

Independent Contractor or Employee - Know the Difference

By Angela M. Hardway, Esq.

Workers' compensation is difficult to navigate for injured workers and employers alike. The process is expensive and bogged down with delays. Many workers and employers also erroneously rely on the BWC to assist, but find the bureaucracy impeded the claims process, causing them to avoid workers' compensation as much as possible. A way to do this is to try and have no employees. Pay by 1099 at the end of the year and employees, taxes and workers' compensation can be avoided. Appears to be a sound reasoning until there is an injury on the job. The difference between an employee and an independent contractor in employment and workers' compensation laws is important for employer's protection, as well as the workers to know.

The Ohio Administrative Code (OAC) Section 145-1-42(2) defines an independent contractor as:

- One party in a bilateral agreement, which defines the compensation, rights, obligations, benefits and responsibilities of both parties.

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- A worker who is paid for the particular services stipulated in the contractual agreement.
- A worker who is not eligible for workers' compensation or unemployment compensation.
- A worker who may not be eligible for employee fringe benefits.
- A worker who does not appear on a public employer's payroll.
- A worker who is required to provide his own supplies and equipment, and provide and pay his assistants or replacements if necessary.
- A worker who is not controlled or supervised by the company's personnel.
- A worker who should receive an IRS form 1099.

The Ohio Revised Code (ORC) Section 4123.01, defines an employee versus independent contractor, as "Every person who performs labor ... pursuant to a construction contract ... if at least ten of the following criteria apply."

- The worker is required to comply with instructions from the contracting party regarding the manner of their labor.
- The worker is required by the contracting party to have particular training.
- The worker's services are integrated into the regular functioning of the contracting party.
- The worker is required to perform the work personally.
- The worker is hired, supervised or paid by the contracting party.
- A continuing relationship exists between the worker and the contracting party with continuing and/or recurring work.
- The worker's work hours are set by the contracting party.
- The worker is required to devote full time to the contracting party.
- The worker is required to perform their work duties on the contracting party's premises.
- The worker is required to follow the order of work set by the contracting party.
- The worker is required to submit re-

- ports of their progress to the contracting party.
- The worker is paid on a regular basis – hourly, weekly or monthly.
- The worker's expenses are paid by the contracting party.
- The worker's tools and materials are provided by the contracting party.
- The worker is provided with the facilities in which to perform the services.
- The worker does not realize a profit or suffer a loss as a result of the services provided.
- The worker is not providing services for multiple employers at the same time.
- The worker does not offer the same services they perform for the contracting party to the general public.
- The contracting party has a right to discharge the worker.
- The worker has the right to end the relationship ... without incurring liability pursuant to an employment contract or agreement.

Essentially the ORC defines an employee when the worker meets 10 of the 20 factors. If not met, the worker is an independent contractor.

If an injured worker meets the employee definition under the ORC, workers' compensation coverage is the employer's responsibility. For the employer who fails to properly provide workers' compensation coverage for the employee, the result is the employer paying dollar for dollar to the BWC for any costs paid for the injury. A very expensive mistake for the employer.

This is a distinction that isn't always thoroughly understood by employers. Employers affected are commonly skilled trades, such as construction, roofing, plumbing, etc. Self-employment is common and work is sporadic at times. An accountant usually is sought out for tax advice, but rarely is legal advice sought regarding workers' compensation responsibility by the employer beyond cost. Without proper legal advice, it's a costly lesson in the difference between an employee and an independent contractor in the world of workers' compensation.