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# Independent Contractors: Will the Solution Become Your Problem?

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We all know what the problem is: the construction industry throughout New England is rife with uninsured "independent contractors." When these people are injured, liability for their lost wages and medical bills occasionally gravitates to the general contractor (GC). When that fails, the state's second injury fund usually picks up the tab.

Massachusetts thinks it has solved the problem. The state wants general contractors to be held accountable for the insurance coverage of all their subcontractors. On July 19, 2004, new requirements for independent contractors were implemented (M.G.L.c.149 sec.148). Attorney General Tom Reilly subsequently issued an advisory on the law, which removes any potential ambiguities. The new law contains strong, unambiguous language creating a default assumption that "independent contractors" are, in fact, employees of the general contractor, unless three explicit criteria are met. In other words, the burden of proof has shifted clearly to GCs to prove the independence of their subs. In the absence of such proof, the subcontractor is assumed to be an employee.

There are two significant consequences for workers' compensation stemming from this determination: First, the GC will be charged additional workers' comp premium (at audit). And second, the loss runs of GCs will begin to reflect the losses of their subs.

The new standards in Massachusetts are more stringent than those promulgated by the IRS, the Fair Labor Standards Act (FLSA), and even the state's common law.

## Three Criteria

The law creates a presumption that any working arrangement involving "independent contractors" and sole proprietors is, in fact, an employer-employee relationship unless you establish that all three of the following factors are present:

1. The worker is free from the presumed employer's control and direction in performing the service. This standard is similar to those of the IRS and FLSA. Activities must be carried out with autonomy and independence. Contractors must provide their own tools and materials and use their own approach without instruction or supervision. They determine their own hours.

2. The service provided by the worker must be outside the employer's usual course of business. In other words, if the "independent" contractor is in the same trade as the employer's own workers, there can be no determination of independence. Hence, overflow crews engaged in the same trade as the GC are by law employees.

   NOTE: When an "independent contractor" roofer fell to his death in Marlborough last February, the GC, a roofing company, was clearly on the hook for the fatality. Under the new Massachusetts statute, they have no case for establishing the worker's "independence."

3. The worker must be customarily

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engaged in an independent trade, occupation, profession or business of the same type. The contractor must be in an independent business enterprise, working for others, working on his or her own. If the GC keeps the subs busy year-round, the GC is the employer.

### Lawsuits and Penalties

In addition to the unambiguous wording, the new law opens the door for lawsuits. Once it has been determined that the "independent contractor" is in fact an "employee," the employee your client did not know he or she had can sue for violation of any number of worker rights. They may institute private actions for themselves and others...for treble damages, attorneys' fees, and costs.

The law contains severe penalties for violations (especially when compared to the relatively mild penalties for failure to carry workers compensation insurance under Ch. 152.). In order to meet the criteria for a violation, two conditions must be met:

1. The employer classifies or treats a worker as an independent contractor when each of the above 3 criteria have not been met.

2. Given that the "independent" contractor is, in fact, an employee, the employer is in violation of one or more of the laws pertaining to employees:

   -Wage and hour laws

   -Minimum wage law

   -State overtime law

   -Law on keeping payroll records

   -Withholding taxes and payment of social security benefits

   -Willful understatement of payrolls for workers compensation insurance

   -Violation of laws on discrimination

   -Civil and criminal penalties include fines up to $50,000 and even prison terms. In addition, firms can be debarred from public works projects for 6 months (for the first unintended offense) up to 5 years (for a willful first offence). This is in addition to any penalties under the long list of employee benefit rights listed above.

Sole proprietors used to be excluded from workers comp coverage in Massachusetts. Now, they have the option of participating. If they choose to opt out of coverage, the GCs they work for may well have to pay for their comp premiums through the premium audit process.

**One of the far-reaching and possibly unintended consequences of the new law is that it goes far beyond construction. The definition of "independence" is so restricted and the definition of "employee" is so broad that the law creates a presumption of employment that cuts across all fields of endeavor, from bookkeeping and law to handymen and housekeepers. All your business clients are at risk for being the employer of people they currently believe are contractors.**

### Protecting Your Clients

The managing of independent contractors and sole proprietors has become a very high stakes game. So how can agents help their clients to protect themselves?

You should consider providing the following advice to your clients:

1. If you hire subcontractors, require all of these subs to be incorporated and to carry full insurance coverage, including general liability and workers' compensation. If you choose to let your subs operate without workers comp, be prepared to pay for this insurance when your policy is audited.

2. Require that subs and independent contractors provide certificates of insurance with specified levels of coverage. Carefully track the certificates and make sure they are up-to-date. Secure original certificates (not copies and not faxed copies!) and make sure the coverage is maintained from year-to-year. NOTE: By having yourself named as an additional insured, you will be notified if coverage changes.

If your client's subs and independent contractors cannot provide documentation of insurance, or if the certificates expire, recommend that they not allow the subcontractors on the job site. Once they allow subs to begin working without documented insurance, they have, in effect, hired them as their own employees.

### It's Not Just Construction

One of the far-reaching and possibly unintended consequences of the new law is that it goes far beyond construction. The definition of "independence" is so restricted and the definition of "employee" is so broad that the law creates a presumption of employment that cuts across all fields of endeavor, from bookkeeping and law to handymen and housekeepers. All your business clients are at risk for being the employer of people they currently believe are contractors.

Many of the issues stemming from the new law have yet to be tested in the courts. The first confrontations are already occurring in unemployment insurance and workers compensation coverage. A Worcester firm, Claims Outsource, Inc., was hit with a bill for $56,000 in unemployment insurance when it was determined that the working-at-home, "independent contractors" were indeed employees, under the control of Claims Outsource. The assessment put the company out of business. It's no stretch to project that companies relying on a generous definition of "independent contractor" (FedEx drivers come immediately to mind) will find themselves on the losing end of legal challenges. At this point, because the law is relatively new, there is much we do not know.

Eventually, challenges to the new law will wend their way through the courts, up to the Massachusetts Supreme Judicial Court. In the meantime, a word to the wise must suffice. Agents in Massachusetts should alert their insureds to the new law and its powerful impact on the definition of employment. ■