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## **You Say Employee, I Say Independent Contractor –The Idaho Supreme Court Discusses 15 Factors for Determining Whether a Worker Is An Independent Contractor**

*By Colleen D. Zahn*

*Whether a worker is classified as an employee or an independent contractor can trigger many different consequences for a company. Merely because the company and worker have agreed between themselves as to the worker's status is not conclusive. For example, a company may deem a worker to be an independent contractor and, as a result, not provide worker's compensation coverage. The Idaho Industrial Commission often finds that such workers are actually employees and files a legal action against the company. Such action forces employers to make the tough business decision of whether to fight the classification in court, or simply pay the worker's compensation premium for the employee.*

*A key element in determining a worker's compensation status is whether the employer has control or direction over the way the worker performs his or her job. In a June decision, the Idaho Supreme Court reviewed 15 factors to be considered when making this determination, and indicated that some of the factors are of little importance.*

In June of this year, the Idaho Supreme Court reversed a decision of the Idaho Industrial Commission finding that sheetrock hangers and tapers were not independent contractors, but instead covered employees for purposes of Idaho's worker's compensation law. *Excell Construction, Inc. v. Idaho Dep't Commerce and Labor*. The company appealed the determination to the Supreme Court. In a victory for the company, the Court considered 15 factors set out in the Commission's rules and reversed the Commission, finding that the hangers and tapers were clearly independent contractors. The Court decided that while certain factors were important in deciding the issue, others were of little significance, hinting they may even be obsolete.

### **The 15 Factors**

Services performed by a worker are considered covered employment unless two requirements are met: (1) the worker has been and will continue to be free from employer control or direction over the performance of his work; and (2) the worker is engaged in an independently established trade, occupation, profession or business.

In March 1999, the Commission adopted a new rule providing that 15 factors should be considered when determining whether a worker is subject to the employer's control: (1) the level of skills, qualifications, and training required for the job—is extensive training required; (2) how workers were paid and whether the employer provided them with benefits and tax withholding—are workers paid hourly and does the employer provide benefits or tax withholding; (3) the right to negotiate subcontracts with other workers; (4) the right to choose sales or business techniques—is the worker

free to advertise his services; (5) the right to determine hours—does the worker determine when he works and for how many hours; (6) the existence of outside business or occupations—does the worker have another business or other work aside from that provided by the employer; (7) the existence of special licensing or regulatory requirements for performance of work; (8) whether the work is part of the employer's general business; (9) the nature and extent of the work—is the worker doing work performed by covered employees; (10) the term and duration of the relationship—is the worker engaged in an ongoing, long term relationship with the employer; (11) the control of the premises; (12) whether the worker has authority to hire subordinates; (13) whether the worker owns or leases major items of equipment or incurs substantial unreimbursed expenses; (14) whether the parties would be liable to each other if the business relationship was terminated by one party; and (15) other factors which, viewed fairly in light of all circumstances, may indicate the existence or lack of an independently established trade, occupation, profession or business.

### **Factors important to the Court's decision**

Applying these factors to the sheetrockers, the Court indicated factors 2, 3, 4, 5, 10, 12, 13 were crucial in this case. The Court stated that factors 6 and 14 were of minimal significance, providing an indication that they may not be relevant in any case. Factor 8 was also discounted, but only as it applied to the sheetrockers, indicating this factor may still be important in other situations. The Court found the remaining factors were neutral, meaning they did not provide evidence of either employee or independent contractor status.

### **Deciding whether a worker is an independent contractor**

The Court's decision means that the decision whether a worker is an independent contractor requires careful consideration of a number of factors and depends on the specific facts in each situation. Of importance is how the worker is paid, whether the worker sets his own hours, whether the worker can contract with others and hire subordinates to do his work, whether the worker owns his own tools, whether the worker works consistently and only for the employer over a period of time, and whether the worker owns most of his own equipment. The worker doesn't have to own expensive or large equipment, so long as he owns most of his own tools and materials. If these core elements are met, then the worker is likely an independent contractor.

Making the correct decision as to a worker's status (employee vs. independent contractor) is crucial for a company. This decision impacts many areas, such as tax withholding, worker's compensation coverage, and liability for the worker's negligence, to name just a few. The Excell decision gives employers new guidance in classifying workers.