

Subcontractors: how their injuries can become your responsibility

By William E. Shaughnessy, Esquire

With increasing frequency in recent years, employers are "subcontracting" rather than "hiring." In certain situations, it can save many costs of doing business, such as

- equipment costs
- health insurance costs
- training costs
- workers' compensation insurance costs

Additionally, employers who use subcontractors can avoid many of the requirements of recent protective federal regulations and statutes because they apply to employees.

Many employers subcontract security services, housekeeping and cleaning services, and logistical services rather than performing those functions through direct employees. The same is true of public entities, such as cities and counties which are, with increasing frequency, subcontracting garbage services, debris pickup services, security services and other public functions.

While subcontractors can save employer's costs associated with workers' compensation insurance, employers may still have liability for work injuries of your "subcontractors" or employees of your "subcontractors." Just because you call someone a "contractor" does not imply that the law will recognize that person as one. Employers may find themselves responsible to pay a subcontractor or a subcontractor's employee when that person is injured.

Employer or Subcontractor

Assume the City of Maybank contracts with Joe Smith of Joe's Garbage Service to perform trash pickup on the west side of town. An elaborate contract is signed, throughout which the parties refer to "Joe" as a "subcontractor." The City of Maybank is Joe's principal source of income. Joe, a sole proprietor, uses the old City of Maybank debris removal truck and is paid \$20 an hour for the hours he works. The payments to Joe are reported by the City of Maybank on an IRS Form 1099. The city prescribes Joe a route, restricts him as to the days and hours he can pick up on each street in the area, etc.

The law looks at certain factors to determine whether a "subcontractor" is truly an independent contractor or if that "subcontractor" is, indeed and in reality, an employee.

1. direct evidence of the right or exercise of control
2. method of payment
3. furnishing of equipment
4. right to fire

In the example above, there is a good chance that Joe will be found to be an employee of the City of Maybank for workers' compensation purposes and that the City of Maybank will be found responsible for the payment of workers' compensation benefits if Joe is injured while collecting trash on the west side.

Statutory Employment

How about this situation? Assume Joe Smith, owner of Joe's Garbage Service, has two employees. Further assume that the City of Maybank has five elderly trash collection employees and decides that, as each of those employees retire, the city will contract with Joe's to pick up in the area assigned to the retiring employee. The city signs an elaborate contract throughout which "Joe's Garbage Service" is referred to as an independent contractor. Assume that Joe's has no workers' compensation coverage. Further assume that Bob Jones, an employee of Joe's Garbage Service, fractures his leg when he slips off the back of a garbage truck while collecting in Maybank.

Who pays? Answer – the City of Maybank under the "statutory employment" theory. When using employees of subcontractors in performing work in the City of Maybank, the employer/contractor is responsible for paying workers' compensation benefits if the direct employer has no coverage.

Moral of the Story

1. Ensure that your subcontractors have workers' compensation insurance coverage.
2. Before contracting, require a certificate of coverage. Read it carefully and investigate (i.e. confirm with the subcontractor's insurance agent that the coverage is in effect). Document your investigation.
3. Collect a Certificate of Insurance when the contract is signed.
4. Retain the Certificate of Insurance in your file.
5. Ensure the Certificate of Insurance is signed, dated and issued by an authorized representative of the insurance carrier or subcontractor see recent Supreme Court decision of *David H. Barton v. William Ian Higgs, d/b/a Iyanel Enterprises (Opinion No. 26594)*.
6. When the contract is renewed, obtain another Certificate of Insurance, and go through the same "drill" outlined above.
7. Do not buy the argument that because your sub-contractor has less than four employees, he does not need to have workers' compensation insurance coverage. (If you, as an employer, buy this argument, you will find yourself paying workers' compensation benefits to employees of uninsured subcontractors.)

Remember, just because a city drafts and signs an elaborate contract designating someone as an "independent contractor" or "subcontractor," it does not necessarily insulate it from workers' compensation responsibility.

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<http://www.masc.sc/NEWSROOM/UPTOWN/2009-JUNE/Pages/Subcontractors.aspx>