

## **Independent Contractors & Workers' Compensation Law In Nebraska – A Festering Problem**

### **ISSUE**

Independent Contractors who have no employees and who do not purchase or provide proof of an in-force Workers Compensation policy are routinely being treated by the hiring contractor's insurance company as if they were a direct employee of the hiring contractor when the hiring contractor's payroll is audited after the end of the policy term. The entire amount paid to the uninsured independent contractor (usually based on 1099's) is added to the audited payroll of the hiring contractor, resulting in unanticipated and often substantial additional Workers Compensation premiums.

### **CAUSE**

- 1) The regulator for Workers' Compensation law in Nebraska – the Workers' Compensation Court – has determined that “employers are not required to provide coverage for **independent contractors.**” However, the Workers Compensation Act does not define “independent contractor”.
- 2) In cases where an uninsured independent contractor is injured while completing work for another party, but makes a claim against the Workers' Compensation insurance policy of the other party anyway, **if the Court determines that the injured independent contractor was actually working as an “employee” rather than an “independent contractor”**, then the other “hiring” party's insurance policy must provide WC benefits to the injured “independent contractor”.
- 3) The Workers' Compensation Court has its own tests to determine if an injured individual is an employee or an Independent Contractor, **irrespective of any agreement or understandings between the parties.**
- 4) This results in a situation where **all insurance companies who provide Workers' Compensation insurance in Nebraska are potentially exposed to losses from claims of uninsured “independent contractors” against “hiring” parties' insurance coverage, without having collected any premium for this exposure, which can be substantial.**
- 5) Workers' Compensation **policy language approved in Nebraska allows insurance companies to make an additional premium charge if it is discovered during an annual premium audit that the insured (“hiring” party) has had work done by any uninsured “independent contractors”** – and these additional premium charges can amount to hundreds of thousands of dollars, which the “hiring” party is then obligated to pay.
- 6) This is an issue for “hiring” parties nationwide, not just in Nebraska.

The Nebraska Insurance Department has stated that:

The Department of Insurance cannot develop a form that would prohibit the [WC] court from allowing benefits to a sub-contractor if they [the Court] found that the particular circumstances did not fit the requirements for a true independent contractor status. Thus, ultimately the insurer would be on the

hook for the claim even if it had not collected the appropriate premium for the payroll and classification [of the sub-contractor].

## **POSSIBLE SOLUTIONS**

### **Market-Driven**

“Hiring” parties can already require independent contractors to purchase Workers’ Compensation insurance as part of their contractual agreement, and independent contractors can bring themselves under the Workers’ Compensation law by requesting or purchasing insurance. Minimum premiums for independent contractors can be substantial, relative to the total amount of the contract.\*\*

### **Nebraska Statute Change**

A number of other states\* have statutes requiring independent contractors (and others not required in the law to purchase Workers’ Compensation insurance) – to either purchase insurance or file an “exemption certificate” to be conclusively presumed (that is, legally determining) to be an independent contractor in cases of injury and other liability issues. This has effectively solved the legal issue for regulators and the “unintended” exposure problem for insurance companies in these states.

\*Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Michigan, Minnesota, Missouri, Montana, Tennessee

### **Examples:**

- Kansas requires all sole proprietors contractors to obtain their own coverage.
- Montana statutes allow eligible individuals to be registered with their Department of Labor & Industry as an Independent Contractor. They are issued an Independent Contractor Exemption Certificate which is good for up to 2 years. It specifically waives the right of the Independent Contractor to any benefits under the Montana Workers Compensation Act or the Occupational Disease Act of Montana. The cost is \$125 and requires applications, verification etc.
- In Tennessee a “Construction Service Provider” can apply for an exception, if they meet the criteria issued by the Board of Licensing Contractors. The filing fee is \$50-100. This exception applies to the construction industry only and lasts for 2 years. A Contractor cannot have more than three Construction Service Providers performing direct labor in a project.

### **We think it is time for the Nebraska legislature to consider this kind of solution.**

Nebraska law already requires all contractors with one or more employees to provide a Workers Compensation certificate of insurance to the Department of Labor. The reporting mechanism is already in place.

**A change in Nebraska law would be required to** – for example - create a new class of Independent Contractor which is precluded from any benefits under the Nebraska Workers Compensation Act. The revenue could go to the Department of Labor defray regulatory costs. Once certified the individual Independent Contractor would not be required to purchase Workers Compensation coverage for himself

or herself, and any contractor using a “Certified Independent Contractor” would not be held responsible for injuries by the Workers’ Compensation Court.

\*\* NCCI rules approved in Nebraska, require that a default payroll (currently \$36,900) be used for each sole proprietor, co-partner or LLC member regardless of their actual income. A corporate officer is charged for their actual payroll subject to a minimum weekly wage of \$750 (or \$39,000 annually) which will cap at \$2,900 per week (or \$150,800 annually). Assuming a Work Comp policy is placed with the Assigned Risk Pool, which is the most expensive option, their base policy premium before adjustments would be similar to the following examples for other than the corporate officers only;

- a. 5403 Carpentry NOC = \$7,188
- b. 5445 Drywall = \$5,720
- c. 5474 Painting = \$4,883
- d. 5551 Roofing = \$12,198

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