

February 25, 2015

To cover my own liability issues, and for clarification, the first group of documents consists of an independent contractor agreement and an independent contractor overview guide. These came from our drop box and were prepared by unknown people at unknown times. They are not my work.

The rest of the papers set forth statutes and cases -- or relevant parts of both. In some cases, they enhance what had already been created. Otherwise, you get a sense of how this information gets discovered. I certainly did not create those documents, only researched them.

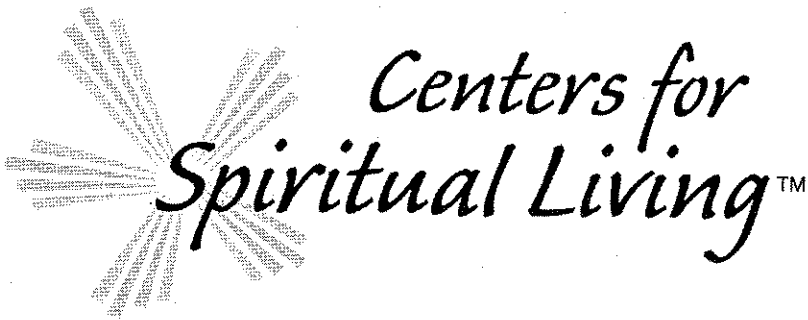
I have not intended, nor should you conclude, that the attached papers set forth all aspects of independent contractor or agency law on any particular state or all states. I have include enough to give you an idea of what's out there.

Barbara Jo Call

Georgia Bar No. 104530

404.633.6993

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INDEPENDENT CONTRACTOR AGREEMENT

This Agreement, made this _____ day of _____, _____ between, **Centers for Spiritual Living (CSL)** hereinafter referred to as "Company", located at **573 Park Point Drive Golden, CO 80401** and _____ hereinafter referred to as "Independent Contractor", collectively referred to as the "Parties".

RECITALS

Independent Contractor is engaged in providing CSL business services, with their principal place of business at _____ (address)

Employer Tax I.D. Number. _____ Business License Number _____).

Independent Contractor represents that he or she has complied with all Federal, State, and local laws regarding business permits, sales permits, licenses, reporting requirements, tax withholding requirements, and other legal requirements of any kind that may be required to carry out said business and the Scope of Work which is to be performed as an Independent Contractor pursuant to this Agreement. Independent Contractor is or remains open to conducting similar tasks or activities for entities other than the Company and holds himself or herself out to the public to be an independent contractor.

Company desires to engage and contract for the services of the Independent Contractor to perform certain tasks as set forth below. Independent Contractor desires to enter into this Agreement and perform as an independent contractor for the company and is willing to do so on the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the above recitals and the mutual promises and conditions contained in this Agreement, the Parties agree as follows:

STATUS OF INDEPENDENT CONTRACTOR

1. This Agreement does not constitute a hiring by either party. It is the parties intention that Independent Contractor shall have an independent contractor status and not be an employee for any purposes, including, but not limited to, the application of the Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, the State Revenue and Taxation Code relating to

income tax withholding at the source of income, the Workers' Compensation Insurance Code 401(k) and other benefit payments and third party liability claims. Independent Contractor shall retain sole and absolute discretion in the manner and means of carrying out their activities and responsibilities under this Agreement. This Agreement shall not be considered or construed to be a partnership or joint venture, and the Company shall not be liable for any obligations incurred by Independent Contractor unless specifically authorized in writing. Independent Contractor shall not act as an agent of the Company, ostensibly or otherwise, nor bind the Company in any manner.

TASKS, DUTIES, AND SCOPE OF WORK

2. Independent Contractor agrees to devote as much time, attention, and energy as necessary to complete or achieve the following: [or the attached "Scope of Work"] _____

The above to be referred to in this Agreement as the "Scope of Work." It is expected that the Scope of Work will be completed by: _____

3. Independent Contractor shall additionally perform any and all tasks and duties associated with the Scope of Work set forth above, including but not limited to, work already being performed or related change orders. Independent Contractor shall not be entitled to engage in any activities which are not expressly set forth by this Agreement.
4. The books and records related to the Scope of Work set forth in this Agreement shall be maintained by the Independent Contractor at the Independent Contractor's principal place of business and open to inspection by Company during regular working hours. Documents to which Company will be entitled to inspect include, but are not limited to, any and all contract documents, change orders/purchase orders and work authorized by Independent Contractor or Company on existing or potential projects related to this Agreement.
5. Independent Contractor shall be responsible to the management and directors of Company, but Independent Contractor will not be required to follow or establish a regular or daily work schedule, Independent Contractor shall supply all necessary equipment, materials and supplies. Company retains the right to inspect, stop, or alter the work of Independent Contractor to assure its conformity with this Agreement.

COMPENSATION

6. Independent Contractor shall be entitled to compensation for performing those tasks and duties related to the Scope of Work as follows: _____
- _____
7. Such compensation shall become due and payable to Independent Contractor upon receiving an invoice and shall be paid according to the following schedule: _____
- _____

NOTICE CONCERNING WITHHOLDING OF TAXES

8. Independent Contractor recognizes and understands that it will receive an IRS 1099 statement and related tax statements, and will be required to file corporate and/or individual tax returns and to pay taxes in accordance with all provisions of applicable Federal and State law. Independent Contractor hereby promises and agrees to indemnify the Company for any damages or expenses, including attorney's fees, and legal expenses, incurred by the Company as a result of independent contractor's failure to make such required payments.

AGREEMENT TO WAIVE RIGHTS TO BENEFITS

9. Independent Contractor hereby waives and foregoes the right to receive any benefits given by Company to its regular employees, including, but not limited to, health benefits, vacation and sick leave benefits, profit sharing plans, such as 401(k) plans. This waiver is applicable to all non-salary benefits which might otherwise be found to accrue to the Independent Contractor by virtue of their services to Company, and is effective for the entire duration of Independent Contractor's agreement with Company. This waiver is effective independently of Independent Contractor's employment status as adjudged for taxation purposes or for any other purpose.

TERMINATION

10. This Agreement may be terminated at any time prior to the completion or achievement of the Scope of Work by either party giving _____ days written notice, or by confirmed e-mail. Such termination shall not prejudice any other remedy to which the terminating party may be entitled, either by law, in equity, or under this Agreement.

NON-DISCLOSURE OF TRADE SECRETS, CUSTOMER LISTS AND OTHER PROPRIETARY INFORMATION

11. Independent Contractor agrees not to disclose or communicate, in any manner, either during or after Independent Contractor's agreement with Company, proprietary information about Company, its operations, clientele, or any other proprietary information, that relate to the business of Company including, but not limited to, the names of its customers, its marketing strategies, operations, or any other information of any kind which would be deemed confidential, a trade secret, a customer list, or other form of proprietary information of Company. Independent Contractor acknowledges that the above information is material and confidential and that it affects the profitability of Company. Independent Contractor understands that any breach of this provision, or that of any other Confidentiality and Non-Disclosure Agreement, is a material breach of this Agreement. To the extent Independent Contractor feels they need to disclose confidential information, they may do so only after obtaining written authorization from [an officer] of the Company.

Independent Contractor's obligations under this Agreement do not extend to information that is: (a) publicly known at the time of disclosure or subsequently becomes publicly known through no fault of the Independent Contractor; (b) discovered or created by the Independent Contractor before disclosure by the Company; (c) or learned by the

Independent Contractor through legitimate means other than from the Company's representatives.

Independent Contractor shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the Company. Independent Contractor shall carefully restrict access to Confidential Information to employees, contractors and third parties as is reasonably required and shall require those persons to sign nondisclosure restrictions at least as protective as those in this Agreement. Independent Contractor shall not, without prior written approval of the Company, use for Independent Contractor own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their benefit or to the detriment of the Company, any Confidential Information. Independent Contractor shall return to the Company any and all records, notes, videos, DVD's, and other written, printed, recorded or tangible materials in its possession pertaining to Confidential Information immediately if the Company requests it in writing.

The nondisclosure provisions of this Agreement shall survive the termination of this Agreement and Independent Contractor duty to hold Confidential Information in confidence shall remain in effect until the Confidential Information no longer qualifies as a trade secret or until the Company sends Independent Contractor written notice releasing Independent Contractor from this Agreement, whichever occurs first.

NON-SOLICITATION COVENANT

12. Independent Contractors shall not, during the Agreement and for a period of *one year* immediately following termination of this Agreement, either directly or indirectly, call on, solicit, or take away, or attempt to call on, solicit, or take away, any of the customers or clients of the Company on whom Independent Contractor called or became acquainted with during the terms of this Agreement, either for their own benefit, or for the benefit of any other person, firm, corporation or organization.

NON-RECRUIT COVENANT

13. Independent Contractor shall not, during this Agreement and for a period of *one year* immediately following termination of this agreement, either directly or indirectly, recruit any of Company's employees for the purpose of any outside business.

RETURN OF PROPERTY

14. On termination of this Agreement, or whenever requested by the parties, each party shall immediately deliver to the other party all property in its possession, or under its care and control, belonging to the other party to them, including but not limited to, proprietary information, customer lists, trade secrets, intellectual property, computers, equipment, tools, documents, plans, recordings, software, and all related records or accounting ledgers.

EXPENSE ACCOUNTS

15. Independent Contractor and the Company agree to maintain separate accounts in regards to all expenses related to performing the Scope of Work. Independent Contractor is solely responsible for payment of expenses incurred pursuant to this Agreement unless provided otherwise in writing by [an officer] of the company. Independent Contractor agrees to

execute and deliver any agreements and documents prepared by Company and to do all other lawful acts required to establish document and protect such rights.

WORKS FOR HIRE

16. Independent Contractor agrees that the Scope of Work, all tasks, duties, results, inventions and intellectual property developed or performed pursuant to this Agreement are considered "works for hire" and that the results of said work is by virtue of this Agreement assigned to the Company and shall be the sole property of Company for all purposes, including, but not limited to, copyright, trademark, service mark, patent, and trade secret laws.

LICENSING, WORKERS' COMPENSATION AND GENERAL LIABILITY INSURANCE

17. Independent Contractor agrees to immediately supply the Company with proof of any licensing status required to perform the Scope of Work pursuant to this Agreement, Workers' Compensation Coverage where required by law and General Liability Insurance, upon request of the Company.

PERSONS HIRED BY INDEPENDENT CONTRACTOR

18. All persons hired by Independent Contractor to assist in performing the tasks and duties necessary to complete the Scope of Work shall be the employees of Independent Contractor unless specifically indicated otherwise in an agreement signed by all parties. Independent Contractor shall immediately provide proof of Workers' Compensation insurance and General Liability insurance covering said employees, upon request of the Company.

NOTICES

19. Any notice to be given hereunder by any party to the other may be affected either by personal delivery in writing, or by mail, registered or certified, postage pre-paid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraphs of this Agreement, but each party may change their address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of five (5) days after mailing. Independent Contractor agrees to keep Company current as to their business and mailing addresses, as well as telephone, facsimile, e-mail and pager numbers.

ATTORNEY'S FEES AND COSTS

20. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs and necessary disbursements incurred both before or after judgment in addition to any other relief to which such party may be entitled.

MEDIATION AND ARBITRATION

21. Any controversy between the parties to this Agreement involving the construction or application of any of the terms, provisions, or conditions of this Agreement, shall on written request of either party served on the other, be submitted first to mediation and then if still unresolved to binding arbitration. Said mediation or binding arbitration shall comply with

and be governed by the provisions of the American Arbitration Association for Commercial Disputes unless the Parties stipulate otherwise. The attorneys' fees and costs of arbitration shall be borne by the losing party, as set forth in paragraph 22 above, unless the Parties stipulate otherwise, or in such proportions, as the arbitrator shall decide.

INDEMNIFICATION

22. Independent Contractor shall defend, indemnify, hold harmless, and insure Company from any and all damages expenses or liability resulting from or arising out of, any negligence or misconduct on Independent Contractor's part, or from any breach or default of this Agreement which is caused or occasioned by the acts of Independent Contractor. Independent Contractor shall insure that its employees and affiliates take all actions necessary to comply with the terms and conditions set forth in this Agreement. Independent Contractor shall name Company as an additional insured on all related insurance policies including workers compensation, and general liability.

INTEGRATION

23. This Agreement expresses the complete understanding of the parties with respect to the subject matter and supersedes, nullifies and overrides any and all prior proposals, agreements, representations and understandings whether any of these were written or oral between The Independent Contractor and the Company. This Agreement may not be amended except in a writing signed by both parties.

REPRESENTATION

24. Each party of this Agreement acknowledges that no representations, inducements, promises or agreements, orally or otherwise, have been made by any party hereto, or anyone acting on behalf of any party hereto, which are not embodied herein, and that no other agreement, statement or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement shall be effective only if it is in writing, signed and dated by all parties hereto.

PARTIAL INVALIDITY

25. If any provision of this Agreement is held by a Court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect without being impaired or invalidated in any way.

GOVERNING LAW AND JURISDICTION

26. This Agreement shall be governed by and construed under the laws of the State of Colorado. Jurisdiction and venue for all purposes shall be in Jefferson County, Colorado.

Executed on _____, _____, at Golden, CO.

Independent Contractor's Signature

Date

Independent Contractor's Name Printed

Company Representative

Date

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Independent Contractor Guide

Overview

Perhaps the most basic question about the employment relationship is whether a worker is, in fact, an employee or an independent contractor. As with so many employment law issues, the answer is, "It depends." In this case, it depends in particular on who is asking: the **U.S. Internal Revenue Service (IRS)**, the **U.S. Department of Labor (DOL)**, a workers' compensation hearing officer and so on. Even courts have admitted that the distinction is not always clear.

There is no all inclusive test to determine when a worker should be classified as an employee rather than an independent contractor. However, there are factors that all regulatory authorities consider that can be used by organizations as a guide to make the necessary case-by-case decision to hire a contractor or employee.

Classification of employees is subject to increased scrutiny by regulators because of abuses that occur when employers misclassify employees to avoid payroll taxes, and other related costs. Organizations face significant risks when they improperly classify a worker as an independent contractor when, under all the circumstances, that worker should be treated as an employee. The responsibility for classifying a worker correctly falls squarely on the employer.

While care needs to be taken in deciding to hire an independent contractor, there are many good reasons for doing so. Once the decision has been made to meet a staffing need through independent contractors, organizations can take a number of practical steps to manage independent them effectively.

The Staffing Decision: Employees or Independent Contractors?

In all cases, the staffing decision should start with a job description, sometimes called "Scope of Work".

In general, engaging a regular employee when an independent contract might have been a better staffing solution poses fewer risks. However, if the organization does hire a regular employee for a specific project, knowing additional work will not likely be available, the best practice is to inform the individual in writing that employment is for a limited duration.

Accordingly, an employer should consider a variety of factors—none of them in isolation—in deciding whether to meet a staffing need by means of independent contractors versus employees. Weighing the requirements of the job description in combination with other factors will enable the employer to judge whether an independent contractor will both meet the employer's staffing needs and withstand legal scrutiny. The most important factors to be considered are:

Duration: If the staffing need relates to a specific project with no likelihood of continued employment, using an independent contractor as project manager would avoid the problem of having to lay off an employee when the project is done. Such a case would weigh in favor of independent contractor status. Every independent contractor agreement should have a specific beginning and end date.

Exclusivity: If the organization needs the worker's full-time efforts over an extended or indefinite period, the situation would likely call for a traditional employee. Regulatory authorities will tend to view long-term independent contractors who have only one client as suspiciously similar to employees. If the organization needs the worker only part time, does not object to the individual having other clients or will be satisfied as long as the worker meets set deadlines, then the organization is on relatively solid footing in engaging an independent contractor.

Control: If the employer will prescribe the manner in which the work is performed, that weighs toward employee status. Hiring an employee would be the safer course of action. If the organization is concerned only about the final product and does not need to dictate how, when, or where the work gets done an independent contractor may be the preferred approach.

Independent judgment: If the relevant job requires exercise of independent judgment, engaging an independent contractor may be a sound choice. An organization might choose to use an outside contractor to manage a specific complex project such as implementing a computer system, facilitating a building move, or conducting a large scale fund-raising project.

Specialized knowledge, training or experience: Organizations routinely engage professionals such as lawyers, accountants and human resources professionals as independent contractors. Information technology professionals also commonly serve on that basis, as do musicians in certain circumstances.

Other situations requiring an independent contractor's specialized knowledge, training or experience might include:

- Developing a Smart Phone App and marketing plan for the organization.
- Overall coordination of logistics and the program for a large event.

Stewardship of confidential matter: It may seem inappropriate and risky for employers to entrust independent contractors with confidential information. Nevertheless, an argument can be made that some types of sensitive information are *more* safely lodged outside the organization than inside, where leaks and gossip predictably occur.

Importance of marketing: Real estate agents, mortgage brokers, stock brokers and financial planners are often compensated on a commission basis that depends largely on their ability to bring in new business. A commission-based compensation arrangement makes meeting a staffing need through independent contractors particularly appropriate. This is especially true if

the contractor's clients are deemed to be property of the contractor and not of the hiring organization.

Independent contractors are in business for themselves and should be actively engaged in offering their services for hire. Web site marketing and other forms of advertising are considered by regulatory authorities in their determination of the contractor's opportunity for profit and loss.

Exigent circumstances: An urgent need may warrant engaging an independent contractor to perform work that a regular employee normally does. Meeting needs created when a worker goes on extended leave, for example, would weigh in favor of hiring an independent contractor even if the work required extensive controls over the worker's efforts and output. Generally, an organization can find a suitable independent contractor faster than it can find a suitable employee. (An organization may well want to pursue both avenues simultaneously, bringing in an independent contractor to deal with exigent circumstances, but taking its time to select a regular employee to assume the duties long term.)

Business essentials: Regulatory authorities will expect that truly independent contractors do not need organizations to provide them with an office, equipment or other basic necessities of doing business.

Business expenses are generally the contractor's responsibility. If expenses are paid by the organization, the contract should specially state the conditions and limits of reimbursement.

Employees doing the same job: This is a big red flag for regulators. It is very risky for an organization to have two classes of workers— independent contractors and employees— performing the same job. If challenged, the employer will be expected to offer a clear and convincing rationale that does not involve avoiding legal obligations.

Industry standard: The legality of a worker's classification as an independent contractor often boils down to the issue of reasonableness. One important factor considered is relationship between the organization and contractor. There should be a clear distinction between employees and contractors. The concept of "common law employee" dictates that if you present the contractor as your employee...he or she is for all practical purposes, your employee.

Legal Ramifications of Misclassification: Classifying a worker as an independent contractor should always be an informed and bona fide business decision, not a subterfuge to avoid the employer's obligations to employees. Independent contractor arrangements have drawn increasing scrutiny and significance with the proliferation of workplace laws covering employees and the growth of the contingent workforce. Misclassification of an individual as an independent contractor can give rise to a variety of liabilities; liability and employee practice insurance, Worker's Compensation; unemployment eligibility, and employment taxes.

There are several reasons a contractor may want to assert their status as employee when he or she is faced with unforeseen circumstances such as tax liability or injury. The organization has responsibility for employee related costs but since the contractor is not an employee, the organization has no responsibility, unless the contractor is deemed to be a misclassified employee

Tax consequences: Employers are required to withhold income taxes on the basis of information employees provide on IRS Form W-4. If an employer fails to withhold income taxes on behalf of a worker improperly classified as an independent contractor, and the individual has failed to pay the taxes, the employer may be liable for federal or state taxes that were required to be withheld but were not.

Independent Contractor: Hiring Checklist

The following are merely recommended guidelines. Each organization should look at its organizational needs and amend the following according to the organizations requirements.

- ✓ Use the Centers for Spiritual Living Independent Contractor Agreement approved by the Legal Committee and available on the csl.org Internal Website under the Business Administration tab, Human Resources category. This document records all of the information required for hiring an independent contractor:
 - All business-related information on the independent contractors business, i.e., business name, type of business, address, phone/e-mail/fax information, and business license, if appropriate.
 - IRS-assigned Employer Identification Number (EIN) or social security number.
 - Scope of Work statement that describes the work to be performed, milestones to be achieved, start and end date.
 - Determine who should sign the contract; concurring that the employee classification is correct, nature and scope of work, and terms meet the requirements for a contractor.
- ✓ Have the organizations confidentiality or proprietary information agreement signed by the contractor.
- ✓ Provide the contractor with copies of all policies and procedures the organization expects the independent contractor to adhere to during the assignment. Have the contractor acknowledge receipt and understanding of policies, where necessary.
- ✓ Copy of invoicing requirements procedures and payment dates.
- ✓ If work is to be performed on the organizations premises:
 - Have the contractor complete an emergency notification contact form; retain in the HR department.
 - Assign parking and inform about parking rules, if appropriate.
 - Provide logins/access codes to business systems/IT systems/telephone systems and security identification/badges, as needed.

As used in this chapter, the term:

OCGA 34-9-1
workers' comp. + employer
statutes

- (1) "Board" means the State Board of Workers' Compensation.
- (2) "Employee" means every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer; and, except as otherwise provided in this chapter, minors are included even though working in violation of any child labor law or other similar statute; provided, however, that nothing contained in this chapter shall be construed as repealing or altering any such law or statute. Any reference to any employee who has been injured shall, if the employee dies, include such employee's legal representatives, dependents, and other persons to whom compensation may be payable pursuant to this chapter. All firefighters, law enforcement personnel, and personnel of emergency management or civil defense agencies, emergency medical services, and rescue organizations whose compensation is paid by the state or any county or municipality, regardless of the method of appointment, and all full-time county employees and employees of elected salaried county officials are specifically included in this definition. There shall also be included within such term any volunteer firefighter of any county or municipality of this state, but only for services rendered in such capacity which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer firefighters; any volunteer law enforcement personnel of any county or municipality of this state who are certified by the Georgia Peace Officer Standards and Training Council, for volunteer law enforcement services rendered in such capacity which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer law enforcement personnel; any person who is a volunteer member or worker of an emergency management or civil defense organization, emergency medical service, or rescue organization, whether governmental or not, of any county or municipality of this state for volunteer services, which are not prohibited by Code Section 38-3-36, rendered in such capacity and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer members or workers; and any person certified by the Department of Public Health or the Georgia Composite Medical Board and registered with any county or municipality of this state as a medical first responder for any volunteer first responder services rendered in such capacity, which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such responders. The various elected county officers and elected members of the governing authority of an individual county shall also be included in this definition, if the governing authority of said county shall provide therefor by appropriate resolution. For the purposes of workers' compensation coverage, employees of county and district health agencies established under Chapter 3 of Title 31 are deemed and shall be considered employees of the State of Georgia and employees of community service boards established under Chapter 2 of Title 37 shall be considered to be employees of the state. For the purpose of workers' compensation coverage, members of the Georgia National Guard and the State Defense Force serving on state active duty pursuant to an order by the Governor are deemed and shall be considered to be employees of this state. ~~A~~ person shall be an

(13)

independent contractor and not an employee if such person has a written contract as an independent contractor and if such person buys a product and resells it, receiving no other compensation, or provides an agricultural service or such person otherwise qualifies as an independent contractor. Notwithstanding the foregoing provisions of this paragraph, any officer of a corporation may elect to be exempt from coverage under this chapter by filing written certification of such election with the insurer or, if there is no insurer, the State Board of Workers' Compensation as provided in Code Section 34-9-2.1. For purposes of this chapter, an owner-operator as such term is defined in Code Section 40-2-87 shall be deemed to be an independent contractor. Inmates or persons participating in a work release program, community service program, or similar program as part of the punishment for violation of a municipal ordinance pursuant to Code Section 36-32-5 or a county ordinance or a state law shall not be deemed to be an employee while participating in work or training or while going to and from the work site or training site, unless such inmate or person is employed for private gain in violation of Code Section 42-1-5 or Code Section 42-8-70 or unless the municipality or county had voluntarily established a policy, on or before January 1, 1993, to provide workers' compensation benefits to such individuals. Individuals who are parties to a franchise agreement as set out by the Federal Trade Commission franchise disclosure rule, 16 C.F.R. 436.1 through 436.11, shall not be deemed employees for purposes of this chapter.

(3) "Employer" shall include the State of Georgia and all departments, instrumentalities, and authorities thereof; each county within the state, including its school district; each independent public school district; any municipal corporation within the state and any political division thereof; any individual, firm, association, or public or private corporation engaged in any business, except as otherwise provided in this chapter, and the receiver or trustee thereof; any electric membership corporation organized under Article 4 of Chapter 3 of Title 46 or other cooperative corporation engaged in rural electrification, including electric refrigeration cooperatives; any telephone cooperative organized under Part 3 of Article 2 of Chapter 5 of Title 46 or other cooperative or nonprofit corporation engaged in furnishing telephone service; the legal representative of a deceased employer using the service of another for pay; and any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits. If the employer is insured, this term shall include his insurer as far as applicable.

(4) "Injury" or "personal injury" means only injury by accident arising out of and in the course of the employment and shall not, except as provided in this chapter, include a disease in any form except where it results naturally and unavoidably from the accident. Except as otherwise provided in this chapter, "injury" and "personal injury" shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability. "Injury" and "personal injury" shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, nor shall "injury" and "personal injury" include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown

by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment. Alcoholism and disabilities attributable thereto shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment. Drug addiction or disabilities resulting therefrom shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment except when such addiction or disability resulted from the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician. Notwithstanding any other provision of this chapter, and solely for members of the Georgia National Guard and State Defense Force, an injury arising in the course of employment shall include any injury incurred by a member of the Georgia National Guard or State Defense Force while serving on state active duty or when traveling to and from state active duty.

HISTORY: Ga. L. 1920, p. 167, §§ 2, 45; Ga. L. 1922, p. 185, § 1; Code 1933, §§ 114-101, 114-102; Ga. L. 1943, p. 401, § 1; Ga. L. 1946, p. 103; Ga. L. 1950, p. 324, § 1; Ga. L. 1950, p. 404, § 1; Ga. L. 1952, p. 167, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 526, § 1; Ga. L. 1958, p. 183, § 1; Ga. L. 1963, p. 141, § 1; Ga. L. 1964, p. 675, § 1; Ga. L. 1967, p. 633, § 1; Ga. L. 1968, p. 1163, § 1; Ga. L. 1970, p. 196, § 1; Ga. L. 1970, p. 235, § 1; Ga. L. 1973, p. 232, § 1; Ga. L. 1975, p. 190, § 1; Ga. L. 1975, p. 1231, § 1; Ga. L. 1978, p. 2220, § 1; Ga. L. 1980, p. 1145, § 1; Ga. L. 1981, p. 842, § 1; Ga. L. 1981, p. 1585, § 1; Ga. L. 1982, p. 2360, §§ 1, 3; Ga. L. 1982, p. 2485, §§ 0.5, 5.5; Ga. L. 1983, p. 3, § 25; Ga. L. 1984, p. 816, § 1; Ga. L. 1987, p. 1038, § 1; Ga. L. 1987, p. 1110, § 1; Ga. L. 1988, p. 1679, § 0.5; Ga. L. 1990, p. 1501, § 1; Ga. L. 1991, p. 94, § 34; Ga. L. 1991, p. 677, § 1; Ga. L. 1991, p. 1850, § 1; Ga. L. 1992, p. 1942, § 1; Ga. L. 1993, p. 491, § 1; Ga. L. 1994, p. 97, § 34; Ga. L. 1994, p. 887, § 1; Ga. L. 1994, p. 1717, § 2; Ga. L. 1996, p. 1291, § 1; Ga. L. 2000, p. 794, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2009, p. 859, § 2/HB 509; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2012, p. 685, § 1/HB 548.

Annotations

1 to 10 of 260 results Authority Check

Case Decision Date Entire Database

1. Clark v. Coats & Clark, Inc., 929 F.2d 604 (C.A.11 (Ga.), 1991) April 19, 1991 1,710
4 O.C.G.A. Secs. **34-9-1** to 389...
2. Texas Workers' Compensation Com'n v. Garcia, 893 S.W.2d 504 (Tex., 1995) February 9, 1995 367
21 See Alaska Stat. § 23.30.190; Ariz.Rev.Stat.Ann. § 23-1065(C); Ark.Code Ann. § 11-9-522(g); Colo.Rev.Stat.Ann. § 8-42-107(8)(c); Fla.Stat.Ann. § 440.15(3); Ga.Code Ann. § **34-9-1**(5); Idaho Code § 72-430(2); Kan.Stat.Ann. § 44-510d(a)(23); Ky.Rev. Stat.Ann. § 342.730(1)(c); La.Rev.Stat.Ann. § 23:1221(4)(q); Me.Rev.Stat.Ann. tit. 39-A, § 153(8); Mass.Gen.L. ch. 152, § 35; Minn.Stat.Ann. § 176.105; Mont.Code Ann...
3. Madrid v. St. Joseph Hosp., 928 P.2d 250, 122 N.M. 524 (N.M., 1996) July 22, 1996 57
4 See Alaska Stat. § 23.30.190 (1990); Ariz.Rev.Stat.Ann. § 23-1065(C) (1995); Colo.Rev.Stat. § 8-42-107(8)(c) (Cum.Supp.1995); Ga.Code Ann. § **34-9-1**(5) (1994); Ky.Rev.Stat.Ann. § 342.730(1)(c) (Michie/Bobbs-Merrill Cum.Supp.1994); La.Rev.Stat.Ann. § 23-1221(4)(q) (West Cum.Supp.1996); Me.Rev.Stat.Ann. tit. 39-A, § 153(8) (West Cum.Supp.1996); Mass.Ann.Laws ch. 152, § 35 (Law. Co-op Cum.Supp.1996); Mont.Code Ann. § 39-71-703(1)(b)(ii)...
4. Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (C.A.8 (Ark.), 1986) January 22, 1986 56
We also find significant the fact that the rule of law adopted in most of the decisions permitting this type of action against the workers' compensation carrier has been overturned by statutory amendment. See N.H.Rev.Stat.Ann. Secs. 281:2, -:12, -:14 (reversing Smith);

Fla.Stat. Sec. 440.11(3) (reversing Nelson); Mich.Comp.Laws Secs. 418.131 & 418.827 (reversing Ray); Ky.Rev.Stat. Sec. 342.690(1) (reversing Bryant v. Old Republic Insurance Co., 431 F.2d 1385 (6th Cir.1970)); ...

5. Murphy v. ARA Services, Inc., 164 Ga.App. 859, 298 S.E.2d 528 (Ga. App., 1982) November 30, 1982 42
 Contrary to the trial court's order, appellant contends that the misconduct of the supervisor for which she seeks damages is not a compensable "injury" within the meaning of the Act. Code Ann. § 114-102 (now OCGA § **34-9-1**(4)) defines "injury" for purposes of the Act as "injury by accident arising out of and in the course of the employment...." Specifically excluded from this definition is "injury caused by the wilful act of a third person directed against an employee for reasons..."
6. Bright v. Nimmo, 253 Ga. 378, 320 S.E.2d 365 (Ga., 1984) September 26, 1984 37
 In Helton v. Interstate Brands Corp., 155 Ga.App. 607, 271 S.E.2d 739 (1980), plaintiff sued her employer in tort for failing to maintain a well-lighted and secure parking lot where plaintiff was assaulted and kidnapped (and later raped) when she arrived for work at 4:40 a.m. After finding that plaintiff was injured by accident arising out of and in the course of the employment for reasons not personal to the employee, the court held that plaintiff's exclusive remedy was under the Workers'...
7. Brockington v. Certified Elec., Inc., 903 F.2d 1523 (C.A.11 (Ga.), 1990) June 26, 1990 35
 Joseph Daniel Brockington and Sylvia, his wife, bring this action to recover damages for an injury sustained by Brockington on the "navigable" waters of the Intracoastal Waterway in the course of his employment with Certified Electric, Inc. ("Certified"). Brockington, who has already received compensation for his injury pursuant to the Georgia Workers' Compensation Act, O.C.G.A. Sec. **34-9-1**, et seq., now seeks an independent recovery against Certified as his employer, pursuant to section 5(b)...
8. Cox v. Brazo, 165 Ga.App. 888, 303 S.E.2d 71 (Ga. App., 1983) March 10, 1983 34
 1. Appellant contends that the trial court erred in granting appellees' motions for summary judgment because her common law tort claim of assault against Brazo and Krystal is not barred by the Georgia Workers' Compensation Act. OCGA § **34-9-1** et seq. (formerly Code Ann. § 114-101 et seq.). We...
9. Lightning v. Roadway Exp., Inc., 60 F.3d 1551 (C.A.11 (Ga.), 1995) August 16, 1995 31
 The Act states, in relevant part, that "[t]he rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee ... at common law or otherwise, on account of ... injury." O.C.G.A. Sec. 34-9-11(a) (1992). The Act provides the following definition of injury: " 'Injury' or 'personal injury' means only injury by accident arising out of and in the course of the employment...." O.C.G.A. Sec. **34-9-1**(4) (1992 & 1994 Supp.). Georgia courts...
10. Doss v. Food Lion, Inc., 267 Ga. 312, 477 S.E.2d 577 (Ga., 1996) November 12, 1996 27
 2 O.C.G.A. §...

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GA

Georgia

1st case

Adcox v. Atlanta Bldg. Maintenance Co. Inc., 687 S.E.2d 137, 301 Ga. App. 74 (Ga. App., 2009)
...general scope of the work. They do not dictate the time, manner or method of executing the work. ABM told Mesa the days that cleaning was needed and that it had to be completed outside of normal business hours, which were Monday through Friday, 8:00 a.m. to 5:00 p.m. Although Mesa stated that ABM told him the hours to work, he explained that he did not keep track of employee hours worked nor pay by the hour because the employees "don't have to spend any time, just do their job and leave."... (court finds independent contractor status)

2nd case

Brown v. Who's Three, Inc., 457 S.E.2d 186, 217 Ga.App. 131 (Ga. App., 1995)

The usual test applied to determine if one is a "servant" for [217 Ga.App. 134] purposes of respondeat superior is "whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work.... The test is not whether the employer did in fact control and direct the employee in the work, but it is whether the employer had that right under the employment contract." ... [Cits.] " Hall v. Buck, 206 Ga.App. 754, 758-759(6), 426 S.E.2d 586 (1992). One who accepts responsibility for

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teaching an apprentice or student the trade of cosmetology or esthetics under OCGA § 43-10-14 may be liable for the student's negligence in performing the duties incident to the instructor/apprentice relationship. The fact that Al-Ansari received a percentage of the fees she generated for the salon does not diminish the duty.

The salon asserts that Al-Ansari was an independent contractor, placing her outside the doctrine of respondeat superior. See Hall, supra. OCGA § 43-10-14 does not require that the student/apprentice be an employee; no specific relationship is required and the student could be uncompensated.

"The original common law rule that an employer is not liable for the torts of an independent contractor is codified in Georgia in OCGA § 51-2-4 which provides: 'An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer.' [Cit.] ... 'With (respect) to the "independent business" requirement set forth in the code section, the test is essentially whether the contractor has a bona fide existence apart from the employer or functions instead as the employer's alter ego.' ... [Cit.]" Loudermilk Enterprises v. Hurtig, 214 Ga.App. 746, 747, 449 S.E.2d 141 (1994). Under OCGA § 43-10-14, Al-Ansari could not have any such independent business existence as a matter of law; she was not a licensed esthetician and could only work while learning under a master cosmetologist or certified esthetician. The statute precludes, by public policy, the status of independent contractor for an apprentice.

Aside from the aspects of the relationship necessary to satisfy OCGA § 43-10-14, there is ample evidence that Al-Ansari was treated as an employee and not as an independent contractor. The salon not only had the right to control the "time, the manner, the methods, and the means of the execution of [the apprentice's] work," Hall, supra, but actually exerted such control by

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approving Al-Ansari's use of her self-provided table, after investigation of it, when she first began working there. An owner and employee of the salon, a holder of a master cosmetologist certificate and the person who satisfied the requirements of OCGA § 43-10-14 pertaining to Al-Ansari's apprenticeship, had her perform several facials on him to ensure that she did [217 Ga.App. 135] "the manipulation during the facial correct (sic)" and observed "what products she used], her basic knowledge, whatever." This testimony demonstrates not only his acceptance of his role as instructor of an apprentice, but his right to oversee and control the methods and manner of her work as an esthetician, and his right to insist upon adherence to certain standards and methods. The salon again exhibited such control by telling the student she could not use the table after Brown's injury until it had been further investigated.

The salon contends that Al-Ansari signed a document which stated that she understood she was paid as an independent contractor and was responsible for her own tax payments. Such documentary labeling "is not determinative of the status of any such person and other factors may negate the label. [Cits.]" Doctors Hosp. of Augusta v. Bonner, 195 Ga.App. 152, 162(6)(a), 392 S.E.2d 897 (1990). Here, the "other factors" already stated negate the documentary label. As to control of Al-Ansari's time of arrival and departure, "[t]he test is not whether the employer did in fact control and direct the employee in the work, but it is whether the employer had that right under the employment contract." ... [Cits.] Hall, supra at 759(6), 426 S.E.2d 586. The salon clearly had the right to control such.

By virtue of the relationship between the parties imposed by OCGA § 43-10-14 and the salon's acceptance thereof, as well as the degree of control actually asserted by the salon, there was ample evidence to thwart a conclusion on summary judgment that the salon was not liable under respondeat superior for any negligent acts committed by Al-Ansari as apprentice and/or as employee.

MO

In determining whether a worker is an employee or an independent contractor, we must employ a "right of control" test. § 288.034-5. "Utilizing this 'right of control' test, the Division must follow 'the common law rules applicable in determining the employee-employer relationship under 26 U.S.C. § 3306(i).'" *Quality Med. Transcription, Inc. v. Woods*, 91 S.W.3d 181, 185 (Mo. App. W.D. 2002) (quoting 8 C.S.R. § 10-4.150(1)). "The Division must also consider the case law, Internal Revenue Service (IRS) regulations, and letter rulings interpreting § 3306(i)." *Id.*

IRS

In Revenue Ruling 87-41, the IRS identified twenty factors to consider in classifying an individual as an employee or independent contractor. Those factors are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.

Id. (citing Rev. Rul. 87-41, 1987-1 C.B. 296) (internal citation omitted).

unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that—

- (1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;
- (2) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices,⁴
- (3) nothing in this subsection shall be construed to prohibit deducting any amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the withholding of Federal, State, or local individual income tax, if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor;
- (4) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act;
- (5) amounts may be withdrawn for the payment of short-time compensation under a short-time compensation program (as defined in subsection (v)); and
- (6) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in subsection (t)).

(g) Contributions

For purposes of this chapter, the term "contributions" means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

(h) Compensation

For purposes of this chapter, the term "compensation" means cash benefits payable to individuals with respect to their unemployment.

(i) Employee

For purposes of this chapter, the term "employee" has the meaning assigned to such term by section 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply.

(j) State, United States, and American employer

For purposes of this chapter—

(1) State

The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) United States

The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) American employer

The term "American employer" means a person who is—

- (A) an individual who is a resident of the United States,
- (B) a partnership, if two-thirds or more of the partners are residents of the United States,
- (C) a trust, if all of the trustees are residents of the United States, or
- (D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(k) Agricultural labor

For purposes of this chapter, the term "agricultural labor" has the meaning assigned to such term by subsection (g) of section 3121, except that for purposes of this chapter subparagraph (B) of paragraph (4) of such subsection (g) shall be treated as reading:

"(B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subparagraph (A), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;"

[(I) Repealed. Sept. 1, 1954, ch. 1212, §4(c), 68 Stat. 1135]

(m) American vessel and aircraft

For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means

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an aircraft registered under the laws of the United States.

(n) Vessels operated by general agents of United States

Notwithstanding the provisions of subsection (c)(6), service performed by officers and members of the crew of a vessel which would otherwise be included as employment under subsection (c) shall not be excluded by reason of the fact that it is performed on or in connection with an American vessel—

- (1) owned by or bareboat chartered to the United States and
- (2) whose business is conducted by a general agent of the Secretary of Commerce.

For purposes of this chapter, each such general agent shall be considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account, and the officers and members of the crew of such an American vessel whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than the United States. Each such general agent who in his capacity as such is an employer within the meaning of subsection (a) shall be subject to all the requirements imposed upon an employer under this chapter with respect to service which constitutes employment by reason of this subsection.

(o) Special rule in case of certain agricultural workers

(1) Crew leaders who are registered or provide specialized agricultural labor

For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such crew leader—

(A) if—

(i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or

(ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(B) if such individual is not an employee of such other person within the meaning of subsection (i).

(2) Other crew leaders

For purposes of this chapter, in the case of any individual who is furnished by a crew leader to perform agricultural labor for any other person and who is not treated as an

91 S.W.3d 181

**QUALITY MEDICAL TRANSCRIPTION, INC., Appellant,
v.
Dorothy WOODS, Defendant,
Division of Employment Security, Respondent.**

No. WD 60584.**No. WD 60719.****Missouri Court of Appeals, Western District.****December 17, 2002.**

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William J. Sanders, Esq., Kansas City, MO, for Appellant.

Ronald J. Miller, Esq., Jefferson City, MO, for Respondent.

Before ELLIS, C.J., HOLLIGER and HARDWICK, JJ.

LISA WHITE HARDWICK, Judge.

Quality Medical Transcription, Inc. (QMT) appeals the Labor and Industrial Relations Commission's (Commission) determination that QMT is liable for state unemployment benefits and taxes for its medical transcribers because they are employees and not independent contractors. We affirm.

Factual and Procedural Background

QMT began business in 1987, providing medical records transcription services for physicians, clinics, and hospitals. A management staff of three employees currently work in its central office in Blue Springs. QMT has "Subcontractor Agreements" with approximately fifteen transcribers who work out of their homes performing all of the company's transcription services.

Prior to 1992, the transcribers worked in QMT's central office, where they used company equipment and were considered employees. As digital computer technology improved and transcribers desired more flexibility in their work schedules, QMT revised its operational procedures in 1992 to require transcribers to work from home using their own transcription equipment. QMT thereafter entered into Subcontractor Agreements with the transcribers and considered them independent contractors.

On July 18, 2000, Dorothy Woods signed a Subcontractor Agreement to provide transcription services for QMT. Woods continued working under the agreement until QMT "discharged" her on January 18, 2001.

On January 22, 2001, Woods filed a claim for unemployment benefits with the Division of Employment Security (Division). The Division issued a determination, on

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March 6, 2001, that Woods was

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"employed by" QMT during the third quarter of the year 2000 and was entitled to receive unemployment benefits based on wages received from QMT during that quarter.

Concurrently, sometime in early 2001, the Division conducted a general investigation into QMT's practice of retaining transcribers on a subcontractor basis. The investigation resulted in the Division issuing a separate determination, on March 22, 2001, that all of the transcribers "per`formed services in employment" and were paid "wages" as defined by the Missouri Employment Security Law, §§ 288.034 and 288.036 RSMo.2000. The Division concluded the transcribers were not independent contractors but employees, for whom QMT owed unemployment taxes.

At QMT's request, the Division's Appeals Tribunal held joint hearings on Woods' unemployment claim and the tax liability determination. Woods testified at one of the appeals hearings. Two other transcribers, who similarly contracted with QMT, also testified. Other witnesses included the president/founder of QMT, an unemployment insurance auditor, and a Division employee responsible for reviewing documents related to the investigation of QMT's relationship with the transcribers.

Evidence at the appeals hearings indicated Woods previously worked as a licensed practical nurse and had no prior experience as a medical transcriber. To prepare for her transcriber job, Woods received training from QMT on computer word-processing and the operation of micro-cassette recording equipment. Once trained, Woods and the other transcribers worked out of their homes using their own computers, internet access, and word processing software. QMT provided Woods with a micro-cassette recorder. Some of the transcribers borrowed or rented specialized transcription equipment, such as headphones and foot pedals, from QMT.

QMT's office manager distributed transcription assignments on a daily basis to each transcriber. Each assignment included an instructional handout, prepared by QMT, to demonstrate the transcription format required by the client. QMT sent the daily transcription assignments to each transcriber via internet work files, or the transcriber could pick up the assignments at QMT's offices between 11:00 a.m. and 2:00 p.m. each workday. Per the industry standard, the transcriptions were to be completed and returned to QMT by 8:00 a.m. the following day with a "job sheet" documenting the work performed for a particular client. If the assignments could not be timely completed, transcribers called QMT to request an extension.

The transcribers also documented their completed assignments weekly on "work log" forms they received from QMT. The completed forms provided information QMT needed in order to bill clients and pay the transcribers. Transcribers were paid by the number of characters typed, at a rate generally set by QMT. Paychecks were issued to the transcribers each Friday and were drawn from QMT's business account. QMT did not withhold taxes or reimburse any business expenses incurred by the transcribers.

The Subcontractor Agreement signed by each of the transcribers contained confidentiality and non-compete clauses. While QMT never told transcribers they could not hire assistants, Woods and one other transcriber believed the confidentiality clause

required that they personally complete all of the work assigned to them. The non-compete provision prohibited the transcribers from directly or indirectly soliciting business from the same clients served by QMT for five years after termination of the Subcontractor Agreement.

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The number of hours the transcribers worked per week varied from full time to a few hours per week, depending on client need and transcriber availability. Woods testified that QMT's president urged her to work "full-time" for QMT and even offered to pay insurance benefits if Woods quit her other job. Woods opted for less than full-time, working five to eight hours daily for QMT, five days a week. QMT's president denied offering Woods full-time employment or benefits.

Woods and one other transcriber held other employment — but not as medical transcribers — at the time they worked for QMT. None of the three testifying transcribers worked for other medical transcription firms at the same time they were under contract with QMT. None held themselves out to the public as providers of transcription services. The transcribers understood they could quit working for QMT at any time and that QMT could discharge them at any time without liability.

Following the evidentiary hearing, the Appeals Tribunal concluded that Woods and all of the transcribers had an employment relationship with QMT. In separate decisions, the Appeals Referee affirmed QMT's liability for Woods' unemployment claim and the unemployment taxes for all of its transcribers. QMT sought review from the Commission, which affirmed and adopted the Appeals Referee's decisions. The Commission also issued supplemental findings of fact and conclusions of law in affirming the award of unemployment benefits to Woods.

Standard of Review

On appeal to this court, QMT challenges the sufficiency of the evidence to support the Commission's decision on Woods' unemployment claim and the tax liability for all transcribers. Pursuant to § 288.210, we have authority to modify, reverse, remand, or set aside the decision if there is "no sufficient competent evidence" to warrant the Commission's action.

We must apply a two-step process in reviewing the Commission's findings based on the evidence presented. Asaro v. Div. of Employment Sec., 32 S.W.3d 623, 626 (Mo.App. W.D.2000). First, we examine the entire record, viewing the evidence and all reasonable inferences in the light most favorable to the decision, to determine if it contains competent and substantial evidence to support the decision. *Id.* If not, the Commission's decision must be reversed. *Id.* If there is sufficient evidence, this court moves to the second step, where it views the evidence in the light most favorable to the decision but must consider *all* evidence in the record, including that which opposes or is unfavorable to the decision. *Id.* Taking account of the overall effect of the evidence, we must determine whether the Commission's award is against the overwhelming weight of the evidence. *Id.*

The Commission's findings of fact are conclusive if supported by competent and substantial evidence absent fraud. Mo. Shelfco, Inc. v. Labor and Indus. Relations Comm'n, 849 S.W.2d 245, 248 (Mo. App. W.D.1993). While we defer to the

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Commission's findings of fact, our review of the application of the law to the facts is *de novo*. Stover Delivery Sys., Inc. v. Div. of Employment Sec., 11 S.W.3d 685, 688 (Mo.App. W.D.1999).

Applicable Law

The issues in this case are governed by Chapter 288 of the Missouri Revised Statutes, which requires employers to make unemployment tax contributions for their employees but not for independent contractors. *Kirksville Publ'g Co. v.*

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Div. of Employment Sec., 950 S.W.2d 891, 895 (Mo.App. W.D.1997). A "right of control" test is used to determine whether an individual is an employee or an independent contractor, as set forth in § 288.034.5:

Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: If the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

Utilizing this "right of control" test, the Division must follow "the common law rules applicable in determining the employee-employer relationship under 26 U.S.C. § 3306(i)." 8 C.S.R. 10-4.150(1). The Division must also consider the case law, Internal Revenue Service (IRS) regulations, and letter rulings interpreting § 3306(i). *Id.*

In Revenue Ruling 87-41, the IRS identified twenty factors to consider in classifying an individual as an employee or independent contractor. *Stover Delivery Sys.*, 11 S.W.3d at 691. Those factors are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate. Rev. Rul. 87-41, 1987-1 C.B. 296.

Missouri courts routinely apply the twenty-factor test in determining the nature of the employment relationship for purposes of tax liability. *Fritts v. Div. of Employment Sec.*, 11 S.W.3d 721, 724 (Mo. App. W.D.1999). No single factor is conclusive but some may be more important than others depending upon the industry and context in which the services are performed. See *Edward Lowe Indus., Inc. v. Mo. Div. of Employment Sec.*, 865 S.W.2d 855, 860-863 (Mo.App. S.D.1993). The focus of the inquiry must be the degree to which the employer has the "right to control the manner and means of performance." *Fritts*, 11 S.W.3d at 725.

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Sufficiency of Evidence to Support Commission's Decision

Neither the Appeals Referee nor Commission made written findings on each factor of the IRS test. The Commission adopted the Appeals Tribunal's conclusion that "the balance of the 20 factors weighed in favor of finding an employer-employee relationship." We review the record and each of the twenty factors to determine whether the evidence supports the Commission's decision. In our listing of those factors as follows, the initial paragraph is the descriptive comment taken from Revenue Ruling 87-41.

1. *Instructions.* A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present

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if the person or persons for whom the services are performed has the *right* to require compliance with instructions.

QMT assigned transcription projects on a daily basis and expected the transcribers to complete the assignments by 8:00 a.m. the next day. Transcribers were required to seek an extension from QMT if assignments could not be timely completed. QMT also provided the transcribers with an instructional handout regarding the format to be used for each client's transcription. The daily assignment and instructions included the names and telephone numbers of management employees to call in QMT's central office if the transcriber had questions. If a client was dissatisfied with a completed assignment, QMT was responsible for communicating with the transcriber about any problems and making certain that future transcription assignments were done in accordance with the client's specific instructions.

Despite QMT's contention on appeal that the handout instructions were general in nature and originated from the client, it is clear that the manner and time in which the transcribers completed their assignments on a daily basis was directly controlled by QMT. Because QMT had the right to require strict compliance with its instructions, this factor indicates an employment relationship.

2. *Training.* Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

New transcribers received initial training from QMT in the operation of the micro-cassette recorder and particular features of the Microsoft Word program that were relevant to medical transcription. Because the transcribers already knew how to type and did not require on-going training, QMT argues that the initial training was insignificant for purposes of this second factor. We note, however, that Woods had not previously worked as a transcriber, and the evidence demonstrates it was necessary for QMT to provide some training in order for inexperienced persons to learn to operate the transcription equipment and software. Some of the transcribers could not perform their jobs without this training; thus, this factor weighs slightly in favor of employee status.

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3. *Integration.* Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

QMT makes no argument on appeal regarding this factor. The company president admitted at the appeals hearing that without the transcribers, QMT has no business. The transcriber's services are highly integrated into QMT's business operations. This factor clearly supports the Division's position that an employment relationship exists.

4. *Services Rendered Personally.* If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

QMT required each transcriber to sign an agreement to maintain the confidentiality of the medical information revealed in

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the transcription process. As a result of this confidentiality agreement, some of the transcribers believed they were personally required to do the work and could not hire anyone else to assist. At the appeals hearing, the three transcribers testified they personally performed all work assigned to them by QMT. However, the evidence is undisputed that QMT never told the transcribers they could not hire assistants. The company president testified that approximately twenty-five percent of the transcribers retained help or substitutes. This factor favors a contractual relationship because there is no evidence the transcribers were ever actually *required* to personally perform the assigned work.

5. *Hiring, Supervising, and Paying Assistants.* If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

As noted above, twenty-five percent of the transcribers paid assistants to perform transcription work. Although none of the three testifying transcribers hired assistants, they did not dispute the testimony of QMT's president that other transcribers engaged in this practice. This factor favors QMT.

6. *Continuing Relationship.* A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

QMT does not dispute the Commission's finding that the transcribers had a continuing relationship with QMT. Woods worked for QMT consistently from July 2000 until her discharge in January 2001. The other two testifying transcribers had each worked for QMT for more than three years. None of the transcribers were retained by QMT for a single assignment or on an irregular basis. This factor favors an employment

relationship.

7. *Set Hours of Work.* The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

The transcribers were required to pickup their daily assignments between 11:00 a.m. and 2:00 p.m. The completed transcriptions were due in QMT's offices the following morning by 8:00 a.m. The Appeals Referee found that QMT indirectly set transcribers' hours by imposing strict deadlines for completion of the work. Viewed in a light most favorable to the Commission's decision, this finding is supported by the evidence. This factor leans toward an employment relationship.

8. *Full Time Required.* If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. And independent contractor on the other hand, is free to work when and for whom he or she chooses.

Only one of the three testifying transcribers worked full-time for QMT. Although Woods testified the company president urged her to work full-time, there is no evidence that any of the transcribers were restricted from other gainful employment

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at the time they worked for QMT.¹ This factor suggests the existence of a contractual relationship.

9. *Doing Work on Employer's Premises.* If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

The transcribers performed all of their work at home. QMT did not require the work to be performed at any specific location. This factor indicates a contractual relationship.

10. *Order or Sequence Set.* If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.

Transcribers testified that QMT would occasionally dictate priority for one transcription project over another when multiple assignments were given. The Commission found that QMT indirectly set the order or sequence of work by making

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daily assignments and requiring completion of the transcriptions by 8:00 a.m. the following work day. This finding is supported by the evidence and weighs in favor of an employment relationship.

11. *Oral or Written Reports.* A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

The transcribers were required to regularly submit two written reports on forms provided by QMT. On a daily basis, the transcribers filled out a "job sheet" for each transcription assignment to indicate which patient records had been transcribed and whether there were any discrepancies. On a weekly basis, the transcribers submitted "work logs," which summarized all completed assignments and the total number of characters transcribed. The mandatory submission of these forms indicates an element of control and favors the Division's position.

12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of giving a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally

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indicates that the worker is an independent contractor.

The transcribers were paid weekly, based on the number of characters transcribed. QMT set the rate of pay and established a regular payday each Friday. This factor tends to indicate an employment relationship based on the regularity of payment.

13. *Payment of Business and/or Traveling Expenses.* If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

The transcribers incurred business-related expenses for computer equipment, Internet access, second telephone lines, and gasoline. None of these expenses were paid or reimbursed by QMT. This factor weighs in favor of a contractual relationship.

14. *Furnishing Tools and Materials.* The fact that the person or persons for whom the services are performed furnished significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

The transcribers furnished their own computer equipment, the most significant and expensive tools required to perform the transcription work. The fact that the transcribers also used this equipment for personal reasons does not detract from its business significance given the nature of the work. On a few occasions, QMT loaned out micro-cassette recorders, headphones, or foot pedals, but more than ninety percent of the transcribers utilized equipment that was not provided by QMT.

This factor suggests the transcribers were independent contractors.

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15. *Significant Investment.* If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as maintenance of an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

The transcribers did not have any significant investment in facilities as they worked out of their homes. However, because they were home-based, the transcribers were not dependent on QMT for a place to perform their services. This factor is neutral as it does not weigh clearly in either party's favor.

16. *Realization of Profit or Loss.* A worker who can realize a profit or loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor.

QMT makes no argument regarding this factor. The record reflects the transcribers cannot realize a profit or incur a loss beyond that ordinarily realized by an employee. The only way they can make more

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money is to transcribe more documents. Since the transcribers have no significant investment in facilities or computer equipment separate and apart from what they can also use personally, the risk of economic loss is not a business risk. This factor favors an employment relationship.

17. *Working for More Than One Firm at a Time.* If a worker performs more than *de minimis* services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

None of the testifying transcribers worked for other medical transcription firms at the same time they performed services for QMT. Two of the transcribers, including Woods, held other unrelated employment. QMT's president testified that some transcribers worked for other physicians or hospitals. However, viewed in a light most favorable to the Commission's decision, the evidence could support a finding that the transcribers were employees of QMT even if they also held other part-time jobs. This factor is neutral, as the totality of the evidence does not clearly favor an employment or contractual relationship.

18. *Making Services Available to General Public.* The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

None of the transcribers who testified held themselves out to the public as performing medical transcription services. They did not advertise or have business cards. QMT's president testified that some transcribers had done work for others and held themselves out to the public as transcribers. However, there was no evidence that this was done on a regular and consistent basis. This factor tends to support an employment relationship.

19. *Right to Discharge.* The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

The transcribers understood they could be discharged by QMT at any time. The record reflects that QMT terminated Woods and other transcribers due to concerns about the quality of their work, even though the transcribers had not breached the Subcontractor Agreement. The exercise of this right to discharge indicates an employment relationship.

20. *Right to Terminate.* If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

QMT does not dispute that the transcribers could terminate their services at any time. Those who quit were paid for partial performance and did not incur liability to QMT. This factor strongly suggests an employment relationship.

A composite analysis of all twenty factors indicates that QMT exercised a significant degree of control over the manner and means by which the transcribers provided services to QMT's clients. Because

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the transcription services are fundamental to its business, QMT seeks to maintain high quality work standards by regularly using the same transcribers, assigning daily work specifying the format in which documents are transcribed, monitoring progress through written reports, and requiring daily deadlines to be met. The evidence is competent and substantially supports the Commission's decision that the transcribers were employed by QMT. While a few factors of the IRS test lean toward a contractual relationship, a substantial majority of the factors indicate QMT exercised the requisite degree of control to indicate an employment relationship. Thus, the Commission's decision is not against the overwhelming weight of the evidence.

We have reviewed the two IRS decisions that QMT argues are instructive in deciding this matter. In *Revenue Ruling*, 1970 WL 21078, Rev. Rul. 70-340, 1970-1 C.B. 202, the IRS concluded that transcribers were not employees of a court reporter who retained them to "handle his own overflow transcription work." On an as needed basis, the transcribers picked up tapes and later returned the completed transcriptions of legal proceedings to the court reporter with a billing statement. Rev. Rul. 70-340. This IRS ruling is distinguished from the instant case because the legal transcribers only "occasionally" performed work for the court reporter and were not

required to strictly comply with daily deadlines. *Id.*

Similarly unavailing is *Technical Advice Memorandum, TAM 9535002, 1995 WL 517790 (Sept. 01, 1995)*, wherein the IRS determined that a hospital engaged medical transcribers on an independent contractor basis. The hospital provided the transcribers with computer software, disks, and initial training on the computer applications. The transcribers worked at home, furnished their own computers, and were not reimbursed for expenses. The facts, however, fundamentally differ from QMT's situation because the medical transcribers were not an integral part of the hospital's primary business. Moreover, the hospital's contractual agreement specified that the transcribers could terminate the relationship only upon thirty days notice. Unlike the instant case, the hospital's transcribers could incur liability for immediate termination of their services, thereby indicating independent contractor status.

QMT established an employment relationship with its medical transcribers by controlling not only the results of the work product but also the time, manner, and means of performance. The record supports the Commission's determinations that QMT is liable for unemployment benefits for Dorothy Woods and unemployment taxes on behalf of all the medical transcribers. We affirm.

All concur.

Notes:

1. In its supplemental decision on Woods' unemployment claim, the Commission concluded the non-compete clause (in the Subcontractor Agreement) indicates QMT intended to have an exclusive relationship with the transcribers. We disagree. The non-compete clause prohibited the transcribers from soliciting any of QMT's clients for five years from the date of *termination* of the agreement. This clause did not prohibit the transcribers from working for other employers while performing services for QMT.

LA (Louisiana)

An employee (servant) is a person who lets, hires or engages his services to another to be employed at any work, commerce or occupation whatever for the benefit of the other for a certain price, or upon certain conditions. La.C.C. art. 163; Vining v. Bardwell, 482 So.2d 685 (La.App. 1st Cir. 1985), writ denied, 487 So.2d 439 (La. 1986).

the single most important factor to consider in deciding whether the employer-employee relationship exists is the right of the employer to control the work of the employee. Roberts v. State. Through the Louisiana Health and Human Resources Administration, 404 So.2d 1221 (La. 1981). The supreme court quoted

Blanchard v. Ogima, 253 La. 34, 215 So.2d 902 (1968), at page 1225 as follows:

It is the right of control of the time and physical activities in the other party and the existence of a close relationship between the parties which determine that one is a servant.

'Servant' must be interpreted as that particular kind of agent who has a very close economic relation to, and is subject to very close control by the principal. A servant is one who offers his personal services for a price. He is an integral part of his employer's business and must submit to the control of his physical conduct as well as of his time."

The factors used to determine the right to control are selection and engagement, payment of wages, power of dismissal, and power of control. Varnado v. Sanders, 477 So.2d 1205 (La.App. 1st Cir. 1985), writ denied, 481 So.2d 630 (La. 1986). We feel Mr. Hopping did not exercise such degree of control over Mr. Braud or Ms. Cash so as to constitute an employer-employee relationship. We therefore agree with the Commission's decision that neither Mr. Braud nor Ms. Cash were regular employees of Mr. Hopping and conclude that its findings of fact were not manifestly erroneous. Accordingly, the Commission's legal conclusion that Mr. Hopping did not have a regular employee under LSA-R.S. 37:1964(C) is legally correct.

Ohio

State ex rel. Ugicom Enters., Inc. v. Buehrer, 2014 Ohio 4942 (Ohio App., 2014)

the correct test was the common law right to control test. ER contended that cable installers were independent contractors under the common law test, as they "control[led] the manner and means of performing the cable tv installation," decided "how many installations, if any, they [would] perform on any particular day," and decided "when and how many hours per day they [would] work." the cable installers used their own trucks to go to the job sites, and used their own tools and equipment at the job site. Ugicom noted that in rare instances for large jobs, the cable installers could rent large excavating equipment from Ugicom, and Ugicom would deduct an equipment fee from the cable installer's pay. Ugicom also noted that, although it required its workers "to only perform outside installation of cable lines for Time Warner Cable," the "Contractors [were] free to work for other companies who install outside lines." (Stip.R. 18.)

Brenlar Investments, Inc. v. Lynch, A121044 (Cal. App. 1/29/2010) (Cal. App., 2010)

"The Labor Code defines '[e]mployee[s]' to include virtually all persons 'in the service of an employer under any . . . contract of hire' ([Lab. Code.] § 3351), but specifically excludes 'independent contractors' ([Lab. Code.] § 3357). An independent contractor is defined as 'any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.' ([Lab. Code.] § 3353.)" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 77 (*Cristler*).) "Due to the numerous variables that can inform the employee/independent contractor distinction," courts have supplemented these statutory definitions "with a host of classification factors." (*Ibid.*) The most important of these factors is " 'the right to control the manner and means of accomplishing the result desired.' " (*Ibid.*, citing *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44.) Strong evidence of an employment relationship is also indicated by " 'the right to discharge at will, without cause.' " (*Ibid.*) Other factors to be taken into consideration include "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (Citation.)" (*Cristler, supra*, 171 Cal.App.4th at p. 77.)

Furthermore, the question of whether a party is an independent contractor or an employee under the Labor Code is one of fact which will be upheld if supported by substantial credible evidence unless only one inference may be drawn from all the facts making the employment

Moreover, that Lynch was an independent contractor is supported by substantial evidence on other factors probative to the employee/independent contractor determination. The Broker-Salesperson Contract between FHAR and Lynch indicates that the parties did not intend to create employer-employee relationship because it states, "The parties agree and intend that Salesperson is an independent contractor and not an employee of Broker." Regarding local industry practice, FHAR's general manager and managing broker Becky Gould testified that to her knowledge no real estate company hired licensed real estate agents as employees rather than independent contractors. Also, regarding whether the method of payment was by the time or by the job, Lynch herself acknowledged that she was not salaried, was paid on a commission basis and paid all state and federal taxes herself without any withholding by FHAR. Lynch stated she never heard another sales agent identify him or herself as an employee but Lynch regarded herself as an employee. In sum, the trial court's determination that Lynch was an independent contractor is supported by substantial evidence.

Brenlar Investments, Inc. v. Lynch, A121044 (Cal. App. 1/29/2010) (Cal. App., 2010)

FL

Florida

1st case Irving v. Doctors Hosp. of Lake Worth, Inc., 415 So.2d 55 (Fla.App. 4 Dist., 1982)

As a general rule, an employer is vicariously liable for the torts of his employee committed while that employee is acting within the scope of his employment, but is not similarly liable for the tortious actions of independent contractors. One exception to the independent contractor rule is found in the doctrine of "estoppel". The application of that doctrine to the area of vicarious liability is found in 1 Restatement Agency 2d, § 267, p. 578:

"One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of skill or the one appearing to be a servant or other agent as if he were such." Where one holds himself out as the employer of a certain person, and there is reliance, that apparent employer is estopped from arguing that such person is an independent contractor. (Emphasis supplied).

This principle has been applied in the context of a hospital setting as to the status of the doctor and the vicarious liability of the hospital. Thus, in Mehlman v. Powell, 281 Md. 269, 378 A.2d 1121, 1123-24 (1977), the court stated:

In B. P. Oil Corp. v. Mabe, 279 Md. 632, 643, 370 A.2d 554, 560 (1977), this Court endorsed § 267 of Restatement (Second) of Agency, which provides in part:

"One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such." (Emphasis supplied).

In the instant case, all appearances suggest and all ordinary expectations would be that the Hospital emergency room, physically a part of the Hospital, was in fact an integral part of the institution. It is not to be expected, and nothing put Mr. Powell on notice, that the various procedures and departments of a complex, modern hospital like Holy Cross are in fact franchised out to various independent contractors. The situation seems to us substantially similar to that in Stanhope v. Los Angeles College of Chiropractic, 54 Cal.App.2d 141, 128 P.2d 705 (1942), where the court, holding that an apparent agency existed between a hospital and an independent radiologist, stated (128 P.2d at 708):

would add lang. + agreement

"... [The] appellant did nothing to put respondent on notice that the X-ray laboratory was not an integral part of appellant institution, and it cannot seriously be contended that respondent, when he was being carried from room to room, should have inquired whether the individual doctors who examined him were employees ... or were independent contractors."

We thus hold that Holy Cross Hospital represented to the decedent that the staff of the Holy Cross Hospital emergency room were its employees, thereby causing the decedent to rely on the skill of the emergency room staff, and that the Hospital is consequently liable to the decedent as if the emergency room staff were its employees. (Emphasis in original.)

Another excellent explication of the apparent authority rule within the hospital setting occurs in Arthur v. St. Peters Hospital, 169 N.J.Super. 575, 405 A.2d 443 (1979), where a plaintiff was examined in the emergency room of the defendant hospital and subsequently x-rayed in the radiology department. In subsequent litigation involving the alleged negligence of the emergency room and radiology doctors, the hospital relied on the absence of deductions from the doctors' compensation to demonstrate that the doctors involved were independent contractors. With regard to the doctors' apparent authority and its effect upon their status as independent contractors, the court said:
Since it has been assumed for purposes of this argument that the physicians here were independent contractors, the general rules outlined above make it clear that the hospital would normally not be responsible for their wrongdoing. How, then, does the doctrine of apparent authority affect that

New Jersey

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conclusion, if at all? Apparent authority, or what is sometimes referred to as the "holding out" theory, has its origins as part of the law of agency. It imposes liability, not as the result of the reality of a contractual relationship but rather because of the actions

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of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists. The concept is essentially one of estoppel and has been explained in this manner:

Pope v. Winter Park Healthcare Group, Ltd., 935 So.2d 185 (Fla. App., 2006)

(second case)

Florida The evidence in this record is sufficient to go to the jury on an exception for nondelegable duties, specifically the principle that one who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance by showing that he hired someone else to perform the task and that other person was the one at fault. Mills v. Krauss, 114 So.2d 817 (Fla. 2d DCA 1959), cert. denied, 119 So.2d 293 (Fla. 1960). In other words, where the contracting party makes it her or his duty to perform a task, that party cannot escape liability for the damage caused to the other contracting party by the negligence of independent contractors hired to carry out the task.

NC

Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (N.C., 1991)

Generally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work. Mack v. Marshall Field & Co., 218 N.C. 697, 12 S.E.2d 235 (1940)

One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others:

"The liability of the employer rests upon the ground that mischievous [sic] consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an 'independent contractor' to perform." Thomas v. Lumber Co., 153 N.C., 351, 69 S.E., 275.

(3)

440.02 Definitions.—When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

- (1) "Accident" means only an unexpected or unusual event or result that happens suddenly. Disability or death due to the accidental acceleration or aggravation of a venereal disease or of a disease due to the habitual use of alcohol or controlled substances or narcotic drugs, or a disease that manifests itself in the fear of or dislike for an individual because of the individual's race, color, religion, sex, national origin, age, or handicap is not an injury by accident arising out of the employment. Subject to s. 440.15(5), if a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only acceleration of death or acceleration or aggravation of the preexisting condition reasonably attributable to the accident is compensable, with respect to any compensation otherwise payable under this chapter. An injury or disease caused by exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of the employment unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee.
- (2) "Adoption" or "adopted" means legal adoption prior to the time of the injury.
- (3) "Agency" means the Agency for Health Care Administration.
- (4) "Carrier" means any person or fund authorized under s. 440.38 to insure under this chapter and includes a self-insurer, and a commercial self-insurance fund authorized under s. 624.462.
- (5) "Casual" as used in this section refers only to employments for work that is anticipated to be completed in 10 working days or less, without regard to the number of persons employed, and at a total labor cost of less than \$500.
- (6) "Child" includes a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged child born out of wedlock dependent upon the deceased, but does not include married children unless wholly dependent on the employee. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers or married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employees are under 18 years of age, or under 22 years of age if a full-time student in an accredited educational institution.
- (7) "Compensation" means the money allowance payable to an employee or to his or her dependents as provided for in this chapter.
- (8) "Construction industry" means for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land. However, "construction" does not mean a homeowner's act of construction or the result of a construction upon his or her own premises, provided such premises are not intended to be sold, resold, or leased by the owner within 1 year after the commencement of construction. The division may, by rule, establish codes

and definitions thereof that meet the criteria of the term "construction industry" as set forth in this section.

(9) "Corporate officer" or "officer of a corporation" means any person who fills an office provided for in the corporate charter or articles of incorporation filed with the Division of Corporations of the Department of State or as authorized or required under part I of chapter 607. The term "officer of a corporation" includes a member owning at least 10 percent of a limited liability company created and approved under chapter 608.

(10) "Date of maximum medical improvement" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Department" means the Department of Financial Services; the term does not include the Financial Services Commission or any office of the commission.

(13) "Disability" means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.

(14) "Division" means the Division of Workers' Compensation of the Department of Financial Services.

* (15)(a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

* (b) "Employee" includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.

1. Any officer of a corporation may elect to be exempt from this chapter by filing notice of the election with the department as provided in s. 440.05.

2. As to officers of a corporation who are engaged in the construction industry, no more than three officers of a corporation or of any group of affiliated corporations may elect to be exempt from this chapter by filing a notice of the election with the department as provided in s. 440.05. Officers must be shareholders, each owning at least 10 percent of the stock of such corporation and listed as an officer of such corporation with the Division of Corporations of the Department of State, in order to elect exemptions under this chapter. For purposes of this subparagraph, the term "affiliated" means and includes one or more corporations or entities, any one of which is a corporation engaged in the construction industry, under the same or substantially the same control of a group of business entities which are connected or associated so that one entity controls or has the power to control each of the other business entities.

(41)

The term "affiliated" includes, but is not limited to, the officers, directors, executives, shareholders active in management, employees, and agents of the affiliated corporation. The ownership by one business entity of a controlling interest in another business entity or a pooling of equipment or income among business entities shall be prima facie evidence that one business is affiliated with the other.

3. An officer of a corporation who elects to be exempt from this chapter by filing a notice of the election with the department as provided in s. 440.05 is not an employee.

Services are presumed to have been rendered to the corporation if the officer is compensated by other than dividends upon shares of stock of the corporation which the officer owns.

(c) "Employee" includes:

1. A sole proprietor or a partner who is not engaged in the construction industry, devotes full time to the proprietorship or partnership, and elects to be included in the definition of employee by filing notice thereof as provided in s. 440.05.
2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.
3. An independent contractor working or performing services in the construction industry.
4. A sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

X (d) "Employee" does not include: 1. An independent contractor who is not engaged in the construction industry. a. In order to meet the definition of independent contractor, at least four of the following criteria must be met:

- (I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
- (II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
- (III) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
- (IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
- (V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or

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(VI) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

b. If four of the criteria listed in sub-subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.

(II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.

(III) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform.

(IV) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.

(V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.

(VI) The independent contractor has continuing or recurring business liabilities or obligations.

(VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

c. Notwithstanding anything to the contrary in this subparagraph, an individual claiming to be an independent contractor has the burden of proving that he or she is an independent contractor for purposes of this chapter.

2. A real estate licensee, if that person agrees, in writing, to perform for remuneration solely by way of commission.

3. Bands, orchestras, and musical and theatrical performers, including disk jockeys, performing in licensed premises as defined in chapter 562, if a written contract evidencing an independent contractor relationship is entered into before the commencement of such entertainment.

4. An owner-operator of a motor vehicle who transports property under a written contract with a motor carrier which evidences a relationship by which the owner-operator assumes the responsibility of an employer for the performance of the contract, if the owner-operator is required to furnish motor vehicle equipment as identified in the written contract and the principal costs incidental to the performance of the contract, including, but not limited to, fuel and repairs, provided a motor carrier's advance of costs to the owner-operator when a written contract evidences the

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owner-operator's obligation to reimburse such advance shall be treated as the owner-operator furnishing such cost and the owner-operator is not paid by the hour or on some other time-measured basis.

5. A person whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer.
6. A volunteer, except a volunteer worker for the state or a county, municipality, or other governmental entity. A person who does not receive monetary remuneration for services is presumed to be a volunteer unless there is substantial evidence that a valuable consideration was intended by both employer and employee. For purposes of this chapter, the term "volunteer" includes, but is not limited to:
 - a. Persons who serve in private nonprofit agencies and who receive no compensation other than expenses in an amount less than or equivalent to the standard mileage and per diem expenses provided to salaried employees in the same agency or, if such agency does not have salaried employees who receive mileage and per diem, then such volunteers who receive no compensation other than expenses in an amount less than or equivalent to the customary mileage and per diem paid to salaried workers in the community as determined by the department; and
 - b. Volunteers participating in federal programs established under Pub. L. No. 93-113.
7. Unless otherwise prohibited by this chapter, any officer of a corporation who elects to be exempt from this chapter. Such officer is not an employee for any reason under this chapter until the notice of revocation of election filed pursuant to s. 440.05 is effective.
8. An officer of a corporation that is engaged in the construction industry who elects to be exempt from the provisions of this chapter, as otherwise permitted by this chapter. Such officer is not an employee for any reason until the notice of revocation of election filed pursuant to s. 440.05 is effective.
9. An exercise rider who does not work for a single horse farm or breeder, and who is compensated for riding on a case-by-case basis, provided a written contract is entered into prior to the commencement of such activity which evidences that an employee/employer relationship does not exist.
10. A taxicab, limousine, or other passenger vehicle-for-hire driver who operates said vehicles pursuant to a written agreement with a company which provides any dispatch, marketing, insurance, communications, or other services under which the driver and any fees or charges paid by the driver to the company for such services are not conditioned upon, or expressed as a proportion of, fare revenues.
11. A person who performs services as a sports official for an entity sponsoring an interscholastic sports event or for a public entity or private, nonprofit organization that sponsors an amateur sports event. For purposes of this subparagraph, such a person is an independent contractor. For purposes of this subparagraph, the term "sports official" means any person who is a neutral participant in a sports event, including, but not limited to, umpires, referees, judges, linespersons, scorekeepers, or timekeepers. This subparagraph does not apply to any person employed by a district school board

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who serves as a sports official as required by the employing school board or who serves as a sports official as part of his or her responsibilities during normal school hours.

12. Medicaid-enrolled clients under chapter 393 who are excluded from the definition of employment under s. 443.1216(4)(d) and served by Adult Day Training Services under the Home and Community-Based or the Family and Supported Living Medicaid Waiver program in a sheltered workshop setting licensed by the United States Department of Labor for the purpose of training and earning less than the federal hourly minimum wage.

13. Medicaid-enrolled clients under chapter 393 who are excluded from the definition of employment under s. 443.1216(4)(d) and served by Adult Day Training Services under the Family and Supported Living Medicaid Waiver program in a sheltered workshop setting licensed by the United States Department of Labor for the purpose of training and earning less than the federal hourly minimum wage.

(16)(a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

(b) A homeowner shall not be considered the employer of persons hired by the homeowner to carry out construction on the homeowner's own premises if those premises are not intended for immediate lease, sale, or resale.

(c) Facilities serving individuals under subparagraph (15)(d)12. shall be considered agents of the Agency for Health Care Administration as it relates to providing Adult Day Training Services under the Home and Community-Based Medicaid Waiver program and not employers or third parties for the purpose of limiting or denying Medicaid benefits.

(17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) "Employment" includes:

1. Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein, including officers elected at the polls.

2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

3. Volunteer firefighters responding to or assisting with fire or medical emergencies whether or not the firefighters are on duty.

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(c) "Employment" does not include service performed by or as:

1. Domestic servants in private homes.
2. Agricultural labor performed on a farm in the employ of a bona fide farmer, or association of farmers, that employs 5 or fewer regular employees and that employs fewer than 12 other employees at one time for seasonal agricultural labor that is completed in less than 30 days, provided such seasonal employment does not exceed 45 days in the same calendar year. The term "farm" includes stock, dairy, poultry, fruit, fur-bearing animals, fish, and truck farms, ranches, nurseries, and orchards. The term "agricultural labor" includes field foremen, timekeepers, checkers, and other farm labor supervisory personnel.
3. Professional athletes, such as professional boxers, wrestlers, baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players, and motorsports teams competing in a motor racing event as defined in s. 549.08.
4. Labor under a sentence of a court to perform community services as provided in s. 316.193.
5. State prisoners or county inmates, except those performing services for private employers or those enumerated in s. 948.036(1).

(18) "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer.

(19) "Injury" means personal injury or death by accident arising out of and in the course of employment, and such diseases or infection as naturally or unavoidably result from such injury. Damage to dentures, eyeglasses, prosthetic devices, and artificial limbs may be included in this definition only when the damage is shown to be part of, or in conjunction with, an accident. This damage must specifically occur as the result of an accident in the normal course of employment.

(20) "Parent" includes stepparents and parents by adoption, parents-in-law, and any persons who for more than 3 years prior to the death of the deceased employee stood in the place of a parent to him or her and were dependent on the injured employee.

(21) "Partner" means any person who is a member of a partnership that is formed by two or more persons to carry on as coowners of a business with the understanding that there will be a proportional sharing of the profits and losses between them. For the purposes of this chapter, a partner is a person who participates fully in the management of the partnership and who is personally liable for its debts.

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(22) "Permanent impairment" means any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury.

(23) "Person" means individual, partnership, association, or corporation, including any public service corporation.

(24) "Self-insurer" means:

(a) Any employer who has secured payment of compensation pursuant to s. 440.38(1)(b) or (6) as an individual self-insurer;

(b) Any employer who has secured payment of compensation through a group self-insurance fund under s. 624.4621;

(c) Any group self-insurance fund established under s. 624.4621;

(d) A public utility as defined in s. 364.02 or s. 366.02 that has assumed by contract the liabilities of contractors or subcontractors pursuant to s. 624.46225; or

(e) Any local government self-insurance fund established under s. 624.4622.

(25) "Sole proprietor" means a natural person who owns a form of business in which that person owns all the assets of the business and is solely liable for all the debts of the business.

(26) "Spouse" includes only a spouse substantially dependent for financial support upon the decedent and living with the decedent at the time of the decedent's injury and death, or substantially dependent upon the decedent for financial support and living apart at that time for justifiable cause.

(27) "Time of injury" means the time of the occurrence of the accident resulting in the injury.

(28) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned and reported for federal income tax purposes on the job where the employee is injured and any other concurrent employment where he or she is also subject to workers' compensation coverage and benefits, together with the reasonable value of housing furnished to the employee by the employer which is the permanent year-round residence of the employee, and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer and employer contributions for health insurance for the employee or the employee's dependents. However, housing furnished to migrant workers shall be included in wages unless provided after the time of injury. In employment in which an employee receives consideration for housing, the reasonable value of such housing compensation shall be the actual cost to the employer or based upon the Fair Market Rent Survey promulgated pursuant to s. 8 of the Housing and Urban Development Act of 1974, whichever is less. However, if employer contributions for housing or health insurance are continued after the time of the injury, the contributions are not "wages" for the purpose of calculating an employee's average (47)

weekly wage.

(29) "Weekly compensation rate" means and refers to the amount of compensation payable for a period of 7 consecutive calendar days, including any Saturdays, Sundays, holidays, and other nonworking days which fall within such period of 7 consecutive calendar days. When Saturdays, Sundays, holidays, or other nonworking days immediately follow the first 7 calendar days of disability or occur at the end of a period of disability as the last day or days of such period, such nonworking days constitute a part of the period of disability with respect to which compensation is payable.

(30) "Construction design professional" means an architect, professional engineer, landscape architect, or surveyor and mapper, or any corporation, professional or general, that has a certificate to practice in the construction design field from the Department of Business and Professional Regulation.

(31) "Individual self-insurer" means any employer who has secured payment of compensation pursuant to s. 440.38(1)(b) as an individual self-insurer.

(32) "Domestic individual self-insurer" means an individual self-insurer:

- (a) Which is a corporation formed under the laws of this state;
- (b) Who is an individual who is a resident of this state or whose primary place of business is located in this state; or
- (c) Which is a partnership whose principals are residents of this state or whose primary place of business is located in this state.

(33) "Foreign individual self-insurer" means an individual self-insurer:

- (a) Which is a corporation formed under the laws of any state, district, territory, or commonwealth of the United States other than this state;
- (b) Who is an individual who is not a resident of this state and whose primary place of business is not located in this state; or
- (c) Which is a partnership whose principals are not residents of this state and whose primary place of business is not located in this state.

(34) "Insolvent member" means an individual self-insurer which is a member of the Florida Self-Insurers Guaranty Association, Incorporated, or which was a member and has withdrawn pursuant to s. 440.385(1)(b), and which has been found insolvent, as defined in subparagraph (35)(a)1., subparagraph (35)(a)2., or subparagraph (35)(a)3., by a court of competent jurisdiction in this or any other state, or meets the definition of subparagraph (35)(a)4.

(35) "Insolvency" or "insolvent" means:(a) With respect to an individual self-insurer:

- 1. That all assets of the individual self-insurer, if made immediately available, would not be sufficient to meet all the individual self-insurer's liabilities;

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2. That the individual self-insurer is unable to pay its debts as they become due in the usual course of business;
3. That the individual self-insurer has substantially ceased or suspended the payment of compensation to its employees as required in this chapter; or
4. That the individual self-insurer has sought protection under the United States Bankruptcy Code or has been brought under the jurisdiction of a court of bankruptcy as a debtor pursuant to the United States Bankruptcy Code.

(b) With respect to an employee claiming insolvency pursuant to s. 440.25(5), a person is insolvent who:

1. Has ceased to pay his or her debts in the ordinary course of business and cannot pay his or her debts as they become due; or
2. Has been adjudicated insolvent pursuant to the federal bankruptcy law.

(36) "Arising out of" pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death.

(37) "Soft-tissue injury" means an injury that produces damage to the soft tissues, rather than to the skeletal tissues or soft organs.

(38) "Insurer" means a group self-insurers' fund authorized by s. 624.4621, an individual self-insurer authorized by s. 440.38, a commercial self-insurance fund authorized by s. 624.462, an assessable mutual insurer authorized by s. 628.6011, and an insurer licensed to write workers' compensation and employer's liability insurance in this state. The term "carrier," as used in this chapter, means an insurer as defined in this subsection.

(39) "Statement," for the purposes of ss. 440.105 and 440.106, shall include the exact fraud statement language in s. 440.105(7). This requirement includes, but is not limited to, any notice, representation, statement, proof of injury, bill for services, diagnosis, prescription, hospital or doctor record, X ray, test result, or other evidence of loss, injury, or expense.

(40) "Specificity" means information on the petition for benefits sufficient to put the employer or carrier on notice of the exact statutory classification and outstanding time period of benefits being requested and includes a detailed explanation of any benefits received that should be increased, decreased, changed, or otherwise modified. If the petition is for medical benefits, the information shall include specific details as to why such benefits are being requested, why such benefits are medically necessary, and why current treatment, if any, is not sufficient. Any petition requesting alternate or other medical care, including, but not limited to, petitions requesting psychiatric or psychological treatment, must specifically identify the physician, as defined in s. 440.13(1), who is recommending such treatment. A copy of a report from such physician making the recommendation for alternate or other medical care shall also be attached to the petition. A judge of compensation claims shall not order such treatment if a physician is not recommending such treatment.

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(41) "Office of Insurance Regulation" means the Office of Insurance Regulation of the Financial Services Commission.

History.—s. 2, ch. 17481, 1935; s. 1, ch. 17482, 1935; s. 1, ch. 17483, 1935; CGL 1936 Supp. 5966(2); s. 1, ch. 18413, 1937; s. 1, ch. 20672, 1941; s. 1, ch. 28238, 1953; s. 1, ch. 29778, 1955; s. 1, ch. 57-155; s. 1, ch. 57-225; s. 1, ch. 59-100; s. 1, ch. 65-184; s. 1, ch. 67-554; ss. 17, 35, ch. 69-106; s. 1, ch. 71-80; s. 162, ch. 71-377; s. 1, ch. 72-243; s. 1, ch. 73-127; s. 1, ch. 73-283; s. 116, ch. 73-333; s. 1, ch. 74-46; s. 1, ch. 74-124; s. 1, ch. 74-197; s. 1, ch. 75-209; s. 1, ch. 77-174; s. 1, ch. 77-290; ss. 1, 23, ch. 78-300; s. 15, ch. 79-7; ss. 2, 124, ch. 79-40; s. 21, ch. 79-312; s. 1, ch. 80-236; s. 3, ch. 81-119; ss. 1, 20, ch. 83-305; s. 1, ch. 84-267; s. 6, ch. 86-171; s. 1, ch. 87-330; s. 1, ch. 88-203; s. 2, ch. 89-61; ss. 3, 43, ch. 89-289; ss. 9, 56, ch. 90-201; ss. 7, 52, ch. 91-1; s. 1, ch. 91-2; s. 2, ch. 93-415; s. 117, ch. 94-119; s. 59, ch. 94-218; s. 97, ch. 97-103; s. 1, ch. 98-174; s. 89, ch. 2000-153; s. 7, ch. 2001-91; s. 11, ch. 2002-194; s. 5, ch. 2002-236; s. 54, ch. 2003-164; s. 467, ch. 2003-261; ss. 1, 2, ch. 2003-412; s. 2, ch. 2003-422; s. 59, ch. 2004-5; s. 32, ch. 2004-373; s. 21, ch. 2005-60; s. 12, ch. 2005-71; s. 1, ch. 2005-78; s. 4, ch. 2006-15; ss. 1, 2, ch. 2012-213; s. 1, ch. 2013-141; s. 46, ch. 2014-209.

Annotations

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1. Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 31 Ill.2d 69 (Ill., 1964) March 18, 1964 321

The Florida act does not include the insurer in its definition of an employer, but reads as follows: '(4) The term 'employer' means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person.' (F.S.A. § 440.02(4).) Had there been a legislative intent to equate the employer and its insurance carrier for all purposes...

2. Mandico v. Taos Const., Inc., 605 So.2d 850 (Fla., 1992) July 9, 1992 141

Pursuant to section 440.02(11)(d)1, Florida Statutes (1983), 3 an independent contractor is ordinarily excluded from the provisions of the Workers' Compensation Law. Strickland v. Al Landers Dump Trucks, Inc., 170 So.2d 445, 446 (Fla.1964). Therefore, the employer of an independent contractor is not required to secure to such an excluded individual the payment of workers' compensation and thus is not entitled to section 440.11 immunity from civil suit for work-related injuries suffered by the...

3. Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 14 Fla. L. Weekly 549 (Fla., 1989) October 26, 1989 99

Thus, the definition of the word "injury" is crucial to the determination of this case. 2 That definition is provided in the statute itself. Section 440.02(14), Florida Statutes (1987), states that "injury" means "personal injury ... by accident arising out of and in the course of employment, and such diseases or infection as naturally or unavoidably result from such injury" (emphasis added). Moreover, section 440.02(1), Florida Statutes (1987), defines "accident" as "only an unexpected or..."

4. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla., 1961) May 3, 1961 99

'(19) 'Accident' shall mean only an unexpected or unusual event or result, happening suddenly. A mental or nervous injury due to fright or excitement only or disability or death due to the accidental acceleration or aggravation of a venereal disease or of a disease due to the habitual use of alcohol or narcotic drugs, shall be deemed not to be an injury by accident arising out of the employment. Where a pre-existing disease is accelerated or aggravated by accident arising out of and in the...

5. Falcon v. Heckler, 732 F.2d 827 (C.A.11 (Fla.), 1984) May 17, 1984 94

The definitions of disability under Florida's worker's compensation law and federal social security law differ. Compare Fla.Stat.Ann.Sec. 440.02(9) (West Supp.1984) with 20 C.F.R. 404.1505(a)(1983). However, the Florida Supreme Court has interpreted the Florida statute in

such a way that the Florida statute operates similarly to the definition under the federal regulations. See *Port Everglades Terminal Co. v. Canty*, 120 So.2d 596 (Fla.1960) (establishing variety of factors to consider in...

6. *Jones v. Florida Power Corp.*, 72 So.2d 285 (Fla., 1954) April 6, 1954 94
Page...

7. *Turner v. PCR, INC.*, 754 So.2d 683 (Fla., 2000) March 2, 2000 90

We also note, as did Justice Adkins' dissent in *Fisher*,⁶ that section 440.09(1), Florida Statutes (1991) provides compensation for injury by accident: "Compensation shall be payable under this chapter in respect of disability or death of an employee if the disability or death results from an injury arising out of and in the course of employment." Injury is defined in section **440.02**(17), Florida Statutes (1991) as "personal injury or death by accident arising out of and in the course of..."

8. *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 November 22, 1996 85
(Fla., 1996)

[ADDED: (1) Indigency Defined. Indigency for the purpose of this rule is synonymous with insolvency as defined by section **440.02**, Florida...

9. *Smith v. Piezo Technology and Professional Adm'rs*, 427 So.2d 182 (Fla., February 3, 1983) 78

The next question relates to the proper forum in which to seek a remedy. We agree with the district court below that the deputy commissioner is without jurisdiction to hear this action. The deputy commissioner is vested only with certain limited quasi-judicial powers relating to the adjudication of claims for compensation and benefits. § 440.25(1), Fla.Stat. (1979); *Fireman's Fund Insurance Co. v. Rich*, 220 So.2d 369 (Fla.1969); *Total Appliance Repairs v. Nelson*, 382 So.2d 1333 (Fla...

10. *Ball v. Mann*, 75 So.2d 758 (Fla., 1954) September 24, 1954 77

The last quoted sub-paragraph must be read in pari materia with Section **440.02**(9), F.S.1951, F.S.A., which defines the word 'disability' as used in the Workmen's Compensation Law to mean 'incapacity because of the injury to earn in the same or any other employment the wages which...

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