Is your Washington worker *truly* an "Independent Contractor"?

By Jennifer Truong ■ January 24, 2020

Employers are often caught off-guard when a Washington Department of Labor and Industries' workers' compensation audit results in a daunting Order of Assessment demanding back payment of industrial insurance premiums, penalties and accruing interest due to the misclassification of covered workers.

Simply labeling a contractor as "independent" does not take away the workers' compensation protections afforded to workers in the State of Washington if that worker provides personal labor.

Regardless of the type of business, an employee asserting an independent contractor relationship will need to pass the Department's Personal Labor Test to meet exemption status.[1] Specifically, the business owner must be able to establish one of these two qualifications:

•A contractor brings their own employees to perform the work and there is no control of the contractor or their employees; OR

•A contractor brings heavy or costly specialized heavy equipment, utilizes their expertise to operate such equipment and this is executed without control.

If a worker cannot meet the requirements of the Personal Labor Test, the Department next offers a six-part test to determine if the company must provide workers' compensation coverage by paying industrial insurance premiums (seven-part test for construction companies).[2]

The company must affirm all of the following questions:

1. The individual must be free from the company's control or direction.
2. The individual must pass one of the following three options:
   a. The service is outside the usual course of business.
   b. The service is performed outside all of the places of business.
   c. The individual is responsible for the costs of the principal place of business from which the service is performed.
3. The individual must pass one of the following two options:
   a. Is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in

Continued

Simply labeling a contractor as "independent" does not take away the workers' compensation protections

Reinisch Wilson Weier PC
LAW OFFICES

OREGON: 10260 SW Greenburg Rd., Suite 1250, Portland, OR 97223 ● T 503-245-1846 / F 503-452-8066
WASHINGTON: 15395 SE 30th Place, Suite 230, Bellevue, WA 98007 ● T 206-622-7940 / F 206-622-5902
www.rwwcomplaw.com

Jenn Truong is an attorney at Reinisch Wilson Weier PC. She may be reached at 206.808.8689 or JenniferT@rwwcomplaw.com.

the contract of service.

b. Has a principal place of business that is eligible for a business deduction for IRS purposes.

4. The individual is responsible for filing a schedule of expenses with the IRS.

5. The individual has established an account with the Department of Revenue and other state agencies as required.

6. The individual is maintaining a separate set of books or records that reflect all items of income and expenses.

7. For construction only: The individual is properly registered as a contractor or has a valid electrical contractor license.

Navigating how to answer each question takes careful consideration. For example, whether an individual is determined to be providing "personal labor" or is "free from the company's control or direction" is highly fact dependent.[3]

Employers who misclassify a worker can quickly be exposed to a hefty assessment. If the company did not recognize a worker was covered, it is likely that the company did not keep records of the work duties and hours. When records are missing, the Department is within their authority to estimate and assign the greatest risk classification and daily hours worked for the past 3 year period.

Engaging counsel for consultation early on may help identify and address misclassification errors prior to an audit. During the audit process employers benefit when having an advocate to provide guidance during interactions with the Department and ensuring information requested is in fact required to be divulged based on considerations of subject matter and/or time limitations. Navigating through the appeal and reconsideration options will require assessment of business objectives and the likelihood of success in challenging the Department's findings. The attorneys at Reinisch Wilson Weier are here to assist at any stage. ■

---

[1] RCW 51.08.180.

[2] RCW 51.08.195 & RCW 51.08.181.

[3] *White v. Department of Labor & Indus.*, 48 Wash.2d 470 (1956); *Risher v. Department of Labor & Indus.,* 55 Wash.2d 830 (1960).