



March 2013

2013 Changes In Michigan Law Underscore That Independent Contractors Can Wreak Havoc On Your Client's Workers' Compensation Coverage and Premium

Under changes effective January 1, 2013, the law now requires that in order to be recognized as an independent contractor for workers' compensation purposes, many factors will be considered that were not before. This makes it more difficult to get away with classifying someone as an independent contractor. Prior to January, 2013, the law provided that someone was an "employee" if he or she did not maintain a separate business, hold him or herself out to the public as offering services, and was not an employee subject to the law. That has now changed to instead require a 20 point analysis.

Under the 20 point IRS test now required by statute to be used in determining if someone is an employee or independent contractor, many factors will be considered such as control, training, and a continuing relationship, among other factors.

Regardless, even if someone is truly an employee of an independent contractor, he or he might still be able to access your workers' compensation insurance if his or her employer did not maintain the required coverage. Per Michigan law, if any employer subject to the workers' compensation law contracts with a contractor, who is not subject to the law or who has not complied with its provisions, the company hiring the contractor is liable to pay workers' compensation benefits to the injured worker of that subcontractor.

Additionally, failure to obtain certificates of insurance from subcontractors could result in your having to pay workers' compensation premiums for those workers at the time of audit. This is sometimes a surprise to companies.

Some suggestions follow on the next page.

1. **Be cautious about entering into a relationship with someone who walks and talks like an employee, but instead is an independent contractor.** Consult legal counsel on how best to protect your organization.

2. **If you are hiring a true independent contractor, be sure to require that they provide you with a certificate of workers' compensation and general liability insurance.** Otherwise, the statute allows the insurer to charge you for the payroll costs or the amount of the subcontracted work. Note that the *Insurance Bulletin 89-03* from the state uses the word "shall" so this is not discretionary with the insurer.
3. **Unless you obtain a waiver of subrogation endorsement from the workers' compensation carrier of you contractor, you are still exposed to a reimbursement action by that carrier.** Thus, attempt to obtain a waiver of subrogation in your favor on the workers' compensation policy of the contractor.
4. **Require in your contract with any contractors that they agree to reimburse you for any loss or premium that you get stuck paying arising out of the relationship.** If your contractors are uninsured, you may be required to pay for the costs of the work in a workers' compensation audit.
5. **Sole proprietor independent contractors with no employees are not able to purchase workers' compensation insurance. Thus, they will not be able to collect under your policy and will not be subject to an additional premium payment by you upon audit.** However, this means that you are also exposed to a negligence lawsuit arising from any injury to the contractor. Consider obtaining a hold harmless and indemnification agreement from the contractor to protect you company. Also, be sure to obtain proof from the worker such as an IRS 1099 form and an advertisement from the contractor that he or she works for others.
6. **Maintain precise payroll records for contractors.** The law provides that if the contractor does not supply payroll records for its subcontractors, the full subcontract price of the work performed during the policy period shall be the payroll for purposes of the workers' compensation audit. ***For purpose of this rule, labor and material subcontractors shall not have less than 50% of the contract price as its payroll. For labor only work, the payroll shall be no less than 90% of the contract price.*** As a result, require that your contractors provide key information on payroll and do not allow the workers' compensation auditor to simply charge you contract price.
7. **Contractors include more than builders and repair workers.** Obtain workers' compensation certificates from all contractors, other than sole proprietors that have no employees.