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Insurance With Assurance

Workers Comp and Independent Subcontractors

by Rick Janis

There is a big difference between an employee and an independent contractor when it comes to Workers Compensation.

Workers Compensation is, of course, a social safety net that provides for employees (not subcontractors) who are injured on the job. So who determines if an individual doing work for you is an employee or an independent subcontractor?

First, I want to make it very clear that neither your accountant, nor the IRS determines whether someone is an employee or an independent contractor. The deciding voice is the Department of Labor in each state. The criteria that the Department of Labor uses to identify employees from subcontractors includes, but is not limited to:

- a) Do they supply their own transportation?
- b) Do they supply their own tools and materials?
- c) Is there a contract or work order in place for this individual to perform the specific task being contracted?
- d) Can they perform the work of the contract at their own schedule subject to a deadline date for completion?
- e) Do they have their own insurance?
- f) Do they advertise separately for providing this type of work to other companies and individuals?
- g) Do they make a livelihood by working for other companies and individuals other than your company?

Now, take a lesson from the following actual claims that went before the Department of Labor.

An alarm dealer hired salespeople, paid them on a commission basis and provided them with 1099's (this dealer also did that with several alarm technicians). On the advice of his accountant, he considered and treated them as independent subcontractors. The so-called independent subcontractor (who was in his own vehicle) was killed on the way to a job, when a stone came through the car's windshield. The estate of the deceased subcontractor through his attorney asserted that the salesman was an employee and not an independent subcontractor. After a hearing by the Department of Labor, it was ruled that this individual was in fact an employee.

Here's another true case. An individual, also considered to be an independent subcontractor, was hired as a salesperson. Although this individual could have used his own

car for sales calls, he used the alarm company's vehicle. Unfortunately, the alarm dealer's vehicle was involved in an accident. Fortunately, no one claimed any injury. However, the subcontractor's attorney claimed that his client was an employee, had suffered injuries in the accident and was due benefits under the Workers Compensation Statute. To date the ruling has yet to be rendered by the Department of Labor.

So what is an employer to do? Well, keep in mind that the Workers Compensation statute and the IRS rules are mutually exclusive remedies. That is, neither depends on the other to define who is an employee. There is no reason an employer cannot hire independent subcontractors and provide them with 1099's thereby treating them as independent contractors for tax purposes. That same employer may include those subcontractors under his Workers Compensation policy in order to avoid exposing his company to the liability of paying for Workers Compensation benefits to those independent subcontractors should they become injured while performing their duties on behalf of the alarm company.

The Workers Compensation Statute requires employers to carry Workers Compensation coverage and makes them liable for all benefits provided under the Workers Compensation Statute for an individual not covered who should have been covered. That's why alarm company owners should take another look at their independent subcontractors and employees. The costs associated with hiring employees pale in comparison to the liability imposed upon an alarm company to pay Workers Compensation benefits for a "subcontractor" deemed to be an employee.

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