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## The Nightmare of Independent and Subcontractor Claims

It seems like a cut and dry situation, you or your clients hire someone to do a job; they are independent contractors or subcontractors so you don't worry much about liability... until the accident occurs.

Each and every year carriers pay out thousands of dollars in claims for independent contractors and subcontractors. More often than not a quick review of the employment arrangement by the presiding judge determines that the arrangement constitutes an employment relationship and not an independent contractor relationship. This determination is generally based on the Internal Revenue standard for determining employment. The IRS along with many states have a defined test to assist in the determination of independent contractors as opposed to employees. The simple test when applied to the work arrangement often results in the requirement to purchase workers compensation. So let's begin by looking at the IRS definitions and see how they apply to workers.

**The Statutory Employee** may be treated as an employee by statute for certain tax purposes if they meet conditions described under Social Security and Medicare taxes. The work that falls under these employments are:

- A driver that is paid commission.
- A full-time Life Insurance Agent working primarily for one company.
- An individual who works at home on materials or goods you supply and must be returned to you, if you also furnish specifications for the work to be done.
- A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operations. The work performed for you must be the salesperson's principal business activity.

The **Common Law Employee** is anyone who performs services for you if you can control what will be done and how it will be done. This rule applies even if you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

Facts that provide evidence of the degree of control and independence fall into three categories:

- **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?

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## The Nightmare of Independent and Subcontractor Claims

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- **Financial:** Are the business aspects of the worker's job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- **Type of Relationship:** Are there written contracts or employee type benefits (i.e., pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

**Independent Contractor:** An individual is an independent contractor if you, the person for whom the services are performed, have right to control or direct only the result of the work and not the means and methods of accomplishing the result.

Many employers are under the mistaken belief that Statutory Employees and Common Law Employees, as defined by the IRS are Independent Contractors. Not so, according to the IRS. Most state laws include the definition set forth by the IRS to determine if a worker meets the definition of employee but may have additional regulations.

At the end of the day the issues that cause the most friction in these relationships is who will pay a workers' compensation claim if one should arise in the course of the relationship.

Most workers' compensation laws provide that a contractor is responsible for the payment of compensation benefits to employees of its uninsured subcontractors. The statutory

responsibility is automatically insured under the contractor's policy. The contractor can initiate legal action against the independent or subcontractor but the injured worker will receive their benefits.

### So what can be done to limit the exposure?

Some states have enacted an Independent /Subcontractor exclusion form. These forms clearly delineate the employment status, roles and responsibilities of each signing party. A word of caution, the contractor must be diligent to ensure that the certificates are current and each and every Independent Contractor has signed them.

Require each and every independent contractor or subcontractor to supply you with a Certificate of Coverage. The Certificate should be current and have a notice of cancellation provision. Small subcontractors and independent contractors are notorious for allowing their coverage to lapse so each month you should require a new certificate evidencing coverage for that month.

Examiners will argue that there still are capricious decisions made to extend your policy to the uninsured worker but each of these steps will strengthen your defenses should a claim arise. The overriding rule is that in the absence of viable coverage by the independent or the subcontractor, the general contractor is liable.

## Independent Contractor Questionnaire

When you meet with a prospective Independent Contractor (IC) for the first time, you should have the IC complete an independent contractor questionnaire. You should design a questionnaire to elicit the sort of information that will establish that the IC is a separate business entity, not merely an employee in IC's clothing. Below is some information you will want to know:

- Whether the IC has a fictitious or assumed business name.
- How the IC's business is structured (for example, sole proprietorship, partnership, corporation, limited liability company).
- The IC's business address and phone number.
- The number of people employed by the IC, if any.
- Any professional or business licenses the IC holds.
- Contact information for other companies for whom the IC has worked as an independent contractor.
- How the IC markets his or her business (for example, Yellow Pages, advertising).

- Whether the IC has an office separate from his home.
- A description of the business equipment and facilities that the IC owns.
- Whether the IC has his own business cards, professional stationery and invoice forms.
- A list of all of the types of insurance that the IC carries (Make sure you get copies of Certificates of Insurance).

None of the answers to these questions will provide conclusive evidence that a worker is an Independent Contractor or Subcontractor. But taken together, this information will help you decide whether the worker is an independent businessperson whom you can safely treat as an IC.

*Note: Do not ask an IC to complete one of your standard employment applications. Government agencies can use the mere fact that the IC filled out an "employment" application as evidence that the IC is actually an employee.*



## Potential Risks and Responsibilities Associated with Self-Administering Claims and CMS Reporting

Now more than ever it is imperative that all claims be reported to the carrier or their agent, the Third-Party Administrator (TPA). Recent government legislation has made it mandatory to register with and transmit claims data to the Centers for Medicare and Medicaid Services (CMS). The Responsible Reporting Entities (RRE) must register by September 30, 2009. RRE is defined as a carrier, their agent or a qualified self-insurance plan. The registration and reporting requirements impact the handling of Workers' Compensation, Liability, Auto No-Fault, and Self-Insurers claims, defined by CMS as Non-Group Health Plans (NGHP).

The Carrier or their agent, the TPA is required to transmit the claims data to determine a claimant's Medicare eligibility status on all claims. In addition, specific information shall be transmitted on claims involving Medicare entitlement if there is: 1) Ongoing Responsibility for Medical on or after 7/1/09, 2) Closure through settlement, judgment or award on or after 7/1/09, 3) Cases closed due to inactivity on or after 1/1/09, and 4) Cases re-opened from an inactive status on or after 1/1/09.

Unless you are self-insured and have made arrangements for CMS reporting, only claims that have been reported to the carrier or TPA will be protected under the new CMS provision. Once reported, the carrier or TPA becomes responsible for accurate and timely reporting to CMS. Failure to identify and report claims timely carries a \$1,000.00 per day, per claim civil penalty. If you are currently self-administering a portion of your claims, the carrier or TPA will not be reporting these claims on your behalf.

We encourage our clients to report all claims and let the carrier or TPA assume the responsibility of determining if reporting to CMS is applicable.

To avoid the risk of unreported eligible claims all claims should be reported to your claims administrator. For additional information please use the Link below to access CMS.

<http://www.cms.hhs.gov/MandatoryInsRep/>

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## The Importance of Classification Codes

### What is a Classification Code?

Class codes are intended to categorize the overall business class of a particular employer, not necessarily the particular work being performed by a specific employee. For example, a cook employed in a hospital cafeteria would be categorized as a hospital employee, not simply as a cook.

### Why are Class Codes Important?

Class codes are intended to classify the overall risk of an employer or type of business. Different classifications obviously have different premium cost associated with that particular code. The accuracy of a specific classification is important because it can have an impact on the cost of your workers compensation program.

### Obstacles of NCCI Classifications in the Temp Service and PEO Industries:

As you are aware, a Temporary Service Organization and/or PEO often have employees working in several different types of businesses. Therefore the workers should be as-

signed to the code that governs the worksite location. Each worksite may have a different code. You will need to advise your underwriter when you begin working at a location that has a code you have not previously used. This will allow the code to be endorsed to your policy, an important step to take in insuring that your experience modification is correct. Each code will have differing rates and the rates may vary by state. You will want to work closely with your underwriter to be sure that you have the proper rate for each code and state. A little preliminary homework will prevent confusion at the time of your audit.

### Why is class code accuracy essential?

Your policy premium is a direct reflection of the type of business that your employees are working in. A premium audit at the end of a policy year is also the industry norm. If a business is initially coded incorrectly, it can lead to unbudgeted premium cost after your policy period has concluded. In today's volatile market, precision is vital to saving cost.



## Safety and Return-to-Work Programs Contain Claim Costs

The *Ironton Tribune* recently wrote an article regarding the cost savings realized by Lawrence County, W.Va., by instituting several changes in their Workers' Compensation Program. The county's claim costs were spiraling out of control and the County Commissioners decided that something had to be done to curb costs.

I mention this article to highlight the fact that with a few changes an organization can realize tremendous savings. When Lawrence County decided to make changes two years ago the first step they took was to assemble a safety team. The team is formed from existing members of an organization. These team members are notified of on-the-job injuries and conduct accident analyses to see what safety measures can be implemented to prevent similar accidents or injuries in the future.

In addition to the safety team Lawrence County instituted an early Return-to-Work Program and offers transitional job duties to injured workers until they are released to their regular jobs. Keeping employees working while recuperating from an injury saves more than just lost wages.

Studies show that the longer an injured employee is off work, the greater the likelihood that he or she will become

permanently disabled. Injured employees that do not return to work within 6 months have only a 50% likelihood of returning to their workplace. The likelihood of an injured employee returning to his or her workplace drops to less than 10% after a year of not working. However, if an employer is committed to encouraging their injured employees to return to work after an injury they can increase the likelihood and reduce the time off work.

For Lawrence County, W.Va., the "proof is in the pudding." Their claims cost have significantly decreased over the last two years. In 2006 they paid \$395,000 in claims. In 2007 the costs had dropped to \$273,000. In 2008 they paid only \$35,000 in workers' compensation claims. So far this year Lawrence County has only filed seven claims and all have been Medical Only.

In an effort to assist our valued clients in implementing a Return-to-Work Program we have created a Stay at Work/Return-to-Work (SAW/RTW) program and posted it to our website, Artex Cedar Hill at [www.cedarhill.com](http://www.cedarhill.com).

If you need assistance with implementing a SAW/RTW program or guidance in setting up a safety team please contact your Claims Advocate.

## How Can OSHA Help You?



The Occupational Safety and Health Organization (OSHA) is the principal organization utilized by companies to find guidelines to provide a safe work environment for their employees. Their website has invaluable information to implant safety programs. Below you will find their recommendations for Heat Stress.

### Protect Yourself

#### Heat Stress

When the body is unable to cool itself by sweating, several heat-induced illnesses such as heat stress or heat exhaustion and the more severe heat stroke can occur, and can result in death.

#### Factors Leading to Heat Stress

High temperature and humidity; direct sun or heat; limited air movement; physical exertion; poor physical condition; some medicines; and inadequate tolerance for hot workplaces.

#### Symptoms of Heat Exhaustion

- Headaches, dizziness, light-headedness or fainting.
- Weakness and moist skin.
- Mood changes such as irritability or confusion.
- Upset stomach or vomiting.

#### Symptoms of Heat Stroke

- Dry, hot skin with no sweating.
- Mental confusion or losing consciousness.
- Seizures or convulsions.

#### Preventing Heat Stress

- Know signs/symptoms of heat-related illnesses; monitor yourself and coworkers.
- Block out direct sun or other heat sources.
- Use cooling fans/air-conditioning; rest regularly.
- Drink lots of water; about 1 cup every 15 minutes.
- Wear lightweight, light colored, loose-fitting clothes.
- Avoid alcohol, caffeinated drinks, or heavy meals.

#### What to Do for Heat-Related Illness

- Call 911 (or local emergency number) at once.

#### While waiting for help to arrive

- Move the worker to a cool, shaded area.
- Loosen or remove heavy clothing.
- Provide cool drinking water.
- Fan and mist the person with water.

