



Risk Management

Are You Using Independent Contractors?

You May Still Be Liable If They Are Injured On Your Job

by

Drew Rzepiennik, Attorney

Ruegsegger Simons Smith & Stern

Many contractors believe that if they use “independent contractors” to perform work on their projects their company will not be liable if that independent contractor is injured on their job. Indeed, it is not uncommon for some contractors to have a work force which is substantially made up of independent contractors.

Generally, the notion that your workers’ compensation coverage does not extend to an independent contractor is correct. C.R.S. 8-41-401(3) provides that “any individual who is excluded from the definition of employee pursuant to section 8-40-202(2)” shall not have any cause of action of any kind under the Colorado Workers’ Compensation Act. True independent contractors do not fall within the definition of your employee. However, as I have mentioned before, issues in the workers’ compensation arena are never simple. When an independent contractor is injured on your job their attorney will most likely advise them to look to your company for workers’ compensation coverage, particularly if they do not carry coverage themselves.

The primary question that arises is whether the injured worker is truly an independent contractor, or just one in name. The determination of this issue focuses on how much control your company exercised over the injured worker at the time of the injury, **regardless of whether or not they have been labeled an independent contractor.**

C.R.S. 8-40-202(2)(b)(II) provides nine criteria to consider in determining whether an individual is an employee for purposes of the Colorado Workers' Compensation Act. To prove independence, and that a claimant is not an employee, it must be shown that the person for whom services are performed does not:

- (A) Require the worker to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
- (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
- (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
- (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- (E) Provide more than minimal training for the individual;
- (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
- (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
- (H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
- (I) Combine the business operations of the person from whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

The existence of any one of these factors is not conclusive evidence that the individual is an employee. Likewise, is not necessary that all of the elements be met in order for a Court to find that claimant is not an employee. *See, Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998), *cert. den.* Generally the Court will consider all of these factors to get a “feeling” for the true relationship between your company and the injured worker. The more control your company exercised over the injured worker the less likely it is that he will be considered a true independent contractor. I have had a workers’ compensation judge sum up the law on this issue as follows: **If it walks like a duck and quacks like a duck, it is most likely a duck.** In other words, if your independent contractor is acting more like an employee he may have a viable workers’ compensation claim against your company.

So how do you protect against an independent contractor’s potential workers’ compensation claim against your company? First, make sure the criteria/factors listed above fall in your favor. However, you can also make sure that the independent contractor relationship is firmly established in writing before any work begins. C.R.S. 8-40-404(2)(b)(1) provides that **your company may prove independent contractor status through a written document.** The document must be signed by both parties and may be within the contract for performance of service or a separate document. The document must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers’ compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. All signatures on any such document must be notarized. **If you use this document there will then be a rebuttable presumption of an independent contractor relationship between the parties.**

Below is an example of a written disclosure document of independent contractor status used by Pinnacol Assurance.

If you are going to use independent contractors in your business, please contact me 303-575-8096 to assist with meeting the criteria and limiting your exposure for workers’ compensation liability.

**** Note: The information contained in this document does not convey legal advice of any kind. Please consult your attorney for advice on the application of the law to the specific facts of your case or legal problem.**

Declaration of Independent Contractor Status Form

We certify UNDER PENALTY OF PERJURY that: (name and trade name) _____
performing (type of work) _____
Social Security or Federal Employer Identification # _____
Address: _____ Phone: _____
is an independent contractor (IC) and is not an employee of the following policyholder (PH): _____
Address: _____ Policy # _____ Phone: _____

We also certify, by OUR initials WHERE APPLICABLE, that the above business for which the above individual performs services meet the following criteria:

- IC _____ PH _____ 1. The business DOES NOT require the individual to work ONLY for the business for whom services are performed (except that the individual may DECIDE to work only for the business for a definite period);
- IC _____ PH _____ 2. The business DOES NOT establish a quality standard for the individual (except that the business may provide plans and specifications regarding work but cannot oversee the actual work or instruct the individual as to how work will be performed);
- IC _____ PH _____ 3. The business DOES NOT pay the individual a salary or an hourly rate instead of a fixed or contract rate;
- IC _____ PH _____ 4. The business DOES NOT terminate the work or the service provided during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
- IC _____ PH _____ 5. The business DOES NOT provide more than minimal training for the individual;
- IC _____ PH _____ 6. The business DOES NOT provide tools or benefits to the individual (except that materials and equipment may be supplied);
- IC _____ PH _____ 7. The business DOES NOT dictate the time of performance (except that a completion schedule and a range of agreeable work hours may be established);
- IC _____ PH _____ 8. The business DOES NOT pay the individual personally instead of making payment or checks payable to the trade or business name of the individual;
- IC _____ PH _____ 9. The business DOES NOT combine the business operations in any way with the individual's business operations instead of maintaining all such operations separately and distinctly.

CERTIFICATION BY INDEPENDENT CONTRACTOR

THE INDEPENDENT CONTRACTOR UNDERSTANDS THAT HE/SHE:

- WILL NOT BE ENTITLED TO ANY WORKERS' COMPENSATION BENEFITS IN THE EVENT OF INJURY.
- IS OBLIGATED TO PAY ALL FEDERAL AND STATE INCOME TAX ON ALL MONEY EARNED WHILE PERFORMING SERVICES FOR THE BUSINESS.
- IS REQUIRED TO PROVIDE WORKERS' COMPENSATION INSURANCE FOR ALL WORKERS THAT HE/SHE HIRES.

Independent Contractor Signature _____ Title _____ Social Security # _____
STATE OF COLORADO, COUNTY OF _____
Subscribed and sworn before me by _____ this _____ day of _____, _____
Commission expires: _____

NOTARY PUBLIC

Acceptance of the Independent Contractor named on this form does not change any party's responsibility under the Workers' Compensation Act. If individuals or organizations hired or contracted by the Independent Contractor are not covered by other workers' compensation insurance, the policyholder specified on this form will be charged premium for coverage of those individuals or organizations.

CERTIFICATION BY BUSINESS

I certify that I am authorized by the business listed above to state that all of the information on this form is true and accurate. I understand that if the above person does not qualify for independent contractor status, the proper premium can be assessed.

Signature _____ Title _____
STATE OF COLORADO, COUNTY OF _____
Subscribed and sworn before me by _____ this _____ day of _____, _____
Commission expires: _____

NOTARY PUBLIC

Safety Series 2018
Issue 3 | March 29, 2018

American Subcontractors Association Colorado
3575 South Sherman Street, Suite 3 | Englewood, CO 80113
303.759.8260 | DScifo@ASAColorado.com