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The Independent Contractor Determination Process

Workers Compensation Review Committee
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North Dakota Law Presumes Employment

65-01-03. Individual performing service for remuneration presumed an employee.

1. Each individual who performs services for another for remuneration is presumed to be an employee of the person for which the services are performed, unless it is proven that the individual is an independent contractor under the common-law test. The person that asserts that an individual is an independent contractor under the common-law test, rather than an employee, has the burden of proving that fact.

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The two industries in which WSI sees many Independent Contractor Issues are the Construction and Trucking Industry

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The issue isn't limited to those industries. WSI has evaluated:

Cleaning Services
Maintenance/Handyman People
Limousine Drivers
Daycare Providers
Flooring Installers
Process Servers
Computer Repairmen
Contract Physicians
Food Delivery People
Laboratory Delivery People

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The Over the Road Trucking issue was the subject of legislative change in 2009

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2. In the case of commercial motor vehicles whose gross vehicle weight rating is more than twenty-six thousand pounds [11793.40 kilograms], with an individual operating a licensed truck or licensed tractor for a motor carrier of property, the presumption in subsection 1 is successfully rebutted if all of the following factors are present:

   a. The individual owns, leases, or enters a purchase agreement to purchase a truck or tractor. The lease or purchase agreement must represent reasonably the value of the lease or purchase of the truck or tractor. The lease or purchase agreement may be with the carrier of property. An unreasonable lease or purchase agreement with a third party, unaffiliated with the carrier, does not affect this factor.

   b. The individual is responsible for the maintenance and repair of the truck or tractor.

   c. The individual bears the principal burden of operating costs, including fuel, supplies, vehicle insurance, and personal expenses.

   d. The individual is responsible for supplying the necessary personal services to operate the truck or tractor.

   e. Income taxes are not withheld from the individual's compensation.

   f. The individual generally determines the details and means of performing the services, in conformance with statutory or regulatory requirements, operating procedures of the carrier, and specifications of the shipper.

   g. The individual enters a written agreement with the motor carrier outlining the nature of the relationship.

North Dakota Test

- Found in North Dakota Administrative Code 92-01-02-49
- The "Twenty Factor Test"
- Until 2006, the test used by the IRS

Control

- The "new" IRS test converted 20 factors into 11 tests and categorized them into 3 groups:
  – Behavioral Control
  – Financial Control
  – Type of Relationship between the Parties

- Test was changed in response to comments by Congress and representatives of labor and business requesting simplification and refinement of the test

The Central Inquiry in the
myriad of tests is control

Other States: Control

Arizona (Ariz. Rev. Stat Section 23-902)
– Worker is an independent contractor if he is not subject to the
rule or **control** of the business for which the work is done

District of Columbia, Massachusetts,
– "Relative Nature of the Work" Test

Maine (Me. Rev. Stat. Ann. Tit 39-A, section 102 (11)(A)(13)
-An independent contractor is a person who performs services for
another under contract, but who is not under the essential
control or superintendence of the other person.
-7 Factor Test
-no factor given greater weight than another
-totality of the relationship must be considered

Mississippi (Miss. Code. Ann. Section 71-3-3(r)
defines independent contractor as

"any individual….who contracts to do a
piece of work according to his own methods
without being subject to the **control** of his
employer except as to the results of the work, and
who has the right to employee ad direct the
outcome of the workers independent of the
employer and free from an superior authority in the
employer to say how the specified work shall be
done or what the laborers shall do as the work
progresses, one who undertakes to produce a
given result without being in any way controlled as
to the methods by which he attains the result."

New York
- uses a combination of the right to **control** and the
relative nature of the work test

Texas (Tex. Lab. Code Ann. Section 406.121)
- defines independent contractor and uses a four
point test

Wisconsin (Wis. Stat Ann. Section 102.07(8))
- applies 9 factors, all of which must be satisfied

North Dakota Law

North Dakota Administrative Code
section 92-01-02-49

- 20 Factor Test
- 8 of the 20 factors given greater weight

The 20 Factors

1. Instructions
2. Training
3. **Integration**
4. Services rendered personally
5. Hiring, supervising and paying assistants
6. **Continuing relationship**
7. Set hours of work
8. Full Time required
9. Doing work on the premises of the person for whom services are performed
10. Order or sequence set

11. Oral or written reports
12. Payment by the hour, week, month
13. Payment of business or travel expense
14. Furnishing of tools and materials
15. **Significant Investment**
16. **Realization of profit or loss**
17. **Working for more than one firm at a time**
18. **Making service available o the general public**
19. **Right to dismissal**
20. **Right to terminate**

WSI's Process

- ND Admin Code 92-01-02-49.1 permits a business to have their relationships analyzed by WSI. This rarely happens.

- The situation presents itself in:
  – A claim for benefits
  – The underwriting process
  – The audit process

WSI's Process

- WSI determines who the parties are.
- WSI sends out questionnaires to both the worker or workers and the potential employer.
- Gather any additional facts or documents which might exist, i.e. contractor agreements, payment history, invoices, tax documents.
- Apply the facts of each case to the test in the Administrative Code.
- When the call is close, we defer to statute: the presumption of employment.
- WSI makes a determination and issues a Notice of Decision or NOD. This is an appealable decision.

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Increase in Independent Contractor Determinations
(fiscal year)

2008: 17
2009: 25
2010: 28
2011: 17
2012 (ytd): 37

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Application of Facts to Law

Scenario #1: Tim the Trucker, hauls freight for an established trucking firm. He accepts loads via the dispatching office of the firm. He has done so for 10 years. During the first years of his association with the firm, he was an employee. After 5 years of employment, he bought his own tractor, but negotiated an agreement with the firm and now hauls loads both for this firm and for others. He has during the past 5 years declined to haul loads for the firm.

- Owns his "tractor," uses the trailers of whomever he is hauling for.
- Paid by the job
- Pays his own expenses but the firm pays for all DOT related licensing
- He displays the logo and signage of the firm on his tractor
- A Contractor Agreement is in place
- Itemizes his taxes deducting expenses (food, fuel, travel, tolls, maintenance of tractor). Files a schedule C.

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- Employee or Independent Contractor?

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Application of Facts to Law

Scenario #2: Carlton Cleaner. Carlton is hired to perform cleaning services to a string of local banks. He works at night. He provides similar services to a number of other businesses in the city in which he lives. The banks learned of his services through word of mouth as Carlton does not advertise his services to the public. The bank provides the vacuum cleaner and all supplies. Carlton handles the expected duties of dusting, mopping and emptying the garbage but each evening there is a list of additional tasks which are left by bank personnel to perform. Recently, they discussed the cleanliness of the bank with Carlton and indicated they would withhold payment if their expectations were not met.

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- Independent Contractor or Employee?

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Questions?

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"Thank you for the job offer, sir, but I'd hate to give up being an independent contractor."

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