

DON'T GET CHARGED FOR INDEPENDENT CONTRACTORS

Workers' compensation premiums should be based on true employees

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Workers' compensation is a legally required component of any business and serves a simple, critical function: it assumes the potential liability that business owners would otherwise have for work-

Workers' compensation insurance premiums are based, in part, on the number and type of employees hired by a business. As can often be the case, some companies do not hire regular employees and instead engage independent contractors to perform specialized work. In Connecticut, independent contractors are not contemplated

to tens of thousands of dollars per year. Once that determination has been made, the insured likely will face an uphill battle to correct the premium assessment.

The determination of whether a worker is an independent contractor or an employee is fact intensive and considers virtually every aspect of the relationship. In Connecticut, the distinction between independent contractor and employee generally depends on the amount of control exercised over the worker. If the employer has the right to control the means and methods of the work being performed, the worker is an employee. *Hunte v. Blumenthal* 238 Conn. 146, 154 (1996). When the work performed is only subject to inspection of the final product, the worker is an independent contractor. *United States Fidelity & Guaranty v. Spring Brook Farm Dairy*, 135 Conn. 294 (1949). Because the determination is so fact intensive, it is critical that the insured make every effort to properly document the relationship.



related injury to their employees. Business owners who hire independent contractors often overlook a potentially significant risk beyond the injury to their employees for which insurance will not pay: the risk of a wrongly assessed premium.

by the workers' compensation system, are not entitled to workers' compensation benefits, and should not be considered in calculating workers' compensation premiums.

There can be considerable debate as to whether an insured's independent contractors are actually employees. This leaves open the possibility that an insurance company can misclassify independent contractors and factor them into the premium calculation. Depending on the number of employees and independent contractors at issue, this misclassification could drastically increase the insurance premium from only a few thousand dollars

Documenting Relationship

At the inception of the policy, if possible, the insured should request written confirmation from its insurer concerning the independent status of the contractors and acknowledging that they will be properly classified. Typically, however, the independent contractor/employee issue will only surface *after* the policy has already been purchased and usually during the insurer's annual audit. The audit, permitted by most workers' compensation policies, allows the insurer to evaluate the number of employees and assess the claim risk posed by the insured. Based on that audit, the insurer can assess a retroactive premium that will cover the previous year, if it is determined

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that certain employees were not originally identified. Accordingly, the insured can take several steps to ensure the auditor reaches the proper result. The insured should:

- Have a signed, written agreement with each of its independent contractors that specifically details the nature of the relationship. This includes spelling out the contractor's responsibilities to supply its own materials and insurance; making clear that the contractor is not an employee and not entitled to any rights an employee would have, including workers' compensation benefits and/or coverage; and specifying that the insured does not have the right to direct the contractor's work.

- Keep copies of all 1099 tax forms filed for its independent contractors.

- Have physical evidence of each contractor's workers' compensation insurance (a copy of a declarations page should be sufficient).

- Carefully review all relevant policy language regarding the audit and the basis for premium calculation. Some policies will clearly articulate the factors that the insurer must consider in analyzing the independent contractor/employee issue.

The agreement, tax forms and any evidence of the contractor's insurance should be organized and readily available for review during the annual audit. Having all of this information prepared can help to ensure that the contractors are not factored

into the workers' compensation premium assessment.

If the audit takes place at the insured's place of business, the insured can take several additional steps to ensure a proper result. The insured should be present throughout the audit to assist in any document review. The insured should also be prepared to answer any questions, discuss the auditor's likely conclusions and raise any disagreement with those conclusions. The entire audit process is catalogued and documented for later reference and the insured's participation and comments will be included. This can make a difference if the insured later requests a review of those conclusions. Generally, proper preparation for and participation in the audit should reduce the risk that the insurer mischaracterizes independent contractors as employees.

If the insured does not have evidence that the independent contractors have their own workers' compensation insurance, most insurers will assume that the independent contractors are employees. However, it is not always the case that the insured will have evidence of its independent contractor's insurance and some situations simply do not require that the contractor obtain insurance. In such a situation, it is imperative that the insured remember that the independent contractor/employee evaluation is fact specific and the insurer

is required to consider all of the elements previously discussed.

If, despite having taken these precautions, the insurer still classifies the independent contractors as employees, the insured is not without recourse. The insured should immediately request that the insurance company review the audit and revise its position. In addition, the insured should request that a hold be placed on collection of any premium until that review is complete.

If the insurer fails or refuses to revise its position, the insured can then request a review by the state Insurance Department. The insured should take great care to specifically request that the Insurance Department examine whether the contractors are independent contractors or employees. A poorly drafted complaint can lead to an ineffectual decision by the Insurance Department.

However, it's best to take action before the insurance company makes its determination as to who is an employee and who is an independent contractor. Once the insurance company makes its determination, it will cost substantial time and money to reverse an improperly assessed workers' compensation premium and there is no guarantee it will be reversed. The best way to avoid this premium dispute is to anticipate the problem and be prepared to address it with proper documentation. ■