**Who Is An Employee Under the Workers' Compensation Law?**

**Employees in For-profit Businesses**

Under the Workers' Compensation Law, most individuals providing services to a for-profit business will be deemed an employee of that business and therefore must be covered by the employer for workers' compensation insurance. This applies unless those services are specifically excluded as employment under the WCL.

For workers' compensation insurance purposes, the term *employee* generally includes day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) and most subcontractors (specific exclusions listed under [Identifying an Independent Contractor](http://www.wcb.ny.gov/content/main/Employers/Coverage_wc/emp_empDefinition.jsp#indContractor)).

Many factors are used to decide whether an individual is an employee under the Workers' Compensation Law. If a business meets any of the criteria listed below, and the individual hired does not meet the criteria listed under independent contractors, or the services rendered are not specifically exempted as employment under the WCL, then that business must obtain a workers' compensation insurance policy.

The factors that are considered to determine whether an individual is an employee within the meaning of the WCL and thus must be provided with workers' compensation insurance coverage by the employer include:

**Right to Control**- The degree of direction and control a person or organization exercises over someone they contract with to perform a task is always a central issue in determining an employer-employee relationship. A person or organization controlling the manner in which the work is to be performed indicates that the task is being performed by an employee. If the person doing the labor controls the time and manner in which the work is to be done this may indicate that the task is being done by an independent contractor. If an individual is truly independent, the individual generally works under his/her own operating permit, contract or authority.

**Character of Work Is the Same as Employer**- Work being done that is consistent with the primary work performed by the hiring business indicates that the labor is being done by an employee. Work done by a person that is different than the primary work of the hiring business may indicate the task is being performed by an independent contractor. (For example, someone installing shingles for a roofer is generally considered the employee of that roofer. Conversely, a plumber hired on a one time basis to fix a broken pipe for a retail store owner is generally considered an independent contractor,)

**Method of Payment**- Employees tend to be paid wages on an hourly, daily. weekly, or monthly basis. Naturally, employment is indicated if the hiring business withholds taxes and/or provides other employee benefits (Unemployment Insurance, health insurance, pensions, FICA, etc.) Whether the labor is paid using a W2 or 1099 Form for tax purposes does not matter in determining an employer/employee relationship for workers' compensation purposes. A business paying cash to an individual for services usually indicates that the individual is an employee. Payment made for performance of the task as a whole may indicate the task is being done by an independent contractor.

**Furnishing Equipment/Materials**- A business providing the equipment and/or materials used by people in performing the work tends to indicate an employer-employee relationship.

**Right to Hire/Fire**- A business retaining the authority to hire and fire the individuals performing the work indicates an employee is performing the work. An independent contractor retains a degree of control over the time when the work is to be accomplished and is not subject to be discharged by the hiring entity because of the method he chooses to use in performing the work. Naturally, an independent contractor's services may be terminated if the services rendered do not meet contractual requirements,)

All factors may be considered and no one factor alone determines whether a person will be considered an employee under the WCL.

**Note:** A workers' compensation law judge determines whether a person is considered an employee at a hearing following a work related accident or illness.

**Identifying an Independent Contractor**

**2010 Construction Industry Fair Play Act**

**Overview**

On August 27, 2010, the New York State Construction Industry Fair Play Act was signed into law (Chapter 418). This new law amended the Labor Law and the Workers' Compensation Law to establish a presumption of employment in the construction industry. The new statute took effect on October 26, 2010, and for workers' compensation purposes, applies to accidents which occur on or after that date.

The heart of the new law is Labor Law § 861-C which provides that any person performing services for a contractor is presumed to be an employee of that contractor. Contractor is broadly defined to include any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted to do business within the state who engages in construction work. Labor Law § 861-C is incorporated by specific reference into Workers' Compensation Law § 2(4). Therefore, any worker performing services for a contractor who is injured on or after October 26, 2010, will be presumed the employee of that contractor for workers' compensation purposes, subject to the independent contractor test contained in the statute.

**Application**

Under the Fair Play Act, any person working in construction is presumed to be the employee of the person or business for whom he or she is working.

1. For a person to be an independent contractor, the alleged employer must demonstrate ALL three of the following criteria:
	1. The person is free from control and direction in performing the job, both under contract and in fact,
	2. The person is performing services outside of the usual course of business for the company, and;
	3. The person is engaged in an independently established trade, occupation or business that is similar to the service s/he performs.
2. The law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a "separate business entity" from the contractor. If an entity meets ALL of the 12 statutory criteria, it will not be considered an employee of the contractor. Instead, it will be a separate business entity that is itself subject to the new law regarding its own employees. A separate business entity must:
	1. be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the contractor to specify the desired result;
	2. not be subject to cancellation when its work with the contractor ends;
	3. have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle;
	4. own the capital goods and gain the profits and bear the losses of the entity;
	5. make its services available to the general public or business community on a regular basis;
	6. include the services provided on a federal income tax schedule as an independent business;
	7. perform the services under the entity's name;
	8. obtain and pay for any required license or permit in the entity's name;
	9. furnish the tools and equipment necessary to provide the service;
	10. hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employees' income to the Internal Revenue Service;
	11. have the right to perform similar services for others on whatever basis and whenever it chooses; and
	12. the contractor does not represent the entity or the employees of the entity as its own employees to its customers.

**Penalties**

An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to a $2,500 fine per misclassified employee for a first violation and up to $5,000 per misclassified employee for a second violation within a five-year period.

Employers also may be subject to criminal prosecution (a misdemeanor) for violations of the act with a penalty of up to 30 days in jail, up to a $25,000 fine and debarment from bidding on or being awarded any Public Works contracts for up to one year for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail, up to a $50,000 fine and debarment from bidding on or being awarded any Public Works contracts for up to five years.

The term "willfully violates" means a contractor knew or should have known that his or her conduct violated the law. Workers' Compensation Law Judges will impose the civil penalties contained in the new law based on the evidence presented at the hearing.

Workers' Compensation Law Judges and the Bureau of Compliance may impose the penalties contained in the Fair Play Act. Penalties under the act are in addition to all existing civil and criminal penalties for misclassification, failure to provide required coverage or other violations of the Workers' Compensation Law, Labor Law or Tax & Finance Law.

**Identifying Independent Contractors in Non Construction Industries**

The following are factors that a judge will consider to determine whether an individual is an independent contractor, and thus not an employee:

1. Control the time and manner in which the work is to be done; and
2. Obtain a Federal Employer Identification Number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on work or service performed the previous calendar year;
3. Maintain a separate business establishment from the hiring business;
4. Perform work that is different than the primary work of the hiring business and perform work for other businesses;
5. Operate under a **specific** contract, and is responsible for satisfactory performance of work and is subject to profit or loss in performing the specific work under such contract, and be in a position to succeed or fail if the business’s expenses exceed income.
6. Obtain a liability insurance policy (and if appropriate, workers’ compensation and disability benefits insurance policies) under its own legal business name and federal employer identification number;
7. Have recurring business liabilities and obligations;
8. If it has business cards or advertises, the materials must publicize itself, not another entity;
9. Provide all equipment and materials necessary to fulfill the contract; and
10. The individual works under his/her own operating permit, contract or authority.

**Special Note for the Trucking Industry:**

To be considered an independent contractor, drivers must also be transporting goods under their own bill of lading and under their own Department of Transportation Number. For further information please see[Subject Number 046-669](http://www.wcb.ny.gov/content/main/SubjectNos/sn046_669.jsp).

**When Coverage Can or Cannot be Required:**

A business CANNOT require employees working for that business to obtain their own workers' compensation insurance policy or contribute towards a workers' compensation insurance policy (WCL §31, 32 and 32-a). Independent contractors may be required to maintain their own workers' compensation insurance policy if they intend to work for other businesses. For proper risk management and to ensure that its insurance premiums are as low as possible, a business that hires independent contractors should require those independent contractors to provide proof of their own workers' compensation insurance policies prior to commencing work ([Certificate of NYS Workers' Compensation Insurance Coverage (C-105.2)](http://www.wcb.ny.gov/content/main/forms/Forms_CARRIER.jsp#c105-2), [NY State Insurance Fund Certificate of Workers' Compensation Coverage (U-26.3)](http://www.wcb.ny.gov/content/main/forms/Forms_CARRIER.jsp#U26_3), [Certificate of Participation in Workers' Compensation Group Board-approved self-insurance (GSI-105.2)](http://www.wcb.ny.gov/content/main/forms/SIEmpForms/selfins_forms.jsp#GSI105_2) and [Affidavit Certifying That Compensation Has Been Secured (SI-12)](http://www.wcb.ny.gov/content/main/forms/SIEmpForms/selfins_forms.jsp#SI12)).

Therefore, a business may require an independent business that has its own employees to obtain a workers' compensation insurance policy if the independent business is working as a subcontractor. (An independent business usually has characteristics such as media advertising, commercial telephone listing, business cards, business stationary or forms, its own Federal Employer Identification Number (FEIN), working under its own permits or operating authority, business insurance (liability § WC), and/or maintaining a separate establishment. The independent business has a significant investment in facilities and means of performing work.)

For example, if Business "A" contracts with Business "B" to perform services and Business B is an independent business with its own employees, Business A can require Business B to have its own workers' compensation insurance policy and obtain a certificate of insurance for this policy. This will help ensure that Business A's workers' compensation premiums are as low as possible and shield business A from liability under the Workers' Compensation Law.

Reposted from the NY State Worker’s Compensation Board @ http://www.wcb.ny.gov/content/main/Employers/Coverage\_wc/emp\_empDefinition.jsp