

AN AGENTS EDUCATION SUPPLEMENT

THE CONTRACTOR/SUBCONTRACTOR ISSUE

Here is the portion of the Florida Workers Compensation Law which has to do with the relationship of contractors to their subcontractors

440.10 Liability for compensation.--

(1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.

(b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

(d)1. If a contractor becomes liable for the payment of compensation to the employees of a subcontractor who has failed to secure such payment in violation of s. 440.38, the contractor or other third-party payor shall be entitled to recover from the subcontractor all benefits paid or payable plus interest unless the contractor and subcontractor have agreed in writing that the contractor will provide coverage.

2. If a contractor or third-party payor becomes liable for the payment of compensation to the corporate

officer of a subcontractor who is engaged in the construction industry and has elected to be exempt from the provisions of this chapter, but whose election is invalid, the contractor or third-party payor may recover from the claimant or corporation all benefits paid or payable plus interest, unless the contractor and the subcontractor have agreed in writing that the contractor will provide coverage.

(e) A subcontractor providing services in conjunction with a contractor on the same project or contract work is not liable for the payment of compensation to the employees of another subcontractor or the contractor on such contract work and is protected by the exclusiveness-of-liability provisions of s. 440.11 from any action at law or in admiralty on account of injury to an employee of another subcontractor, or of the contractor, provided that:

1. The subcontractor has secured workers' compensation insurance for its employees or the contractor has secured such insurance on behalf of the subcontractor and its employees in accordance with paragraph (b); and

2. The subcontractor's own gross negligence was not the major contributing cause of the injury.

(f) If an employer fails to secure compensation as required by this chapter, the department shall assess against the employer a penalty not to exceed \$5,000 for each employee of that employer who is classified by the employer as an independent contractor but who is found by the department to not meet the criteria for an independent contractor that are set forth in s. 440.02. The department shall adopt rules to administer the provisions of this paragraph.

(g) Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of



440.10 Liability for compensation.—(continued)

this chapter and the Florida Insurance Code. Failure to comply with this paragraph is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The department shall adopt rules for construction industry and nonconstruction-industry employers with regard to the activities that define what constitutes being "engaged in work" in this state, using the following standards:

1. For employees of nonconstruction-industry employers who have their headquarters outside of Florida and also operate in Florida and who are routinely crossing state lines, but usually return to their homes each night, the employee shall be assigned to the headquarters' state. However, the construction industry employees performing new construction or alterations in Florida shall be assigned to Florida even if the employees return to their home state each night.

2. The payroll of executive supervisors who may visit a Florida location but who are not in direct charge of a Florida location shall be assigned to the state in which the headquarters is located.

3. For construction contractors who maintain a permanent staff of employees and superintendents, if any of these employees or superintendents are assigned to a job that is located in Florida, either for the duration of the job or any portion thereof, their payroll shall be assigned to Florida rather than the headquarters' state.

4. Employees who are hired for a specific project in Florida shall be assigned to Florida.

(2) Compensation shall be payable irrespective of fault as a cause for the injury, except as provided in s. 440.09(3).

[EDITOR'S NOTE: 440.13 = medical services; 440.15 = disability compensation; 440.16 = death benefits; 440.38 = security for compensation insurance, self insurance; 775.082 = imprisonment penalties; 775.083 = fines; 775.084 = habitual offender penalties; 440.11 = exclusiveness of liability; 440.09 (3) = no compensation if drugs, alcohol, intentional injury.]



Here are answers to some of the most frequently asked questions (with editorial comment):

Q. Does this section 440.10 refer only to contractors and subcontractors in the construction trades?

A. Most definitely not! A "contractor" might be a trucker, a manufacturer, a materials supplier, a repair service, etc. Although not specifically defined in the law, a contractor is any entity which "...sublets any part or parts of his contract work to a subcontractor." To oversimplify, a contractor is one who performs a specific job under a contract.

Q. Is an owner-builder a contractor?

A. No. An ownerbuilder is not engaged in "contract work" (meaning work being done under contract), and thus is not in the position where he "...sublets any part or parts of his contract work to a subcontractor.

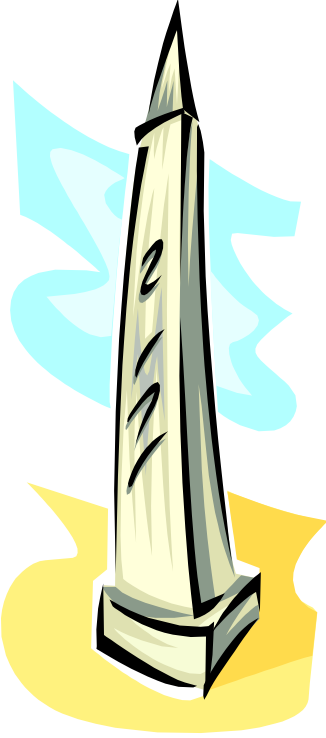
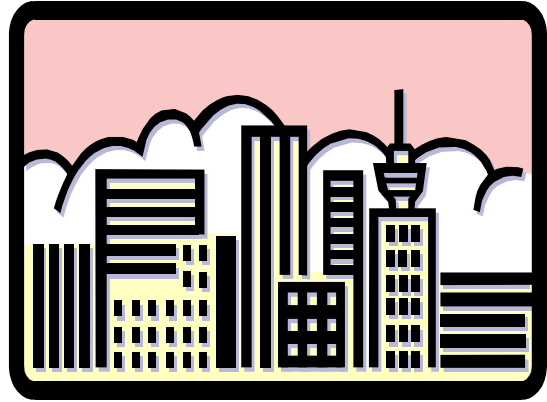
Q. Is a contractor liable for compensation to the uninsured subcontractor for the sub's own injuries?

A. No. The law specifically states that "the term 'employee' shall not include an independent contractor."
§440.10 states "...all of the employees of such contractor and subcontractor...engaged on such contract work shall be deemed to be employed in one and the same business...and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment." Thus, for example, while a contractor is liable for payment of compensation to the injured employees of an uninsured subcontractor, the contractor is not statutorily liable for compensation to an injured uninsured subcontractor who is a sole proprietor or a partner.

Answers to frequently asked questions (continued)

Q. When is a sub-contractor an independent contractor?

A. To establish that the subcontractor truly is an “independent contractor” and therefore, by law, not an “employee” of the contractor, the independent contractor must meet at least four criteria spelled out in §440.02(15)(d) 1., as follows:



- 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
- 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.

Of course, when the insurer for the contractor insists on charging for an alleged subcontractor, the insurer, in effect, is declaring the subcontractor to be an employee of the contractor, not an independent contractor. And the insurer fears that if the sub is seriously injured on the job and has no source to pay his medical bills and loss of earnings, the sub will renounce his independence and say he is an employee of the contractor, thus receiving the workers compensation benefits from the contractor's workers compensation (without the insurer getting any premium for the exposure over the years).

Answers to frequently asked questions (continued)

Q. A great number of contractors employ one-man subcontractors. Is there any way an agent can guarantee, in all instances, that the contractor insured will not be charged?

A. Yes, if a non-construction trade, but it's often a hard sell. Be sure the one-man subcontractor carries workers compensation insurance, does not exempt himself, provides the contractor with a certificate of insurance and maintains the coverage throughout the job. Sole proprietors and partners in construction cannot exempt from coverage.

Q. Is the contractor liable for compensation to the partners when a subcontractor is a partnership, has no employees and is uninsured?

A. No. The situation is the same as in the case of a sole proprietorship. The contractor is liable only to the employees of the partnership, not the partners themselves.

Q. Is the contractor liable for compensation benefits to the officers of an uninsured subcontractor?

A. Yes, if the officers have not filed to be exempt. Under Florida's workers compensation law officers of a corporation are included in the definition of the term "employee."

Q. Suppose the officers of a subcontractor corporation which does carry its own workers compensation elect to reject the act by filing a DWC-250 form with the Divisions of Workers Compensation Will the contractor be liable for workers comp benefits if they are injured?

A. No. The statute specifically says: "An officer of a corporation who elects exemption from this chapter by filing certificate of election under this section may not recover benefits or compensation under this chapter.

Q. If a contractor, not in construction, employs just one person and sublets part of his work to a subcontractor (whether or not the sub has any employees), is the contractor liable for compensation to his own single employee?

A. Yes. §440.10(1)(b), reproduced here, clearly states, "In case a contractor sublets any part...of his contract work to a subcontractor..., all of the employees of such contractor and subcontractor...engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees..." (Emphasis added.) There is no reference to number of employees.

Q. What is the best advice an insurance agent can give a contractor-insured in order to afford the greatest protection for subcontractor responsibilities and minimize the possibility of premium charges to the contractor on audit for the subcontractors?

A. With the fear that we will be considered naive, or unaware of the "real world" situations that exist between contractor and subcontractor, the answer to that question is: Do not sublet any work to a subcontractor who does not carry his own workers compensation insurance (or does not have a written agreement reimbursing the contractor for workers compensation provided to the subcontractor by the contractor).

Some Independent Contractor Guidelines.

As mentioned, the Florida Workers Compensation Law states that the term “employee does not include an independent contractor.” Over the years, it has become difficult, in many instances, to determine whether a particular subcontractor is, in fact, an independent contractor or an employee. Even the Florida Supreme Court, in *Magarian v. Southern Fruit Distributors*, 1 So.2d 858 (Fla. 1941), has said:

“It appears generally conceded that no hard and fast rule may be stated to control the determination of the question as to whether one occupies the status of an employee or that of an independent contractor and that each case must stand on its own facts and, therefore, no useful purpose may be served by citing particular cases involving different factual situations.”

In 2003, the Florida Legislature amended the law to provide a firm rule for determining independent contractor status. As indicated above, this statute spells out criteria, which define an independent contractor. In order to present an overview of the independent contractor status, there are some guidelines, some factual checkpoints, which will assist in arriving at an informed and studied conclusion. Many of these may not apply, but consideration should be given to them. Various court cases indicate that an independent contractor:

1. Has the right to direct what, when, where and how his particular work should be done.
2. Should have a contract, written or oral (preferably written).
3. Accepts payment by the job at a fixed price rather than on a time basis.
4. Is engaged in a distinct occupation or calling.
5. Has the right to hire, fire and supervise his own people.
6. Has the obligation to furnish necessary tools, supplies and materials.
7. Has the right to control the progress of his work except as to the final results.
8. Establishes the pay for his own employees.

Here are a few other factors which might be considered. An independent contractor:

1. Does not have Social Security deducted nor tax payments withheld from his remuneration.
2. Works on a specified job-by-job basis.
3. Performs services for more than one company.
4. Has a place of business as opposed to working from his home (or the back of his truck).
5. Projects the image of an independent contractor to the public.
6. Has an occupational license.
7. Carries general liability insurance.

Finally, the relationship of the contractor to the subcontractor is significant. A contract between them indicating the worker is an independent contractor and not an employee will be reviewed by the courts, but the determination of the worker’s status will be based on the facts at the time of the injury. *A contract naming a worker as an independent contractor will be disregarded if the facts show him or her to be an employee.*

It's Not Just A Workers Compensation Problem!

Indications are that the Internal Revenue Service (IRS) has become extremely interested in this employee/employer/independent contractor relationship, the trigger being a loss of tax dollars to the federal government. With the frank admission that there is no sure, guaranteed, never miss way to determine whether a person is an employee or an independent contractor, here are some factors to be considered when attempting to make a judgment.

Let us urge you, though, not to offer firm opinions on the subject, particularly if the examples given to you are hypothetical!

Behavioral Control – Facts that show whether the business has a right to direct and control.

These include:

Instructions – an employee is generally told:

1. when, where, and how to work
2. what tools or equipment to use
3. what workers to hire or to assist with the work
4. where to purchase supplies and services
5. what work must be performed by a specified individual
6. what order or sequence to follow

Training – an employee may be trained to perform services in a particular manner.

Financial Control – Facts that show whether the business has a right to control the business

Aspects of the worker's job include:

The extent to which the worker has unreimbursed expenses

The extent of the worker's investment

The extent to which the worker makes services available to the relevant market

How the business pays the worker

The extent to which the worker can realize a profit or loss

Type of Relationship – facts that show the type of relationship include:

Written contracts describing the relationship the parties intended to create

Whether the worker is provided with employee-type benefits

The permanency of the relationship

How integral the services are to the principal activity

