



NC LEAGUE
OF MUNICIPALITIES
RISK MANAGEMENT SERVICES

HEALTH BENEFITS TRUST | WORKERS' COMPENSATION | PROPERTY & LIABILITY

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Number 2014-17

September 2014

INDEPENDENT CONTRACTOR or EMPLOYEE?

Many times, our member towns may hire someone to do small odd jobs in and around the municipality. These jobs may include such things as mowing the lawn in front of Town Hall once a week, housekeeping or simple maintenance tasks, and other general services on an occasional basis.

How do you treat these individuals? Are they employees? Or are they contractors? Most often, the Town may consider them as an independent contractor. However, there have been situations where the Town may put them on their payroll, pay them on a weekly or other periodic basis, deduct taxes, and supervise their work. In those cases, these individuals now become employees. Therefore, should there be a claim, the loss experience of these individuals will be included in the loss experience of your entity.

The Workers' Compensation Full Commission recently reviewed a workers compensation claim regarding the issue of who is or is not an independent contractor. This specific case gives us some guidelines, which may be helpful in making this decision prior to hiring an individual to perform work on behalf of the town.

The case, (I.C. NO. 141626, THOMAS E. HELMINGLER, Employee, Plaintiff v. RICHARD GAYLOR HOMES, INC., Employer, BUILDERS MUTUAL INSURANCE, Carrier, Defendants. OPINION AND AWARD for the Full Commission by RENÉE C. RIGGSBEE, Commissioner, N.C. Industrial Commission. Filed 10 December 2002.) lists several criteria to be considered. These are, as taken from this case:

CONCLUSIONS OF LAW

On December 27, 2000, plaintiff was an independent contractor and was not an employee of defendant Gaylor Homes. *McCown v. Hines*, 353 N.C. 683, 549 S.E.2d 175 (2001). "The doctrine of liberal construction [of the Workers' Compensation Act] arises out of the Act itself, and relates to cases falling within the purview of the Act." *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 19, 29 S.E.2d 137 (1944)... In *Hayes*, the North Carolina Supreme Court recited eight factors which may be considered when determining whether a person is an "independent contractor" under the Workers' Compensation Act:

"The person employed

- (a) is engaged in an independent business, calling, or occupation;
- (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
- (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
- (d) is not subject to discharge because he adopts one method of doing the work rather than another;
- (e) is not in the regular employ of the other contracting party;
- (f) is free to use such assistants as he may think proper;

- (g) has full control over such assistants; and
- (h) selects his own time."

Id. None of these factors is controlling, but each is to be considered in determining the relationship between the parties. Id. The essential issue is whether the alleged employer has the right to control the method and means by which the alleged employee performs the work. Id.; Fulcher by Wall v. Willard's Cab Co., 132 N.C. App. 74, 511 S.E.2d 9 (1999); see also McCown, supra. In this case, the evidence is that plaintiff was engaged in his own trade, primarily performing punch list work where he independently used his skill, knowledge, and training to accomplish the items on the punch list. Plaintiff was paid by the hour, and, although at the time of his injury he was primarily working for Gaylor Homes, he had in the past worked for other contractors and was free to work for other contractors. Gaylor Homes wanted a final product that was pleasing to their homeowner-customer. There is insufficient evidence to suggest that Gaylor controlled the method and means of performing the work, or that plaintiff was subject to discharge because he sought to perform the work in a particular way. Although plaintiff did not use any assistants, he was free to employ assistants, and other similarly employed subcontractors did employ assistants. Finally, the time of plaintiff's work was controlled by plaintiff, the homeowner, or others. Gaylor Homes wanted the work accomplished, but did not direct the hours that plaintiff worked. Under the circumstances of this case, plaintiff was an independent contractor and his injury is not subject to the Workers' Compensation Act. McCown, supra. Accordingly, plaintiff is not entitled to workers' compensation benefits.

* * * * *

The foregoing stipulations, findings of fact and conclusions of law engender the following

O R D E R

1. Plaintiff's claim is DENIED.
2. Each side shall bear its own costs. However, defendants shall pay an expert witness fee in the amount of \$500.00 for the deposition of Dr. Obremesky.

This is a perfect analogy for what many of our towns do: hire contractors. In this case Gaylor Homes hired an independent contractor to complete punch lists (just as a town may hire a contractor to do any number of tasks). The contractor was basically self-employed, bought Workers' Compensation insurance, but did not include himself for coverage under his policy. Since this contractor did not sufficiently meet the criteria to qualify as an employee, the Industrial Commission found that Workers' Compensation benefits were not payable.

It our suggestion that you use the eight factors (attached) when making a determination as to whether an individual is considered to be an employee or an independent contractor. If you wish to keep the relationship on an "independent contractor" basis, you should structure that relationship using the eight factors. Some examples of activities that may be subject to these criteria may include:

- Grass cutting/mowing
- Tree trimming
- Ordinance cleanup services
- Janitorial services
- Storm damage cleanup
- Ball game umpires/officials
- Roofing contractors
- Arts & crafts instructors
- Aerobic instructors
- Sanitation pickup
- Aquatics instructors
- Paving contractors

To provide you with further assistance, a sample copy of a "Memorandum of Understanding" is included with this Bulletin. You should structure this agreement based on the work to be done.

Additionally, your attorney should review and approve the agreement.

Memorandum Of Understanding

Through the course of a year, the City/Town of _____ contracts for various construction projects. The city/town finds it necessary to impose certain minimum insurance and hold harmless requirements upon contractors performing the work. The insurance requirements are beneficial to both the city/town and the contractors.

In order to be considered an “eligible contractor” to complete projects as called upon, the contractor agrees with the city/town to the following requirements:

General Provision

The contractor agrees to comply with the specifications of the project as supplied by the City/Town of _____ and provide for the proper protection of employees and the public by necessary barricades, lights, traffic cones, flagman, etc. The contractor agrees to comply with all federal, state and local safety regulations and requirements pertinent to the job.

Insurance Provisions

- A. **Workers’ Compensation**: Insurance covering all employees meeting statutory limits in compliance with the applicable state and federal laws. The coverage must include employer’s liability with a limit of \$_____ for each accident, \$_____ bodily injury by disease, each employee; and \$_____ bodily injury by disease, policy limit.
- B. **Commercial General Liability**: Coverage shall have minimum limits of \$_____ each occurrence, general aggregate, products/completed operations aggregate, personal and advertising injury. This shall include premises and operations, independent contractors, products and completed operations, broad form property damage, XCU coverage and contractual liability. The coverage shall be written on an occurrence basis. This limit should apply on a per project or per location aggregate basis.
- C. **Business Auto Liability**: Coverage shall have a minimum limit of \$_____ per occurrence, combined single limit for bodily injury liability and property damage liability. This shall include owned vehicles, hired vehicles and non-owned vehicles.
- D. **Umbrella/Excess Liability**: At the option of the contractor, the limits of the primary general liability, auto liability and employers’ liability may be less than stipulated herein, with an excess policy providing the additional limits needed. This form of coverage must be approved by the municipality and will only be acceptable when both the primary and excess policies include the coverage and endorsements required herein.

Special Requirements

- A. Current, valid insurance policies meeting the requirements herein identified shall be maintained to be considered an “eligible contractor”. Renewal certificates shall be sent to the city/town 30 days prior to any expiration date. There shall also be a 30-day notification to the city/town in the event of cancellation or modification of any stipulated insurance coverage. Certificates of insurance meeting the required insurance provisions shall be forwarded to the City/Town of _____. Wording on the certificate, which states that no liability shall be imposed upon the company for failure to provide such notice, is not acceptable.

- B. It shall be the responsibility of the contractor to insure that all subcontractors comply with the same insurance requirements that he is required to meet.

Hold Harmless

The contractor agrees to protect, defend, indemnify and hold the City/Town of _____ and its officers, employees, and agents free and harmless from and against any and all losses, penalties, damages, settlements, costs, charges, professional fees or other expenses or liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings or causes of action of every kind and character in connection with or arising directly or indirectly out of this agreement and/or the performance hereof and caused by the negligence of the contractors. The contractor further agrees to investigate, handle, respond to, provide defense for, and defend any such claims, etc., at his sole expense and agrees to bear all other costs and expenses related thereto, even if (claims, etc.) is groundless, false or fraudulent.

This memorandum of understanding expires upon written notification from either party.

Signed:

City/Town of

Contractor

Date

Date

Notary

INDEPENDENT CONTRACTOR vs. EMPLOYEE CHECKLIST:

Whenever any public entity retains an independent contractor, who does not carry workers' compensation insurance, and the owner or an employee of that contractor is injured, a determination must be made as to whether the injured worker is truly an independent contractor or, in fact, is an employee of the public entity and, thereby, eligible for worker's compensation benefits through the entity. The NC Industrial Commission and NC Courts apply the following tests to make this determination:

<u>The person employed :</u>	Yes	No
(a) is engaged in an independent business, calling, or occupation; and has a Federal ID tax number	_____	_____
(b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;	_____	_____
(c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;	_____	_____
(d) is not subject to discharge because he adopts one method of doing the work rather than another;	_____	_____
(e) is not in the regular employ of the other contracting party;	_____	_____
(f) is free to use such assistants as he may think proper;	_____	_____
(g) has full control over such assistants; and	_____	_____
(h) selects his own time.	_____	_____

None of these factors is controlling, but each is to be considered in determining the relationship between the parties. The essential issue is whether the alleged employer has the right to control the method and means by which the "employee" performs their work. RMS will determine whether an employment relationship exists based on these factors.

For additional information contact risk management services at **1- 800-228-0986** and select **"safety and risk control"** from the available options.

This Bulletin is intended to assist in minimizing potential exposure to financial loss and is not intended to insure compliance with federal, state or local laws, regulations or rules, nor is it intended to be a substitute for legal counsel, actuarial assistance or other professional services. By offering periodic information on safety or risk management topics, neither the League nor its sponsored risk pools undertake to assume or guarantee safety or risk from injury or loss.