Below the Red Line

HEYL ROYSTER

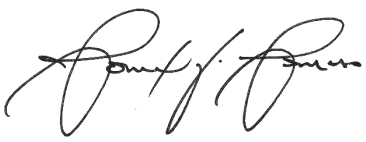
Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals — *December 2018*

A Word From The Practice Chair

I want to wish everyone a Happy Holiday Season, and more to the point ... Merry Christmas, Happy Chanukah, and Happy Kwanzaa! While I am at it, I want to wish you and yours a safe and healthy New Year in 2019! By the time this note finds you, I expect you have opened some presents, maybe over-eaten and had some good naps in between. Now that you are back at it, we have a rather instructive article by my associate, Jordan Emmert, regarding how to properly define and determine when you have an independent contractor (versus an employee). We have outlined the questions the courts have looked at in determining if a person is an independent contractor, or if you will need workers' compensation coverage because the person is an employee per the Illinois Workers' Compensation Act. We also touch on the pitfalls if you claim the worker is an independent contractor and it turns out they are actually an employee. If you need clarification on any of these fine points of the law and how to handle them for your unique situation please feel free to contact me or any Heyl Royster workers' compensation attorney because we are here to help you.



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Revisiting the Concept of Independent Contractors

By Jordan Emmert, jemmert@heylroyster.com

The question of whether someone is an employee or an independent contractor can be an extremely difficult, yet important, question in the Illinois Workers' Compensation arena. If someone is injured on the job, the independent contractor/employee classification can mean the difference between being held liable for their work accident or not. This article will outline the differences between these two classifications of workers, as well as provide some insight on what employers can do to properly classify their employees.

Who Is an Independent Contractor?

The Illinois Workers' Compensation Act defines an employee as "[e]very person in the service of another under any contract of hire, express or implied, oral or written." 820 ILCS 305/1(b)(2). While the Act does define what an employee is, the Act does not provide a definition for an independent contractor. Given the absence of a definition by statute, courts have been left with interpreting case law when making the decision about whether a worker is an employee or an independent contractor.

In determining whether an employment relationship exists, courts have historically looked to the amount of control an employer retains over the details and manner of the employee's work. The extent of an employer's right to control is usually the crux of their decision. If an employer retains control over a worker, an employer-employee relationship has been established. *Immaculate Conception Church v. Industrial Commission,* 395 Ill. 615 (1947). However, if an employer has not retained the requisite amount of control over the employee, no employer-employee

relationship exists and the worker is deemed an independent contractor.

The obvious question here is, what does "control" mean, and when is it being exercised? Over the years, courts have looked to the Second Restatement of Agency to help them define what control means. The Restatement lists the following ten factors as essential in the determination as to whether control exists.

1. The extent of control over the details of the work performed;
2. Whether the one employed is engaged in a distinct occupation or business;
3. Whether the occupation usually requires direction in the particular locality in question;
4. The skill required;
5. Who supplies the instrumentalities, tools, and place for work;
6. Length of time employed;
7. Method of payment, whether by time or by job;
8. Whether or not the work was part of the regular business of the employer;
9. Belief of the parties as to the nature of their relationship;
10. Whether or not the "employer" is in business

Restatement of Agency (Second) §220(2).

Courts often modify the list from the Restatement of Agency (Second) to include other factors, or to narrow down the relevant considerations. The court in *Roberson v. Industrial Commission,* 225 Ill. 2d 159 (2007) considered the following factors:

1. Whether the employer may control the manner in which the person performs the work;
2. Whether the employer dictates the person's schedule;
3. Whether the employer pays the person hourly;
4. Whether the employer withholds income and social security taxes from the person's compensation;
5. Whether the employer may discharge the person at will;
6. Whether the employer supplies the person with materials and equipment;
7. Whether the employer's general business encompasses the person's work

Roberson, 225 Ill. 2d at 175.

As might be expected, there are many different scenarios where this question can arise. Given the fact specific nature of these arrangements, many of which are not clear cut and contain elements of both an employment relationship as well as an independent contractor relationship, courts are free to look at the totality of the circumstances and evaluate all factors in play.

That being said, of all the factors courts consider, the right to control the manner and details of the work performed is often deemed the most important consideration. *Id*. So that leaves us with the vague rule that an employee is someone whose manner of work is always subject to the control of his or her employer, whereas an independent contractor is someone who generally may complete a task in whatever manner the contractor deems appropriate. Unfortunately, this rule is murky and decisions are almost always decided on the specific details of the arrangement in question.

Why Is the Distinction Important?

This distinction is important for employers to understand for many reasons, beyond just the workers' compensation implications. Some of the other reasons include payroll/tax burdens, vicarious liability, and the ease of finding immediate skilled labor. This question is also an important consideration in the workers' compensation context. If a worker is injured on the job and found to be an employee for purposes of the Workers' Compensation Act, the employer will face liability for those injuries. If a worker can be appropriately classified by a business as an independent contractor, liability may be avoided.

Since the possibility of avoiding workers' compensation liability is present, as expected, many

employers have attempted to shield themselves from liability by attempting to craft scenarios where it is clear that a worker is not an employee of the business. Given that these relationships are often complicated, it can be difficult to construct a scenario where the worker's classification is clear. Many employers and their attorneys have tried drafting contracts for some of their workforce to sign. These contracts would lay out in detailed language, that the worker was not an employee of the employer in question, and that their relationship to the employer was nothing more than an independent contractor.

While courts will take these agreements into consideration, and the Illinois Supreme Court has held that it is willing to take the business relationship and structure of an employer into consideration, it intends to continue adhering to the rule that the right to control the details of a worker's performance is the most essential element in its decision. *Kirkwood Bros. Const. v. Industrial Commission*, 72 Ill. 2d 454 (1978). As a result, while it will not hurt an employer to have their workers sign contracts which define the relationship they intend to have with the worker, it is not necessarily going to shield the business from liability. It is important for employers to take as many steps as possible towards clearly defining their relationship with workers. But, courts have made it clear that the most important thing an employer can do to shield themselves from liability is refrain from controlling the details of the worker's performance.

Consequences of Misclassification

For some businesses, the downside of misclassifying an employee as an independent contractor can be more severe than merely incurring the workers' compensation liability. The construction industry is particularly susceptible to consequences well beyond workers' compensation exposure. Illinois' Employee Classification Act, 820 ILCS 185/1, provides that people who work in the construction industry are presumed to be employees unless they meet the two exceptions to the Act. If the exceptions are met, the workers will be considered independent contractors. The statutory factors the court will consider are very similar to the common law factors the courts consider which were listed earlier in the article.

The important takeaway for employers in the construction industry is that if a worker is misclassified, anyone who knows of the misclassification may file a complaint with the Illinois Department of Labor. 820 ILCS 185/25(a). The Department of Labor will investigate the claim and can issue fines of up to $1,000 per offense for the first offense. 820 ILCS 185/40(a). Any subsequent offenses within the next five years can subject the employer to a fine of $2,000 per offense. *Id.* Additionally, if an employer willfully misclassifies an employee, the fines can double, and punitive damages can be assessed. 820 ILCS 185/45.

Recommendations for Proper Employee Classification

The case law is clear; if an employer wishes to classify a worker as an independent contractor, the employer cannot control the manner and details of that worker's performance. However, as we know, these situations are not black and white. While it is important to refrain from controlling the manner of work, employers should not forget about the other factors as well. When a defense attorney makes the argument to the Commission that the claimant is an independent contractor, and not an employee, the argument will carry the most weight if it is supported by many of the factors the courts have said they consider. The more factors which are in the employer's favor, the more likely the Commission will rule in an employer's favor in a gray right to control scenario.

Employers should consider having their independent contractors sign a contract which clearly defines the relationship. These contracts should make it clear what the employer is in the business of doing, and what the independent contractor being hired is in the business of doing. The contract should incorporate as many of the factors the courts consider into the contract as practical. This will give the employer's attorney the best chance for arguing to the Commission that the employer clearly defined its relationship with the worker, and that the worker knew the extent of the relationship up front. The

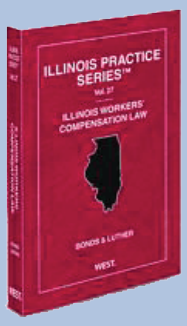
more clear the distinction, the better. When possible, the employer should let the contractor set his or her own schedule, pay the contractor by the job instead of on an hourly basis, and ensure the contractor is providing his or her own equipment for the job. Lastly, the employer should confirm in writing that the independent contractor has its own workers' compensation insurance for itself and its employees. Then, if an employee of the independent contractor is injured on the job, there is a route of recovery for the injured worker apart from the employer of the independent contractor.

An employer should always consult with an attorney prior to making hiring decisions about independent contractors. As stated, this area of workers' compensation law is very fact specific. When done properly, proper classification of an employee can be a great defense against liability at the Commission.

Jordan Emmert – Rockford Office

Jordan focuses his practice on civil litigation in both federal and state courts in the areas of civil rights/ Section 1983 litigation, commercial litigation, and representing employers in employment law and workers' compensation matters. In the area of employment law, he focuses on employers' compliance with federal and state employment laws, such as the Family Medical Leave Act, anti-discrimination laws, and retaliatory discharge matters. He also represents employers in workers' compensation matters. Jordan is also involved in commercial litigation where he represents businesses that are involved in business disputes.

New 2018-2019 Edition Available



Bruce Bonds and **Kevin Luther** co-authored the recently released "Illinois Workers' Compensation Law, 2018 Edition," Volume 27 of the Illinois Practice Series published by Thomson Reuters. This publication provides an up-to-date assessment of Illinois workers' compensation law in a practical format that is useful to practitioners, adjusters, arbitrators, commissioners, judges, lawmakers, students, and the general public. It also contains a summary of historical developments of the Illinois Workers' Compensation Act.

Mr. Bonds concentrates his practice in the areas of workers' compensation, third-party defense of employers, and employment law. He is a member of the Illinois Workers' Compensation Commission's Rules Review and Revisions Committee and an adjunct professor of law at the University of Illinois College of Law, where he has taught workers' compensation law to upper-level students since 1998. Mr. Luther supervises the employment law, employer liability, and Workers' Compensation practices in the firm's Rockford and Chicago offices. He has represented numerous employers before the Illinois Human Rights Commission, arbitrated hundreds of workers' compensation claims, and tried numerous liability cases to jury verdict.

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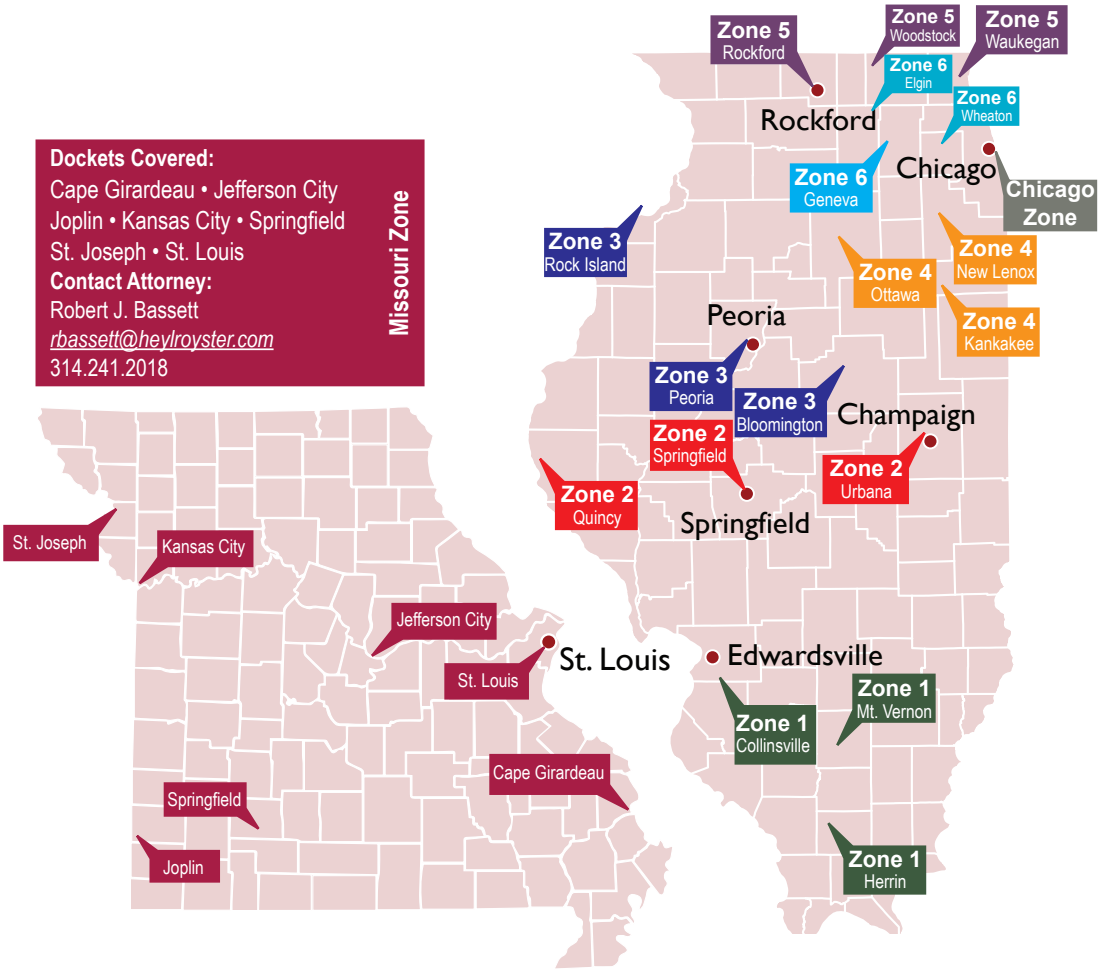

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