Independent contractor or covered worker? Check the Washington law

By Casondra Albrecht andJohn Zanetti • May 19, 2015

Although it may seem like a misnomer, independent contractors may still fall under the coverage of the Washington Industrial Insurance Act ("Act"). As many employers well know, the line between an exempt independent contractor and a covered worker can be elusive. While two recent Washington Court of Appeals decisions did not solve this issue for employers, they did offer a similar lesson: both situations could have been avoided with a solid understanding of the applicable law.

Historically, Washington courts have struggled with distinguishing an exempt independent contractor from a covered worker. In a seminal 1956 case, *White v. Department of Labor & Industries*,[1] the Washington Supreme Court attempted to provide some clarity via a three-part test. The Court held an employer was not required to pay industrial insurance premiums for a contractor who:

- owns or supplies the equipment to perform the contract (as distinguished from the usual hand tools);
- requires assistance to perform the contract; or
- employs others, by necessity or choice, to do the contracted work.[2]

Of course, while the *White* test may appear straightforward, two recent these Washington Court of Appeals decisions clearly dispel that notion.

In *B&R Sales, Inc. v. Department of Labor & Industries*,[3] the employer appealed an audit finding it owed back industrial insurance premiums, plus interest and penalties, for its contracted workers. The work in question involved installing flooring, which the contractors accomplished using their own specialized flooring equipment. The employer argued the first part of the White test excluded the contractors from coverage because they had their own specialized equipment. However, the Court of Appeals disagreed. The court determined the "essence" of the contracts focused on personal labor. Thus the employer was required to pay industrial insurance premiums for the contractors under the Act.

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In *Department of Labor & Industries v. Lyons Enterprises Inc.*,[4] the employer, a franchise distributor, appealed a lower court decision finding all of its franchisees were covered workers under the Act. In its decision, the Court of Appeals relied on the third part of the White test—coverage of contractors

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employing others to do the contracted work.[5] The court held the third part must be read literally: a contractor is only excluded from Act coverage if that contractor actually employs others. In other words, if an independent contractor employs subordinates, it is excluded from coverage, while those that do not employ subordinates, are covered under the Act.

For employers, *B&R* and *Lyons* may appear to represent dissimilar issues. Yet in both cases, the employers could have likely avoided being assessed back industrial insurance premiums had they possessed a better grasp of the applicable law from the beginning.

In *B&R,* the employer argued the flooring contractors were excluded from Act coverage under RCW 51.12.020 because they were independent legal entities. However, even though this statutory argument had merit, the court refused to consider it because the employer had not raised it earlier. Likewise in Lyons, a basic understanding of the *White* test and statutory law would have illuminated the fact that the employer's franchisees did not fall under any known exemption, and could have prompted a contractual condition that franchisees employ subordinates.

Unfortunately, both employers did not have a solid understanding of the applicable law from the outset and, as a result, suffered costly outcomes.

If you have any questions regarding industrial insurance coverage for independent contractors, please feel free to contact us directly, or any of the other Washington practice attorneys at Reinisch Wilson Weier, PC. ■

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[1] 294 P.2d 650 (1956).

[2] Id. At 651-52.

[3] 344 P.3d 741 (Wash. Ct. App. 2015).

[4] No. 45033-0-II, 2015 WL 1472120 (Wash. Ct. App. 2015).

[5] Id.

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