true independent contractor and not a substitute employee. Unfortunately, there is no clear-cut definition or exact set of factors to assist someone in making a determination of an employer/employee relationship.

The issue of inclusion of subcontractors as employees is covered within Section 302 of the Pennsylvania Workers' Compensation Act as amended. That section covers the relationship of contractors and subcontractors as well as the role of statutory employment in deciding employment issues. Further, the inclusion of subcontractors is covered in case law which has for the most part set the standards for deciding on the inclusion of subcontractors as employees. The benchmark case in beginning an analysis of employment status is the West Motor Freight decision. In that decision, a workers' compensation insurance carrier must make a good faith business judgement in determining whether workers are employees or independent contractors. This means that carriers must review the facts of each case in conjunction with legal precedent and make a business determination as to employment status. In essence by applying this process, a company's position must be fair, consistent and reasonable and avoid the appearance of being arbitrary or capricious.

It is important in any analysis of a particular case for a company to analyze the facts of each situation, consider the current legal precedent on employer-employee relationship, and make a reasoned decision based on the merits of each case. The criteria utilized by SWIF in determining employment status is primarily based on its review of direction and control as provided by the general contractor and the relative nature of the work provided by the subcontractors. These factors are significant in determining whether an employer-employee relationship exists.

Direction and Control

Items that indicate an employer exercises direction and control to warrant inclusion as an employee:

1. Work at a place set by the employer.
2. Is subject to supervision and instructions regarding the details of the work.
3. Is subject to dismissal by the employer.
4. Performs on-going service for the employer.
5. Uses tools, equipment and material furnished by the employer.
6. Has federal income, FICA and other taxes deducted by the employer.
7. Performs duties assigned by the employer.
8. Works hours set by the employer.
9. Receives a regular salary, usually based on an hourly, weekly or monthly rate.

It is important to note that not all items are needed in order to demonstrate an employment relationship. Rather, the preponderance of information and intent of the employer is key to making a final determination. Further according to case law, direction and control does not have to be utilized in order to have a employment relationship. The appearance of or the right of direction and control is significant even if the employer never utilizes the right.

Relative Nature of the Work

The relative nature of the work considers two tests. One test is the nature of the alleged employee's work, and the other test is the alleged employee's relationship to the employer's business.

Nature of Employee's Work

The nature of the work includes the level of skill involved and the credentials required. The necessity of a license to perform the work is an indication the work can be considered a separate undertaking. Also important is the employee's dependence on the alleged employer. In some cases, injured workers may qualify for benefits because they are economically dependent on the alleged employer even though they are not subject to direction and control. Because of their economic dependence, such individuals would have no protection unless extended the benefits of the workers' compensation law. Normally if the individuals work is deemed artisan in nature, they will be granted independent status. For example, a plumber, electrician, mason, etc. are examples of trades whereby the workers have historically been considered to be craftsmen and legitimate subcontractors as long as the work they're performing is to a non-related entity. Normally, we expect those people to have as a minimum a general liability certificate and being paid by a 1099.

Relation to the Employer's Business

If the work performed is an integral or essential part of the employer's business, a court may be more likely to find that an employer/employee relationship exists. The same is true if the work is performed continuously rather than intermittently or if it lasts long enough to be deemed continuous service rather than the contracting of a particular project. Thus, even when one of the elements of control appears, a court may determine that an employer/employee relationship exists if the employer appears to accomplish its regular business through the regular services of the individual.

For example, a drywall company who is in essence a subcontractor will have difficulty in proving independent status for any work subcontracted out to other drywall sole proprietors. The reason being is that the subcontractors are an essential part of the employers business and are doing work that should be expected of regular employees. Further, work that is normally labor intensive such as framing or roofing would require adequate justification to show how one individual conducts the necessary work tasks. SWIF also looks at any contract in place between the general contractor and the client as well as who obtains the building permit in analyzing the relationship of the subcontractor to the employer's business. The legislature recognized the importance of determining this relationship in Act 44 which requires municipalities to obtain workers' compensation certificates before the issuance of any building permits. Historically, SWIF has been suspicious of any general contractor who has no recognized or limited construction payroll but yet requires the need for certificates of insurance to be issued to municipalities.

SWIF attempts to obtain as much information as possible before making any judgement as status. Besides looking at the direction and control and the relative nature of the work, SWIF looks at other variables that may shed further light on employment status. These variables include:

1. Factors to Determine if a Subcontractor Maintain a Separate Business:

- A. A Federal Identification Number of the subcontractor.
- B. A copy of an Assumed Name Certificate filed with the State.
- C. Copies of the subcontractors Articles of Incorporation or partnership papers.
- D. Subcontractor received an IRS 1099 Form in lieu of a W-2 form.
- E. Subcontractor maintains own separate place of business.

- F. The subcontractor furnishes all their own materials and equipment to perform the job task.
- G. A copy of a written contract which spells out contractor/subcontractor relationship.
- H. Examples of relevant documentation to include copies or individual's preprinted invoices, business forms or stationery.
- I. The subcontractor has the right to hire or fire their employees without securing permission from a general contractor. (Please note if subcontractor has employees, a worker's compensation certificate is necessary).
- J. The subcontractor is in business to make a profit and has assumed sufficient risk.

2. Factors to Determine if the Subcontractor Holds Itself Out to and Renders Service to the Public:

- A. The subcontractor is listed in the Yellow Pages and/or advertises in newspapers, trade journals, on TV, or on the radio.
- B. A list of other general contractors or individuals the subcontractor worked for recently, along with addresses and telephone numbers.
- C. The subcontractor performs specific jobs for prices agreed upon in advance and pays expenses incurred in connection with the specific jobs.

3. Other Factors:

- A. A sworn statement from the sole proprietor that the sole proprietorship has no employees.
- B. The subcontractor does not primarily depend on the payments from one general contractor for the payment of the individual's living expenses.
- C. The number of certificates of insurance issued by our insured.
- D. The nature of the business our insured vs. the subcontractors.
- E. The number of employees and payroll of our insured vs. total subcontractor payroll.

In the final analysis, SWIF must resolve the subcontractor issue to a logical conclusion. Unlike the standard market who can non-renew policies for Underwriting reasons, SWIF can only cancel for non-payment of premium. Consequently; SWIF must face the issue and resolve it accordingly, since it cannot walk away from an issue. The Legal Committee at SWIF has met the requirements of West Motor Freight and continue to meet the challenges of determining employer/employee relationships according to current case law. It is a challenge that has at times taxed the patience and intestinal fortitude of those tasked with making the decision.