

DOMESTIC SERVANTS, HOME-CARE PROVIDERS & FISCAL AGENTS AND WORKER'S COMPENSATION IN WISCONSIN

The Wisconsin Worker's Compensation Act (the Act) does not provide worker's compensation coverage for domestic servants or any person whose employment is not in the course of a trade, business, profession or occupation of the employer. The term "employee" in s. 102.07 (4) (a), Wis. Stats., defines every person in the service of another under any contract of hire, express or implied, as an employee with two exceptions:

1. domestic servants, and;
2. any person whose employment is not in the trade, business, profession or occupation of the employer, unless the employer elects to cover them.

1. Who is a domestic servant?

Answer: Although neither the statutes nor the case law provide a definition of "domestic servant" as it is used in s. 102.07 (4), Wis. Stats., the department has consistently ruled that persons hired in a private home to perform general household services such as nanny, baby-sitting, cooking, cleaning, laundering, gardening, yard and maintenance work and other duties commonly associated with the meaning of domestic servant, meet the definition of domestic servant intended by the Act.

2. What is the definition of "...trade, business, profession or occupation of the employer..."?

Answer: ***Cornelius v. Industrial Commission***, 242 Wis. 183, 185 (1943) defines a trade or business as an occupation or employment *habitually engaged in for livelihood or gain*. If a person's employment is in the trade, business, profession or occupation of the employer, he or she is an employee, no matter how casual or isolated the employer's trade, business, profession or occupation may be.

3. What about home-care providers?

Answer: Although neither the statutes nor the case law provide a definition of "home-care provider", the department has consistently ruled that persons hired in a private home to give primary-care to an individual such as help in walking, bathing, preparing meals and special diets, supervising use of medications and exercise therapy and other duties commonly associated with the meaning of primary-care giver, meet the definition of home-care provider. While a home-care provider may assist in preparation and clean up of the recipient's meals, such activities are considered incidental to the primary-care duties, rather than domestic servant duties.

The Labor and Industry Review Commission (LIRC) has held that home-care providers are not domestic servants. LIRC has consistently ruled that a person providing personal care to an individual is not a domestic servant. ***Joyce Ambrose v. Harley Vandever Family Trust***, WC claim no. 1986-39393 (LIRC, February 28, 1989); and ***Shirley A. Nickell v. County Kewaunee Oter***, WC Claim no. 1994-064155 (LIRC, September 24, 1996).

4. Since home-care providers are not domestic servants under the Act, are they employees?

Answer: No, LIRC has held that a person providing personal care to an individual does not perform services as part of the trade, business, occupation or profession of the recipient (i.e., the patient-home-owner client) of those services. A recipient arranging for personal care ordinarily is not engaging in a trade, business, profession, or occupation.

Nor is arranging for a family member's home-care an occupation or employment. LIRC has held that providing or arranging home-care for oneself or one's relative is not part of a causal or random trade, occupation, business or profession and is not done for livelihood or gain, at least as those terms are commonly understood in a business sense. The result is there is no employer-employee relationship under the Act.

5. What if a home-care provider serves a client but is paid by a county social-service agency?

Answer: Speaking generally, if this employer-employee relationship existed exclusively between the worker (the home-care provider) and the recipient of the service (client), and all the elements of direction, control and payment rested with the recipient, the recipient would clearly be the employer and the worker would clearly be an employee of the recipient. However, this employment would be considered not to be in the course of trade, business, profession or occupation of the employer (client). Therefore, worker's compensation insurance would be optional on the part of the employer (client).

If, however, a county social-service agency is also involved with this employment arrangement and if a majority of the elements of direction, control, payment and normal employer rights and obligations shift to the county, the role of the employer for worker's compensation purposes most likely would also shift to the county.

Even if the recipient (client) retains some minimal direction and control, the fact the county has most of the control becomes a very strong indicator that the county is the employer. The fact that the work of the home-care provider contributes to the satisfactory performance of the duties of the county could be construed to be a substantial benefit to the county.

Consequently, if the county controls and pays the home-care provider, and benefits from the work even though the recipient (client) retains some control and receives benefits, the county is the employer for worker's compensation purposes.

Any claim filed by a home-care provider injured while performing services under these conditions is determined on a case-by-case basis according to the facts and circumstances at the time of injury.

6. What about a home-care provider that is providing services to a client that is receiving long-term care benefits under certain long-term care programs administered by the Department of Health Services and the client utilizes a fiscal agent to provide financial management services?

Answer: Under s. 102.07 (20), Wis. Stats.,¹ if a client is receiving long-term support services under the following programs;

- s. 46.27, Wis. Stats., Long-term support community options program,
- s. 46.275, Wis. Stats., Community integration program for residents of state centers,
- s. 46.277, Wis. Stats., Community integration program for persons relocated or meeting reimbursable levels of care,
- s. 46.281, Wis. Stats., Family Care benefit, and Family Care Partnership,
- s. 46.2897, Wis. Stats., Self-directed services option,
- s. 46.995, Wis. Stats., Disabled children's long-term support program;

and the client utilizes a fiscal agent to provide financial management services; there are two worker's compensation coverage options to cover a client's home-care provider:

1. The client obtains an individual worker's compensation policy to cover the worker or;
2. If the client does not obtain an individual policy, the worker is considered an employee (for the purposes of worker's compensation coverage only) of the fiscal agent and the worker is covered under the fiscal agent's worker's compensation policy.

Note: Under option 2, the worker is considered an employee of the fiscal agent **only** for the purpose of worker's compensation coverage.

7. What is the definition of financial management services pursuant to Wisconsin Statutes 46.27, 46.275, 46.277, 46.281, 46.2897 or 46.995?

Answer: Financial Management Services are services that assist an individual and their families to manage service dollars or manage their personal finances to prevent institutionalization. This service includes a person or agency paying service providers after the member, guardian or other authorized representative authorizes payment to be made for services included in the member's approved self-directed support plan. Financial Management Services providers, sometimes referred to as fiscal intermediaries or fiscal agents, are organizations or individuals that write checks to pay bills for personnel costs, tax withholding, worker's compensation, health insurance, unemployment tax and other taxes and benefits appropriate for the specific provider consistent with the individual's self-directed support plan and budget for services.

8. What if a client receiving long-term care benefits under certain long-term care programs administered by the Department of Health Services elects not to utilize a fiscal agent?

Answer: If the employer-employee relationship exists exclusively between the worker (the home-care provider) and the recipient of the service (client), and all the elements of direction, control and payment rested with the client, the client would be the employer and the worker would be an employee of the client.

However, this employment would be considered not to be in the course of trade, business, profession or occupation of the employer/client. Therefore, worker's compensation insurance would be **optional** on the part of the employer/client.

¹ **Section 102.07 (20), Wis. Stats.**, An individual who is performing services for a person participating in the self-directed services option, as defined in s. 46.2897 (1), for a person receiving long-term care benefits under s. 46.27, 46.275, or 46.277 or under any children's long-term support waiver program on a self-directed basis, or for a person receiving the Family Care benefit, as defined in s. 46.2805 (4), or benefits under the Family Care Partnership program, as described in s. 49.496 (1) (bk) 3., on a self-directed basis and who does not otherwise have worker's compensation coverage for those services is considered to be an employee of the entity that is providing financial management services for that person.

9. What happens if a domestic servant or a home-care provider is injured and there is a dispute as to whether or not the person is an employee covered by the Act?

Answer: Generally, if there is a dispute regarding insurance coverage, remuneration and/or benefits, it is adjudicated on a case-by-case basis according to the facts and circumstances at the time of injury.

If an employer has a worker's compensation policy in this situation, the policy will cover any person working under the employer if he or she is found to be an employee at the time of injury.

An employer, who does not have a worker's compensation insurance policy when he or she is subject to the Act, is subject to monetary penalties. The penalty for failure to carry worker's compensation insurance when required, is twice the amount of premium not paid during an uninsured time period or \$750, whichever is greater. In addition, if an employee is injured while working for an illegally uninsured employer, the uninsured employer is personally liable for reimbursement to the Uninsured Employers Fund for benefit payments made by the Fund to the injured employee (or the employee's dependents). The penalties and reimbursements to the Fund are mandatory and non-negotiable.

Employers who are not subject to the Act and do not carry worker's compensation insurance may be sued in a civil action for damages by an employee who is injured while at work.

10. What about temporary help agencies and employee leasing companies?

Answer: A temporary help agency or an employee leasing company is the employer for worker's compensation purposes of any employee whom it places, loans or leases to another employer.

Section 102.01(2)(f), Wis. Stats., defines "temporary help agency" as an employer who places its employee with or leases its employees to another employer who controls the employee's work activities and compensates the first employer for the employee's services, regardless of the duration of the services.

Under s. 102.04(2m), Wis. Stats., a temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the employee's services. A temporary help agency is liable for all compensation payable under the Act to that employee.

Employee leasing companies that lease employees to other employers are responsible for worker's compensation benefits in the same way that temporary help agencies are.

If a temporary help agency or an employee leasing company places, loans or leases an employee to provide home-care or domestic servant services, either directly to a recipient (client) or on behalf of a county, the temporary help agency or employee leasing company is the employer for worker's compensation purposes.

11. What about independent contractors?

Answer: Under section 102.07 (8), Wis. Stats.,² a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so. The nine-part statutory test set forth under s. 102.07 (8), Wis. Stats., must be met before a person working under another person is considered not to be an employee. To be considered an independent contractor and not an employee, an individual must meet and maintain all nine of the following requirements:

1. Maintain a separate business.
2. Obtain a Federal Employer Identification Number (FEIN) from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (See note below.)
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

Note: A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8), Wis. Stats.

² S. 102.07(8), Wis. Stats., (a) Except as provided in pars. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(bm) A real estate broker or salesperson who is excluded under s. 452.38 is not an employee of a firm, as defined in s. 452.01 (4w), for whom the real estate broker or salesperson performs services unless the firm elects under s. 102.078 to name the real estate broker or salesperson as its employee.

(c) The division may not admit in evidence any state or federal law, regulation, or document granting operating authority, or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.

12. Can an employer voluntarily obtain worker's compensation insurance?

Answer: Yes, all employers, including those that employ domestic servants and home-care providers, may voluntarily elect coverage for their employees. In the event of a work-injury, the employees are eligible for all medical, indemnity and other worker's compensation benefits, without regard to who was at fault in causing the injury.

13. Does the Worker's Compensation Act protect both employers and workers?

Answer: Yes, the Act provides protection to employers as well as workers. If an injury occurs in covered employment, the worker is automatically entitled to certain wage and medical benefits. The worker, however, is limited to those benefits. A worker's compensation policy is the exclusive remedy for a covered claim-- meaning an insured employer is protected from any law suits brought by an employee because of the work related illness or injury.

14. Where can I get more information about coverage under the Act?

Answer: Contact the Wisconsin Department of Workforce Development - Worker's Compensation Division at (608) 266-1340 or write to P.O. Box 7901, Madison, WI 53707-7901. The Division is located in the GEF 1 State Office Building, Room C100, 201 E. Washington Avenue, Madison. The Division also has a variety of information relating to this and other compliance issues on its internet site at: <http://dwd.wisconsin.gov/wc>