

Should You Hire an Independent Contractor?

Last month we informed members about a recent Montana Supreme Court ruling that dramatically impacts any hiring agent who uses independent contractors (IC). The below article, taken from the Department Of Labor and Industries web site, recaps the issue:

A Montana Supreme Court ruling in a workers' compensation case has implications for Montana's independent contractors and those who hire them. In overturning a ruling concerning the claim of a roofing subcontractor, the court found, basically, that if you are treated like an employee rather than an independent contractor, then you are in fact an employee. The court's stance was that "If it looks like a duck, walks like a duck and quacks like a duck, then it must be a duck," even if it has a piece of paper saying it's a chicken. The worker in the case has an independent contractor exemption on file with the Department of Labor & Industry. But the court found that, since the worker was in fact treated as an employee rather than an independent contractor, the employer had the obligation to supply workers' compensation. The court's ruling goes further to state that the employer has the obligation to determine if a worker is an independent contractor in fact, not just in name.

According to Maggie Connor, of the Independent Contractor Unit of the Department of Labor & Industry, there are indicator questions that can help determine if a worker is an employee or an independent contractor. Some of the indications include whether the employer is telling the worker when and how to do the work, asking for time sheets, providing equipment and materials, providing training and has the right to fire. These are all indications that the worker is an employee. Other factors to consider are whether the worker has his own place of business, has more than one client, supplies most of the equipment and materials, reports to the IRS as a business, pays for license and insurance, and can be held liable. These are some indications that the worker is an independent contractor.

"Independent contractors are free from control and direction," Connor stated. "By statutory definition, they must also have their own independent trade, occupation or business. Those who have been hiring subcontractors whose business has lapsed, or who don't demonstrate an independent business, may need to think about their obligations to that worker as an employee, rather than as a contractor." That includes paying insurance premiums for workers' compensation and unemployment insurance. Basically, if you treat a worker like an employee they are an employee, and it is the employer's responsibility to monitor the relationship. The Department of Labor & Industry is offering more information and answers to questions regarding independent contractor status at 444-1446.

MCA members have called and asked how they can best protect themselves from a surprise court ruling that a worker, hired as an IC, suddenly becomes an "employee" after the worker is injured. Here are your options:

1. DO NOT HIRE ANY IC.

This is as simple as it sounds. If you only hire "employees" there will be no IC's to worry about.

2. HIRE ONLY IC'S WHO HAVE THEIR OWN INSURANCE.

If option 1 is not workable for your business, try to hire only IC's who have their own health or accident insurance. While private insurance may work, ideally, you should hire IC's with an **active** Montana Workers Compensation Policy **covering themselves**. You should always check with the insurer to determine the extent of the coverage.

3. ENSURE THAT YOU HAVE COMPLETED A “GOOD FAITH” INVESTIGATION AS TO WHETHER THE WORKER IS AN IC.

Unfortunately, if you hire un-insured IC's there is no way to guarantee that the worker will not be found to be an employee should the worker become injured. However, you may be able to add some protections by using the checklist below.

You and the worker should go through this checklist prior to hiring any IC and both you and the IC should initial, sign, and date it. Also, if the IC remains on the job for more than 30 days, you should review the checklist to ensure that nothing has changed since the IC's hiring.

Remember, completing this checklist will not guarantee that the worker will be determined to be an IC should the worker become injured – but it may help convince the court in some cases. Also remember that no single answer will normally be determinative as to whether or not the worker qualifies as an IC, but - in general - the more statements to which you can answer “Yes”, the more likely it is that the worker is an IC.

The checklist is provided for guidance only, and you should check with your own attorney before using it.

Independent Contractor Notification and Checklist

NOTICE: You are being hired as an Independent Contractor (IC) and not as an employee. Montana law, section 39-71-120 defines an IC as follows:

Independent contractor defined. (1) An "independent contractor" is one who renders service in the course of an occupation and: (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and (b) is engaged in an independently established trade, occupation, profession, or business.

You and the undersigned Contractor agree you have reviewed the checklist and you both agree you qualify as an IC under Montana law. Should any answers to the checklist change, or if, for any reason, you feel you no longer qualify as an IC under Montana law, you agree to immediately cease work and report your concerns to the undersigned Contractor or that Contractor's designated representative. If your job responsibilities with the undersigned contractor require you to work as an IC for more than 30 days, you will review this checklist periodically to ensure that you still qualify as an IC under Montana law.

The IC and the Contractor should each initial the appropriate box after each statement. Comments regarding specific statements should be made on the backside of this form.

STATEMENT:	YES	NO
The worker is not required to follow specific written or oral instructions concerning how the work is to be done.		
The worker is not required to perform the services at certain established times.		
The worker is not furnished with the facilities, tools, and materials by the hiring agent to do the work.		
The worker is not paid based on the time spent doing the work, but rather is paid per job.		
The working relationship may not be terminated at will by the hiring agent without liability involved.		
The worker has continuing or recurring liabilities associated with performing the services.		
The worker files federal or state business tax forms.		
The worker pays all expenses associated with performing the services, and is not reimbursed by the hiring agent.		
The worker advertises his or her services in telephone books, newspapers, or other media, and obtains insurance and business licenses.		

SIGNED:

INDEPENDENT CONTRACTOR DATE

HIRING AGENT DATE