

## INDEPENDENT CONTRACTORS AND WORKER'S COMPENSATION IN WISCONSIN

### 1. Who is an employee under the Worker's Compensation Act?

Answer: Under section 102.07(4)(a) of the Wisconsin Worker's Compensation Act (Act), an employee is defined as "Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees...but not including (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer,...unless the employer elects to cover them."

### 2. What is the definition of "...any contract of hire...?"

Answer: A contract of hire means that the person is compensated for his or her services.

### 3. Who is a domestic servant?

Although neither the statutes nor the case law provide a definition of "domestic servant" as it is used in s. 102.07(4) of the Act, 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.

### 4. 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.

### 5. When is an employer required to have a worker's compensation policy under the Act?

Answer: Under s. 102.04(1) (b) of the Act, an employer becomes subject to the Act and must carry a worker's compensation insurance policy if:

- 1) The employer usually employs 3 or more persons full-time or part-time. This employer needs insurance immediately upon employing a 3<sup>rd</sup> person.
- 2) The employer has 1 or more full-time or part-time employees and has paid gross combined wages of \$500 or more in any calendar quarter for work done in Wisconsin. This employer must have insurance by the 10th day of the 1<sup>st</sup> month of the next calendar quarter. There are four calendar quarters in a calendar year; the 1<sup>st</sup> quarter is January through March; the 2<sup>nd</sup> quarter is April through June; the 3<sup>rd</sup> quarter is July through September; and the 4<sup>th</sup> quarter is October through December.
- 3) The farm (farmer) employs 6 or more employees (at 1 or more locations) on the same day for 20 days (consecutive or non-consecutive) during a calendar year. A calendar year is January through December. This farmer must have insurance within 10 days after the 20th day of employment. Some relatives of the farmer are not counted towards the 6 employees, but will be covered under a policy if one is purchased.

**6. What is the definition of “...usually employs three or more persons...”?**

Answer: *Stapleton Cheese Co. vs. Industrial. Comm.*, 249 Wis. 133 defines “usually employs three or more persons,” as employment of three persons for a *single moment*, (even though some of these employees may have been only casual employees) this is sufficient to become subject to the Act.

**7. What is the definition of wages?**

Answer: Wages encompass almost anything of value received, accepted or expected as compensation by a worker in exchange for his or her services. If something of value is received, accepted or expected as compensation by a worker in exchange for his or her services, an employee-employer relationship exists. While compensation is a necessary part of an employee-employer relationship for worker’s compensation purposes, compensation need not be money. Compensation is a broader term than salary or wages and may include almost anything of value. When things of value are received as wages, they are deemed a part of the earnings and computed at the value thereof to the employee. This includes room & board, rent credits, training, tuition, discounts, certificates, credits, vouchers and any other type of credit or reimbursement.

**8. Who is covered by the Worker’s Compensation Act?**

Answer: Nearly all employers in Wisconsin are covered. This includes both public and private employers. Nearly all private and public employees in Wisconsin are considered employees and covered under the Act, including family members (except for farmers in some cases), minors, part-time employees and corporate officers.

**9. Are there any exceptions?**

Answer: Some workers covered by federal laws are not covered by the Act. Employees of the federal government (such as postal workers, employees at a veterans administration hospital, or members of the armed forces) are covered by federal laws. People who work on interstate railroads are covered by the Federal Employers Liability Act. Seamen on navigable waters are covered by the Merchant Marine Act of 1920, and people loading and unloading vessels are covered by the Longshoremen’s and Harbor Worker’s Compensation Act.

The only employee exceptions to the Act’s insurance requirement are: (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer, (3) some farm employees, (4) volunteers, including volunteers of non-profit organizations that receive money or other things of value totaling not more than \$10.00 per week, (5) religious sect members that qualify and are certified for an exemption, (6) employees of Native American tribal enterprises (including casinos), unless the tribe elects to waive its sovereign immunity and voluntarily become subject to the Act, (7) real estate brokers, agents and salespersons that satisfy the two elements pursuant to s. 452.38, Wis. Stats. Virtually all other workers and employers are subject to the Act.

**10. What about relatives?**

Answer: A member of a family is considered an employee and is covered by the Act. With the exception of farmers, an employee’s relationship to the owner has no bearing on the requirement to carry worker’s compensation insurance.

**11. What about minors?**

Answer: A minor is considered an employee and is covered by the Act. A person’s age has no bearing on the requirement to carry worker’s compensation insurance.

**12. What about part-time employees?**

Answer: A part-time employee is considered an employee and is covered by the Act. Whether an employee works part-time or full-time has no bearing on the requirement to carry worker’s compensation insurance.

### **13. What about the owners of sole-proprietorships, partnerships and limited liability companies?**

Answer: Sole proprietors, partners and members of limited liability companies are exempt from coverage under the Act, but may elect to cover themselves. The employees of sole proprietorships, partnerships and limited liability companies are covered by the Act.

All worker's compensation policies *exclude* the sole proprietor, partners and members of limited liability companies unless *specifically endorsed to include them*. Sole proprietors, partners and members of limited liability companies may voluntarily purchase worker's compensation insurance to cover their own work-related injuries and illnesses. Employers who have an existing worker's compensation insurance policy may add themselves by endorsement to that policy by notifying their agent and paying the additional premiums. To be covered under the policy, the policy must be endorsed to name the sole proprietor, partner or member of limited liability companies as a covered employee. Premium is determined by using the payroll for individuals/partners given in the most recent rate revision circular.

### **14. What about corporate officers?**

Answer: A corporate officer is considered an employee and is covered by the Act. All worker's compensation policies covering corporations *include* corporate officers. However, in a closely-held corporation (a corporation with not more than 10 stockholders), 1 or 2 officers may exclude themselves from coverage. If the corporation *has other employees or officers, an insurance policy is required* and the exclusion for officers must be made by an endorsement on the corporation's worker's compensation policy. The name of each excluded officer must be specified on the policy. The exclusion will remain in effect for the policy period. An officer who elects to exclude himself or herself is still an employee of the corporation. An excluded officer is still counted as an employee and his or her wages are included for the purposes of determining whether the corporation has three or more employees or has paid gross combined wages of \$500 or more in a calendar quarter under s. 102.04(1)(b) of the Act.

If a closely held corporation has *1 or 2 corporate officers* and has *no other employees or officers*, a worker's compensation policy is not required if each officer elects not to be subject to the Act by filing the Notice of Corporate Officer Option with the Worker's Compensation Division. A corporation with *more than 2 corporate officers or any other employee or employees is not eligible* to file a Notice of Corporate Officer Option and must maintain a worker's compensation insurance policy.

### **15. What about shareholders?**

Answer: The owner of one or more shares of stock in a corporation is a shareholder (also commonly called a "stockholder.") A shareholder is not considered an employee of the corporation unless he or she performs work for the corporation customarily performed by an employee.

### **16. What about members of a board of directors?**

Answer: A member of the governing board of a corporation or association elected at annual meetings of the shareholders or association's members is a member of the board of directors. A director who sits on a board is considered an employee if he or she receives any kind of pay, compensation, director's fee or something of value for his or her services or if he or she performs work customarily performed by an employee.

### **17. What about real estate brokers, agents and salespersons?**

Answer: Under s. 452.38, Wis. Stats., a licensee, including a real estate broker, an agent or a salesperson is not considered an employee of a firm under the Act if all of the following are satisfied:

(a) A written agreement has been entered into with the firm that provides that the licensee shall not be treated as an employee for federal and state tax purposes.

(b) Seventy-five percent (75%) or more of the compensation related to sales or other output, as measured on a calendar year basis, paid to the licensee pursuant to the written agreement referenced under par. (a) is directly related to the brokerage services performed by the licensee on behalf of the firm.

Under s. 102.078 (1), Wis. Stats., a firm, as defined under s. 452.01 (4w), may elect to name as its employee for worker's compensation purposes a real estate broker, an agent or salesperson who is excluded under s. 452.38 by an endorsement on its worker's compensation insurance policy

### 18. Can an employee or an independent contractor waive his or her right to worker's compensation?

Answer: No. No agreement to waive the right to compensation is valid under s. 102.16(5), of the Act. Even if a person signs a waiver, it is not valid and would have no affect on the validity of a worker's compensation claim.

### 19. What about independent contractors?

Answer: Since 1990, every independent contractor who is injured while working is an employee of the person for whom he or she performs work unless the contractor meets all nine "tests" specified in s. 102.07(8),<sup>1</sup> of the Act. 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 must be met. An independent contractor who meets the nine-part test at the time of injury is not an employee under the Worker's Compensation Act.

The worker's compensation employment relationship will be determined, in each case, solely by the evidentiary facts relating to the nine-part statutory test. Any worker's compensation claim filed by an independent contractor 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. 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 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. (A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8) of the Act.)
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 depending on business expenses and income.

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<sup>1</sup>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.

## **20. Where did the nine-part independent contractor test come from?**

Answer: Prior to 1990, under sec. 102.07(8), Wis. Stats., an independent contractor had to meet one of the following provisions to be considered an employee for worker's compensation purposes:

1. Maintain a separate business and hold himself or herself out to and render service to the public; or,
2. Is an employer subject to the worker's compensation statutes; or
3. Has purchased worker's compensation insurance.

The Act provided no guidelines or specifics relative to what was meant by "maintaining a separate business" or "holding himself or herself out to the public". As a result, there was a great deal of confusion relating to worker's compensation insurance coverage for independent contractors.

The pre-1990 law was hard to understand, unpredictable, and created confusion and misunderstanding for independent contractors, employers, insurance companies, agents, and regulators relating to worker's compensation coverage for independent contractors. Without specific guidelines, disputes involving a variety of issues included:

- Insurance companies collecting premiums for individuals where the carrier may not have any liability.
- Insurance companies not collecting premiums for individuals that the carrier ended up being liable for when an injury occurred.
- Employers not paying premiums and not insuring individuals who should have been covered by a worker's compensation policy, because the employer believed the individuals were independent contractors.
- Employers paying premiums on individuals whom the employer did not have to cover because the individuals were independent contractors.
- Independent contractors being forced to buy their own worker's compensation policy even when they did not want coverage.
- Cases where individuals were not covered by worker's compensation because the individual thought they were employees but were found to be independent contractors.

In 1990, the nine-part test was created and adopted under sec. 102.07(8) of the Act, to clarify the law and eliminate the confusion, misunderstanding, unpredictability and disputes relating to worker's compensation coverage for independent contractors.

## **21. How can an employer or individual protect themselves from worker's compensation liability when contracting with an independent contractor?**

Answer: 1) Make sure the nine-part test is met and maintained by the independent contractor. 2) You may stipulate in the contract that the independent contractor must have a worker's compensation insurance policy and require him or her to provide proof of the policy (a policy declaration page or a certificate of insurance). 3) Purchase a worker's compensation policy. 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. 4) If you have a worker's compensation insurance policy, check with your insurance carrier to find out what the carrier requires when the policy is audited as proof that a person is an independent contractor rather than an employee. This will protect you from an unanticipated policy audit premium charge. 5) The only way employers can completely protect themselves from any liability is to have a worker's compensation insurance policy covering his or her business. A worker's compensation policy covers any individual working under the employer if he or she is found to be an employee at the time of injury.

**22. Can an employer voluntarily obtain worker’s compensation insurance?**

Answer: Yes, all employers 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. The voluntary purchase of a worker’s compensation policy also protects the employer from most civil tort actions by employees related to the work-injury. With few exceptions, where the employer has the worker’s compensation insurance coverage in place, an injured worker is limited to the benefits to which he or she is legally entitled under the Act.

**23. How is it determined whether or not a person meets the nine-part statutory test?**

Answer: In determining whether an individual is an employee or an independent contractor, the worker's compensation employment relationship is determined, in each case, solely by the evidentiary facts relating to the nine-part statutory test set forth under s. 102.07(8) of the Act. A number of factors are considered in determining whether a person is an employee or an independent contractor. No one factor is controlling and a designation of the relationship by the parties is also not controlling. An independent contractor agrees to perform specific work or services for another person or entity under a contract between them, with the terms spelled out such as duties, pay, the amount and type of work and other matters. An independent contractor is distinguished from an employee. An employee is hired to perform work for an employer under an expressed or implied contract, for wages, salary or other consideration, generally for a continuous rendering of services for an indefinite period of time, and acts under the direction of the employer. An independent contractor is hired for a finite rendering of services and results, within a stipulated period of time. An independent contractor is not subject to the other party's direction or control, right to control, or the manner and means of performing the services. An independent contractor must be able to determine when and where work is performed, be able to work for others, provide his or her own equipment and other factors which are indicative of true independence. The exact nature of the independent contractor's relationship with the party hiring him or her is vital since an independent contractor pays his or her own Social Security and income taxes without payroll deduction, usually has no retirement or health plan rights, and is not entitled to worker's compensation coverage.

**24. What if the contractor and employer have a written contract or oral understanding that defines their relationship?**

Answer: In determining whether or not the contractor and the employer have an employment relationship under the Act, it does not matter what the contractor or employer say, believe, or intend their relationship to be. Written contracts and oral agreements that define the contractor as an employee (or as not being an employee) are not controlling. Still, some elements of a written contract between the parties may be relevant in determining the relationship of the parties. For example, a contract might define how the contractor will be paid, which may be relevant to the tests in s. 102.07(8)(b) 3 to 7 of the Act.

**25. What about the findings of other government agencies?**

Answer: The findings of other federal, state or local government agencies with regard to whether or not an employment relationship exists are not controlling. For example, the fact that the contractor and the alleged employer are (or are not) in an employment relationship for federal or state income tax purposes, or for unemployment insurance purposes, is not relevant to the question of whether they have an employment relationship in a work-injury situation. The definitions of an “employee” are likely to be similar, but rarely will they be identical. The Legislature has determined that there are different public policy considerations for each program, that in turn require slightly different definitions. It is particularly “at the margins” where most disputes are likely to arise.

Another example may be helpful. The government’s definition of an “employee” varies from program to program in the same way that its definition of who is a “resident” varies. In both cases, significant legal rights are affected. But, the Legislature has determined that it makes sense that the time requirements to establish residency for obtaining a driver’s license should be shorter than the time requirement for paying resident tuition in our public university system. Similarly, the local residency requirements to vote may be different from the local residency requirements for a library card.

**26. Can a bona fide contractor-independent contractor employment relationship inadvertently evolve into an employer-employee relationship during the course of a contract?**

Answer: Yes, here's an example how it can happen. There was a case a few years ago, where an independent contractor plumber was hired under contract by a general contractor to do the plumbing in a new house the general contractor was building. There was no dispute that the plumber met the nine-point independent contractor test and he was clearly an independent contractor at the time he was hired. One day the plumber was working alone at the house site when the general contractor stopped by. The general contractor needed a truck that was at the house site driven to another one of his project sites across town. The general contractor explained to the plumber that he needed the truck (and the equipment on the truck) at the other project located across town. The general contractor asked the plumber if he would do him a favor and drive the truck from the house site to the other project site. The general contractor told the plumber that after the truck was delivered to the other project, he would drive the plumber right back to the house site so he could continue his plumbing work. The plumber had worked for the general contractor on several occasions and had a good working relationship with him. The plumber readily agreed to drive the truck across town.

While driving the truck to the other project, the plumber was broad-sided by another vehicle and injured. The injuries were severe enough that the plumber could not work for some time. The plumber filed a worker's compensation claim against general contractor. The general contractor and his worker's compensation insurance carrier denied the claim.

The general contractor said at the time of injury the plumber was working under a contract as an independent contractor, not an employee. Therefore, since the plumber was an independent contractor, he was not entitled to worker's compensation benefits under the general contractor's policy.

The plumber said at the time of injury he was performing work outside of the scope of the contract, providing a service unrelated to his independent business, under the direction and control of the general contractor, as an employee not an independent contractor. Therefore, since he was an employee, he was entitled to worker's compensation benefits under the general contractor's policy.

A worker's compensation employment relationship is determined, in each case, solely by the evidentiary facts relating to the nine-part statutory test. Any worker's compensation claim filed by an independent contractor injured while performing services is also determined on a case-by-case basis according to the facts and circumstances at the time of injury.

Some questions that arose out of the claim included:

- At the time of injury, was the plumber working outside of the scope of the contract?
- Was driving a truck for the general contractor contemplated in the contract?
- Was driving a truck a service the plumber normally provided?
- At the time of injury, was the plumber working under the direction and control of the general contractor?
- At the of injury, was the plumber working independently or as an employee of the general contractor?
- While driving the truck was the plumber performing his service in a distinct occupation or business or was the performance of the service actually merged into the general contractor's business?
- While driving the truck was the plumber's work really a part of the regular business of the general contractor?
- While driving the truck, was the plumber providing a service of value to the general contractor?

A hearing was held before an administrative law judge (ALJ) to adjudicate the dispute. The hearing record established; 1) the service being performed by the plumber at the time of injury was outside the scope of the contract and outside the scope of the plumber's independent business, 2) the service was performed under the direction and control of the general contractor, 3) the service was part of the regular business of the general contractor, 4) the service was of value to the general contractor, 5) the evidence established that at the time of injury the plumber did not meet the nine-part statutory test. Based upon the record, the ALJ found that the plumber sustained a serious compensable injury arising out of his employment with the general contractor, while performing services growing out of and incidental to that employment. The ALJ found that the plumber was an employee of the general contractor at the time of injury and entitled to benefits.

Due to the particular facts and circumstances surrounding the injury, what seemed to be a somewhat minor request evolved into an employer-employee relationship and a compensable worker's compensation claim. The general contractor's insurance carrier paid the claim.

Fortunately, the general contractor had a worker's compensation policy. A worker's compensation policy covers any person working for the employer if he or she is found to be an employee at the time of injury.

However, in this case, if the general contractor had not had a worker's compensation insurance policy, the general contractor would have been subject to a penalty for failure to carry worker's compensation insurance when required and personally liable for reimbursement to the Uninsured Employers Fund for benefit payments made by the Fund to the injured employee.

If the general contractor had not been subject to the Act at the time the injury occurred and therefore, was not required to carry worker's compensation insurance, he could have been sued in a civil action for damages by the injured worker.

This example illustrates several key points that must be considered when contracting with an independent contractor:

- The nine-part statutory test set forth under s. 102.07(8) of the Act, must be met and maintained at all times before a person working under another person is considered an independent contractor.
- Any worker's compensation claim filed by an independent contractor injured while performing services is determined on a case-by-case basis according to the facts and circumstances at the time of injury.
- Even a minor deviation from a contract and the nine-part test may affect the status of an employment relationship under the Act. Any deviation from the nine-part test may cause a contractor-independent contractor relationship to evolve into an employer-employee relationship.
- The Act provides protection for the employer as well as the worker. If an injury occurs in covered employment, the worker is automatically entitled to certain wage loss and medical benefits. However, the injured worker is limited to those benefits and the employer is protected from any other lawsuit by the injured worker.
- If a person establishes his or her business in such a way that it is exempt from coverage under the Act, the business is also giving up the protection from civil liability that is afforded under the Act.
- The only way an employer can completely protect himself or herself from any liability is to have a worker's compensation insurance policy covering his or her business. A worker's compensation policy covers any individual working for the employer if he or she is found to be an employee at the time of injury.

**27. What about part-one of the nine-part statutory test, “Maintains a separate business with his or her own office, equipment, materials and other facilities”?**

Answer: The separate business requirement is fundamental in determining whether an individual is an independent contractor. This part primarily works to satisfy the requirement that the individual not be dependent on others in order to do his or her work. In other words, he or she has the facilities necessary to do his or her job and is providing more than just labor. The requirement is designed to determine whether the individual makes a significant investment in or incurs a significant obligation related to facilities (equipment or premises) or tools or materials used in performing services for another and which are not typically furnished by an employer.

Another factor to be considered is whether the individual is engaging in an independent business or whether he or she regularly works in the course of the employer’s general business. For this purpose the Department must consider whether the individual advertised or generally offered his or her services to others; whether or not the individual used a business name in dealing with businesses or employers for the purpose of contracting his or her services; whether the individual listed himself or herself in any business capacity in city or telephone directories; whether the individual maintained his or her own offices or place of work; whether the individual procured necessary licenses for the carrying on of his or her activities; whether the individual supplied his or her own tools or equipment; and any other evidence tending to show that he or she was carrying on an independent business as an individual.

In applying part-one of the test, some of the basic questions that must be considered are:

- What documentation is there that the individual has a separate business?
- Specifically, what is the individual’s business and what service does the business provide?
- What investment has the individual made in the business?
- What facilities, equipment, tools or materials does the individual supply?
- Does the individual maintain his or her own office or place of work?
- Does the individual advertise?
- Does the individual offer his or her services to others?
- Does the individual use a business name for the purpose of contracting his or her services?
- Is the individual listed in any business capacity in city or telephone directories?
- Has the individual procured necessary licenses for the carrying on of his or her business activities?
- What is the nature of the occupation? In the locality, is the work usually done under the direction of the principal (employer) or by a specialist (independent contractor) without supervision?
- Does the individual perform his or her services in a distinct occupation or business or is the performance of the services actually merged into the employer’s business?
- Are full-time services required of the individual on the job?
- Must the services be rendered personally by the individual?
- Is the individual providing more than just labor?
- Does the individual have employees working for his or her business?
- Does the individual have a worker’s compensation insurance policy covering his or her business?

**28. What about part-two of the test, “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”?**

Answer: True independent contractors are in business for themselves and should be asserting such to the federal government. Accordingly, he or she would have a federal employer identification number (or would have applied for one) or filed business or self-employment income tax returns with the Internal Revenue Service (IRS). The FEIN number is evidence that the individual has struck out on his or her own. While the contractor may never need to use this number, it is a worthwhile test of his or her decision to be independent. A social security number cannot be substituted for a FEIN. Filing a business or self-employment income tax return with the IRS is a fundamental element in determining an individual’s independence and is evidence that the individual has struck out on his or her own.

In applying part-two of the test, some of the basic questions that must be considered are:

- Does the individual have a Federal Employer Identification Number (FEIN)?
- Did the individual file a business or self-employment income tax return with the IRS based on the work or services in the previous year?

**29. What about part-three of the test, “Operates under contracts to perform specific services. for work or specific amounts of money and under which the independent contractor controls the means of performing the services or work”?**

Answer: A contract is a legally enforceable agreement between two or more parties to create reasonably specific mutual obligations. Required elements of a contract are legally competent parties, a purpose that is not illegal or against public policy, an offer, an acceptance of the offer within a reasonable time, and consideration (which is any value or benefit acquired by a party, or actions undertaken or a sacrifice by a party with the purpose of fulfilling an obligation).

The certainty and the good business practice afforded by the use of contracts is incorporated into this part. This part also incorporates the traditional “right to direction and control” test and clarifies that there can be no direction and control over the means by which the work is to be accomplished if the individual is to be considered as an independent contractor. The means by which that result is accomplished gives rise to the competitive nature of bidding and more importantly, gives rise to the notion that a contract can either be profitable or non-profitable for the participants, and to the “independence” of the individual completing the contract.

One of the most important considerations is the degree of control exercised by the company over the work of the individual. An employer has the right to control an employee. Therefore, it is important to determine whether the company had the right to direct and control the individual not only as to the results desired, but also as to the details, manner and means by which the results were accomplished. There are many questions to consider, for example, whether the company had the right to control; 1) the number and the frequency of breaks, 2) how the individual performs his or her work, 3) the type of equipment he or she can use, and 4) the individual’s work schedule. If the company had the right to supervise and control such details, and the manner and means by which the results were to be accomplished, such a finding would indicate an employer-employee relationship. On the other hand, the absence of those elements of supervision and control by the company would support a finding that the individual is an independent contractor and not an employee. It is the right to control and not the actual exercise of control that is important.

Finally, this part contemplates the term and duration of the relationship between the contractor and the individual. A contractor-independent contractor relationship generally contemplates the completion of an agreed service and result within a stipulated period of time. An employer-employee relationship generally contemplates a continuous rendering of services for an indefinite time.

In applying part-three of the test, some of the basic questions that must be considered are:

- Does the individual operate under a contract to perform specific services for specific amounts of money?
- Is there a signed contract between the individual and the contractor?
- What is the duration of the contract?
- Is the individual permitted to work for anyone else?
- When has the individual previously worked for the employer?
- How many jobs has the individual previously worked for the employer?
- Is there a continuing relationship between the individual and employer?
- Has the individual's work really been a part of the regular business of the employer?
- Does the individual control the means of performing the services or work?
- Who has the right to control the details of the individual's work?
- Who has the right to hire and fire the individual? Under what circumstances?
- May the employer discharge the individual without cause?
- Does the employer have the right to train the individual? Is training required?
- Is the individual required to follow routines and schedules established by the employer?
- Does the employer retain the right to set the order in which the services are provided?
- Does the employer have the right to determine what shall be done and how it shall be done?
- Are there any "work rules" which the employer wants the individual to follow?
- Does the employer establish a daily quota? Does the employer do performance evaluations?
- What about the establishment of set hours of work by the employer?
- Is the individual required to produce a minimum volume of business or work such that the individual must devote all of his or her working time to the employer's business?
- Is the work to be done on the employer's premises or a designated location?
- Did the parties intend or believe that they were creating the relationship of employer - employee or that of a general contractor - independent contractor?

**30. What about part-four of the test, "Incurs the main expenses related to the service or work that he or she performs under contract"?**

Answer: Unlike an employee, an independent contractor does not perform services that the contractor assigns with an expectation of pay raises. The details of the activity (not limited to merely service) and the rate of compensation are agreed upon in advance. The key point in this part relates to the requirement that the independent contractor has the "principal burden for expenses incurred in connection with the work". This speaks to the variable of profitability, as well as to the autonomy and self-reliance of the independent contractor.

To be an independent contractor, an individual must maintain a business and have fixed expenses as part of that business as opposed to simple variable expenses resulting from a specific job.

In applying part-four of the test, some of the basic questions that must be considered are:

- Does the individual have the principal burden for expenses incurred in connection with the work? If yes, what and at what cost?
- Specifically, what expenses does the individual incur related to the services or work performed under the contract?
- Does the individual have fixed expenses? If yes, what?
- Who provides the tools or equipment for the individual to do the job?
- What facilities, equipment, tools or materials does the individual supply?
- What is the value of the individual's equipment and tools?

**31. What about part-five of the test, “Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for failure to complete the work or service”?**

Answer: The obligation of an independent contractor is contractual with potential sanctions if the job is not completed. If an individual is to be autonomous, free from influence, self-reliant and gain the benefits, then the individual should be responsible to make good on any promises he or she fails to keep and liable for failure to provide the services specified in a contract. Certainly, in every case where an agreement is made to complete a job and that job is not completed satisfactorily, someone suffers the consequences.

In applying part-five of the test, some of the basic questions that must be considered are:

- Is the individual responsible for the satisfactory completion of work or services that he or she contracts to perform? If yes, how.
- What are the ramifications of unsatisfactory work?
- Is the individual liable for a failure to satisfactorily complete the work or service? If yes, how and for what is the individual liable? Payable to whom?
- Does the employer have the right to control the method and result of the services?
- Does the employer have the right to control and direct the manner and means?
- Does the individual get instructions from the employer?
- Can and does the employer inspect the particulars of the individual’s work and the progress? On a daily basis?
- Who handles quality control?

**32. What about part-six of the test, “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”?**

Answer: The compensation list outlined in this part (commission or per job or competitive bid) is intended to be illustrative of methods of payment and is not exclusive. It is designed to show that payment is made based on factors related to the work performed and not solely on the basis of hours or time expended. Many professionals who are independent contractors are paid based on an hourly rate. This part is intended to remove the certainty of profitability or outcome for the independent. Methods of payment should be related to the amount of work completed rather than to a simple time factor. If an individual is paid based upon the amount of time spent with no limitations on the allowable time, and payment is made for labor only, the only question involved with profitability is whether the individual can spend enough time. Guarantee of outcome removes independence.

In applying part-six of the test, some of the basic questions that must be considered are:

- How is the individual compensated?
- Is the individual paid by the hour or by the job?
- What is the individual’s rate of pay?
- When is the individual paid?
- Is the individual paid by check?
- Are any taxes withheld by the employer?
- Does the employer provide the individual with a W-2 or 1099 form at the end of the year?
- Does the employer reimburse the individual for business and/or travel expenses?
- Does the employer pay the individual a bonus, pension, sick pay, vacation pay or fringe benefits such as health insurance?
- Did the employer report the individual as an employee on the employer’s quarterly wage reports filed with the State of Wisconsin?

### **33. What about part-seven of the test, “May realize a profit or suffer a loss under contracts to perform work or service”?**

Answer: This part is a true mark of being in business rather than being an employee. An independent contractor has the opportunity to realize a profit, or the risk of taking an out-of-pocket loss, while an employee generally does not have that opportunity nor does he or she take that risk. An employee is generally paid on a time or piece-work or commission basis, whereas an independent contractor is ordinarily paid an agreed amount, or according to an agreed formula, for a given job. Profit and loss is a true mark of being in business rather than being an employee. Business receipts and expenditures separate independent contractors from workers who simply furnish services for a wage or fixed payment with no risk of loss, and whose only investment is the time it takes to do the work. To be an independent contractor, an individual must maintain a business and have fixed expenses as part of that business as opposed to simple variable expenses resulting from a specific job.

In applying part-seven of the test, some of the basic questions that must be considered are:

- How may the individual realize a profit or suffer a loss under the contract?
- What is the monetary risk to the individual under the contract?
- Does the employer pay for the supplies and materials?
- Does the employer furnish tools, materials and equipment?
- What facilities, equipment, tools or materials does the individual supply?
- What is the value of the individual’s equipment and tools?
- Does the individual have fixed expenses? If, yes, what are they?
- Specifically, how may the individual profit under the contract?
- Specifically, how may the individual suffer a loss under the contract?

### **34. What about part-eight of the test, “Has continuing or recurring business liabilities or obligations”?**

Answer: A business is any activity or enterprise entered into for profit. True independent contractors have continuing or recurring business liabilities and obligations. Recurring means the liabilities and obligations occur in a steady succession, time after time. Business liabilities are something for which the independent contractor is liable, usually a monetary obligation, cost or debt. Business obligations are a legal duty to pay or do something, as in a formal contract, a promise, or the demands of conscience or custom, that obligates the independent contractor to a course of action (a commitment to pay a particular sum or money) for which he or she is responsible.

This part is intended to determine whether the individual makes a significant investment in or incurs a significant obligation related to facilities (equipment or premises) or tools or materials used in performing services for another and which are not typically furnished by an employer.

In applying part-eight of the test, some of the basic questions that must be considered are:

- Does the individual have continuing or recurring business liabilities or obligations?
- Specifically, what are the individual’s business liabilities or obligations?
- Specifically, what are the business expenditures?
- Does the individual have fixed expenses? If yes, what are they?
- Does the employer pay for the supplies and materials?
- Does the employer furnish tools, materials and equipment?
- What facilities, equipment, tools or materials does the individual supply? At what cost?
- What is the value of the individual’s equipment and tools?
- Does the employer furnish an office showroom, office equipment, machinery, tools, transportation, business forms, stationery, typing, computer, telephone or vehicle?

**35. What about part-nine of the test, “The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures”?**

Answer: The success or failure of any business (an independent contractor or otherwise) is based on the relationship of income to expenditures. Receipts are monetary payments received (income) for goods or services provided. Expenditures are the cost to the business to provide the goods or services and the operating expenses associated with maintaining the business, such as rent, utilities, tools, equipment and payroll.

An independent contractor has the opportunity to make a profit, or the risk of taking an out-of-pocket loss, while an employee generally does not have that opportunity nor does he or she take that risk. This is a true indicator of being in business rather than being an employee. Business receipts and expenditures separate independent contractors from workers who simply furnish services for a wage or fixed payment with no risk of loss, and whose only investment is the time it takes to do the work.

The independent contractor maintains a business and has fixed expenses as part of that business as opposed to simple variable expenses resulting from a specific job.

In applying part-nine of the test, some of the basic questions that must be considered are:

- Does success or failure of the individual’s business depend on the relationship of business receipts to expenditures? If yes, how?
- Specifically, what are the individual’s business receipts?
- Specifically, what are the individual’s business expenditures?
- Does the individual have fixed expenses? If yes, what are they?
- What is the cost of the facilities, equipment, tools or materials supplied by the individual?

**36. What happens if a person 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 worker's compensation insurance coverage, remuneration and/or benefits, it is adjudicated by the State of Wisconsin Division of Hearing and Appeals - Office of Worker's Compensation Hearings on a case-by-case basis according to the facts and circumstances at the time of injury.

Any worker’s compensation claim filed by an independent contractor injured while performing services is also determined 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 therefore, are not required to carry worker’s compensation insurance, may be sued in a civil action for damages by an employee who is injured while working.

### **37. In a nutshell, what are the key elements an employer must understand and contemplate when considering whether to contract with an independent contractor?**

Answer:

- 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) of the Act, must be met before a person working under another person is considered an independent contractor.
- Any deviation from a contract and the nine-part test may affect the status of an employment relationship under the Act and may cause a contractor-independent contractor relationship to evolve into an employer-employee relationship.
- Any worker's compensation claim filed by an independent contractor injured while performing services is determined 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.
- A worker's compensation policy protects the employer from most law suits brought by an employee or independent contractor because of a work-related illness or 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. 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 or independent contractor who is injured while at work.
- Some employers believe it is desirable to find some way to be exempt from the Worker's Compensation Act. Remember that the Act provides protection for the employer as well as the worker. If an injury occurs in covered employment, the injured worker is automatically entitled to compensation for wage loss and medical benefits. However, the worker is limited to those benefits and the employer is protected from any other lawsuit by the worker. If a person establishes his or her business in such a way that it is exempt from coverage under the Act, the business is also giving up the protection from civil liability that is afforded under the Act.

### **38. How can I get more information about coverage under the Act?**

Answer: Contact the Wisconsin Department of Workforce Development - Worker's Compensation Division, Bureau of Insurance Programs in-person at GEF-1 State Office Building, Room C100, 201 E. Washington Avenue, Madison by mail at P.O. Box 7901, Madison, WI 53707-7901 or by phone at (608) 266-3046. The Division also offers information online at: <http://dwd.wisconsin.gov/wc>

DWD is an equal opportunity employer and service provider. If you have a disability and need assistance with this information, please dial 7-1-1 for Wisconsin Relay Service. Please contact the Worker's Compensation Division at (608) 266-1340 to request information in an alternate format, including translated to another language.

### 39. What are some key statutes regarding employer liability to carry worker's compensation insurance under the Wisconsin Worker's Compensation Act?

Chapter 102	Worker's Compensation
Wisconsin Statute 102.03	Conditions of liability.
Wisconsin Statute 102.03(2)	Exclusive remedy, prevents an injured employee from suing an employer who has the required insurance in force at the time a work related injury occurs.
Wisconsin Statute 102.04	Definition of employer, when an employer becomes subject to the Act.
Wisconsin Statute 102.04(1)(c)	Definition of when a farmer becomes subject to the Act.
Wisconsin Statute 102.04(3)	Definition of farming.
Wisconsin Statute 102.05	Election by employer, withdrawal.
Wisconsin Statute 102.05(3)	Election by farmer, withdrawal.
Wisconsin Statute 102.07	Definition of an employee.
Wisconsin Statute 102.07(5)	Definition of a farm employee.
Wisconsin Statute 102.07(8)(b)	Definition of an independent contractor.
Wisconsin Statute 102.075	Election by sole proprietor, partner or member of limited liability company.
Wisconsin Statute 102.076	Election by corporate officer, corporate officer option under the Act.
Wisconsin Statute 102.28(2)	Required insurance, subject employers must be insured by an insurance company authorized to write worker's compensation in Wisconsin.
Wisconsin Statute 102.28(3)	Provision of Alternative Benefits, allows an exemption from the duty to insure religious sect members that qualify and are certified for an exemption.
Wisconsin Statute 102.28(4)	Closure Order, orders an employer to cease operations until the employer complies with s. 102.28(2)(a) by obtaining a worker's compensation insurance policy.
Wisconsin Statute 102.28(5)	Employer's liability.
Wisconsin Statute 102.31	Worker's compensation insurance; policy regulations.
Wisconsin Statute 102.80	Uninsured employers fund.
Wisconsin Statute 102.81	Compensation for injured employee of uninsured employer.
Wisconsin Statute 102.82(1)(2)(a) and (2)(ag)	Uninsured employer payments, reimbursement of the UEF for payments made under s. 102.81 and penalty assessed an uninsured employer for a lapse of worker's compensation insurance coverage.
Wisconsin Statute 102.83	Collection of uninsured employer payments.
Wisconsin Statute 102.835	Levy for delinquent payments.
Wisconsin Statute 102.85	Uninsured employers; penalties, penalties and forfeitures for uninsured employers who fail to comply with the Act.
DWD 80.62 (Administrative Code)	Uninsured employers fund.
DWD 80.65 (Administrative Code)	Notice of cancellation or termination.
Chapter 626	Rate regulation in worker's compensation insurance
Wisconsin Statute 626.03	Scope of application.
Wisconsin Statute 626.32	Development of rates by bureau.
Wisconsin Statute 626.35	Worker's compensation insurance contracts.