WORKSHOP W9

Wednesday, November 11
12:30 p.m.–2:00 p.m.

PRACTICAL WAYS TO CUT WORKERS COMP COSTS

Presented by

Sonja J. Guenther
Vice President and Workers Compensation Specialist
IMA Financial Group

Workers compensation costs are the single biggest component of most contractors’ risk management programs. It is also the area where contractors have the greatest opportunity to take steps that can cut their overall costs. This workshop outlines practical steps contractors can take to ensure they are not paying more for workers compensation insurance and workers compensation claims than necessary. From basic strategies like verifying correct worker classifications and the calculation of the experience modifier, to more advanced techniques such as deductibles, subrogation, and utilizing the various credits available to contractors, attendees will leave this workshop armed with ideas for trimming and controlling workers compensation costs.

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Ms. Guenther has worked nearly 40 years in the insurance industry. Prior to joining IMA Financial Group, where she is vice president and workers compensation specialist, she served for 20 years in a similar capacity for Willis of Colorado. She also held an analyst position at the National Council on Compensation Insurance (NCCI) and worked in both a marketing and underwriting capacity for CIGNA Insurance Company.

Ms. Guenther is a nationally renowned specialist in workers compensation and an experienced speaker and author of numerous articles on workers compensation topics. She has testified on many occasions before legislators and state regulatory bodies.

Ms. Guenther holds a bachelor of arts degree in criminal justice, a master of science degree in the psychology of communication, and a certificate in conflict resolution, all from Regis University. She holds the Associate in Loss Control Management (ALCM), Associate in Risk Management (ARM), Certified Insurance Counselor (CIC), and Certified Risk Manager (CRM) designations.
Notes
Practical Ways to Cut Workers’ Comp. Costs

Presented By:
Sonja J. Guenther
Vice President
IMA, Inc.

Promote Your Company

Nobody Knows...
Your Company Like You Do
120-160 Days Prior to WC Renewal
Review Safety Program Enhancements
Stretching, Pre-Employ. Testing
New Cert. Requirements of Employee
Drug Testing Pre, Post, Random
Change Medical Providers/Partners
Hours of Safety Training EEs Completed

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Promote Your Company

Accident/Near-Miss Reports Outcome
Findings from Job Site Analysis
JSA Checklist Change as a Result?
Status of OSHA Citations
Positive Changes in Incident Rates
Share ALL With Agent/Carrier
No Injuries in ______ Days

The Agent/Broker Role

Your Advocate
Building Strategic Plans With Your Company
Helping You Choose a Carrier Partner
Sharing Info With Carrier – Telling Your Story
Meetings With Carrier / Loss Control
Working Towards Equitable Price for Insurance
Awareness of Credits and How to Achieve

Analysis of Injury Trends
Claims Frequency
Claims Severity
Loss Ratio Improvement
Changes to Experience Mod Factor
Advise You on Local Regional and National Trends
Pre-Qualification Letters
No Betting!
Know Your Company’s Appetite For Risk

Review Retention Options With Broker
Cost Benefit Analysis of Large/Small Deds.
ND Workforce Safety & Insurance
$250 Mandatory Employer Deductible
NDWSI Covers the $250 If Claim Report < Day 2
(Source: www.workforcesafety.com Sept. 2015)
Employer Pays $350 if Reported >14 Days
Remind EEs of Your $ Investment in Them

Small and Large Deductible Programs

Premium Credits Vary by Hazard Group
Small Deductible Net Reporting States;
AL, CO, FL, GA, HI, ID, IA, KS, KY, ME, MO,
NM, OK, OR, SC, SD (Source: NCCI BA Manual 2014 Version)
Dollars Netted From Mod Different by State
CO vs OR vs FL
Large Deductible Net Reporting-Available States;
AZ, CT, DE, HI, IN, KS, KY, MN, MO, NE
(Source: Silverplume WC State Regulations 10/1/14)
Check With Each Carrier For Their State Filing
You Pay Deductible ONE Time / Benefits You 3 Years
Contractor Classification
Premium Adjustment Program (CCPAP)

Premium Credit if Employer Pays > Avg. State Wage
Complete the Application to Carrier
One Page – Lists Construction Classes/Wages
Carrier Forwards to NCCI to Calculate
Non-NCCI Independent Rating Bureaus
AK, CT, DE*, FL, HI, IL, MA*, MD, MO, MT, NE, NJ*, NY*, NM, OK, OR, PA*, VA, WI*

* Rating Bureaus Independent of National Council on Compensation Insurance (NCCI)

Potential for Additional Policy Credits

Drug-Free Workplace Credits
Safe Workplace Credits
Safety Certification Programs
Vary by State – Contact Your Agent
Penalties/Denial For Some Injured Workers in Violation of Drug/Alcohol Policies
CO, FL, GA, IN, IA, KY, MO, OH, WI, WY

Source: List Not All-Inclusive. Retrieved From Multiple State Websites, Sept., 2015
Schedule Rating

10% - 50% Schedule Rating Credit OR DEBIT
Ask Agent For % in Each State
Carrier Filed Exceptions In Each State
Underwriters Beware of Using As Revenue Adjustment
Cannot Be Based on Injury Experience of Account
Schedule Credits/Debits Include Review of
- Premises Risk
- Medical Control
- Safety Programs
- Safety Devices
- Employee Selection
- Safety Organization

Documentation for Schedule Rating

- Premises Risk to Employees
  - Physical Condition
  - Maintenance
- Safety Devices and Equipment
  - PPE
  - Maintenance Scheds.
- Medical Controls
  - First Aid
  - Design. Med. Providers
- Housekeeping
- Ergonomic Policies
- Guards
- Device Training
- Emergency Plans
- Ret. to Work Pols.
Documentation for Schedule Rating (cont.)

Employee Selection
Pre-Employment Testing
Physical Range of Motion
Integrity Testing
New Hire Training
Standards On Experience
Cooperation with Carrier
Safety Program Enhancements

Class Exposure
Equipment
Rotation
Technology
  GPS  Dash Cameras  Security Cameras
Safety Organization
  Acc. Investigation
  Corrective Actions
  Safety Officer / Rotating Safety Committee
  Recordkeeping
  Independent Safety Awards
Know National, Regional and Local Trends

Ask Your Agent For
National Trends
Regional Issues
State Legislative Changes
Be Involved – Contact State Rep./Senator
Understand What Those Trends Mean For You
Your Trends Should Influence Outcome of WC Renl.

Don’t “Bet the Blinds” With Your Coverage

Check Employers Liability Coverage Limits
Part II of Your WC Policy
Actions Against Employers
Occupational Disease / Fatalities
Rates Reduced in 2013
$1 Mill. WC Claim Could Pierce Umbrella
Don’t Gamble With Industry Class Codes

700+ Classification Codes
BEWARE of Shifting Payrolls to Cheaper Class Codes
Inflates Your Mod Factor
Carrier Can Cancel / Misrepresentation
8810 Payroll But Serious Injuries
Class Code Appeals Mechanisms in Each State
Try to Resolve Dispute With Carrier, First

Experience Mod Factors

National Council on Comp. Insurance (NCCI)
WC Administrator in 39 States
Rules, Regs and Rates
Independent Rating Bureaus
DE, IN*, MA*, MI, MN*, NJ, NY*, NC*, PA, WI*
* Shares Data with NCCI for Interstate Mods
Monopolistic States
NOWW
ND, OH, WA, WY
Employer-Paid Injuries
Check with Agent/Carrier for States
Ex: Missouri WC Endorsement to Policy
Reported As Medical Injury Only
Some States < $1,000
Some States Allow Employer to Pay Lost Wages
State Permit Required
Dollars Not Reported into Your Mod
Beware of Paying Own Claims W/O Approval
Fines of Up to $1k Per Day

Have Your Mod Projected
Know it In Advance
Auditing the Mod Data for Accuracy
Error Ratios of Mod Factors
Three Ways to Change Mods Mid-Term
Errors
Claim Adjudicated-Found Non-Compensable
Subrogation Recovery
Subrogation

Third Party Negligence
  Notify Your Agent/Carrier Immediately
WC Often Primary Insurance When Injured On Job
Vehicular Subrogation Varies by State
Equipment Malfunction / Breakage
  Collect and Secure Evidence
Police Reports
Carrier Must Put 3rd Pty. on Notice Before SOL Expires

Common Errors:
  Not Your Employee
Estimated Payrolls Reported to NCCI
Claims Not Net of Deductibles
Subrogation Recovery $ Not Removed
Unique State Caps Not Applied / Multi-Inj. Cap Not Applied
“Contingent” Mod Factors
Claim in Wrong State
Claims Reserves Overestimated
Claims Included for Cases Found Non Compensable
Unrelated Employers With Combined Mods
Deductibles Vary by Employer
Are WC Experience Mods Truly a Gauge of Safety?

Safety Impacts the Mod
  The Mod is NOT a Reflection of Safety
Some Employers DO NOT Have a Mod Factor
Reliance on a Number or Third Party
  To Tell You if Your Subs Are “Safe” or Not
Takes Effort to Know/Assess Info. on Subs.
  Takes Time
  Commitment
No One Will Know Your Subs Better

Formula Changes to Mod Factors
Experience Rating Adjustment Plan
  70% of Med-Only $ Removed From Mod
Primary Loss Dollars Have > Tripled In Mod Calculation
  “Split Point” Was $5k Per Injury in 2012
  $10k, $13,500, Now $15,500 p/Injury
  2016 Proposal is $16k p/Injury
Tinkering with D Ratios to Offset Impact
Michigan Rating Bureau $15k
California Rating Bureau (WCIRB)
  Split Point in 2012 From $5k to $7k
  2017 May Adjust by Employer Size
Texas “Hold ‘Em”

Texas Joined NCCI July 1, 2015
TX Used $5k Primary Loss Dollars
Eff. 7/1/15 $15,500 Primary Loss Dollars

NCCI Offset Impact with D Ratio Factor Chg.

“Negotiated” Mods Are Set to Expire in 2018
(Source: Feb, 2015, Texas Division of Insurance)

Gambling With the Mod Factor

Merging and Acquiring Other Companies

2014: M&As Toted $3.5 Trillion
(Source: Fortune.com, Jan., 2015)
Increase of 47% Over 2013

2014: $562 Billion Private Equity Transactions
(Source: Thomson-Reuters, June, 2015 – Data is Worldwide)
43% Increase Over 2013

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Gambling With the Mod Factor

Asset Purchases
- Property
- Contracts
- If You Absorb Employees Will Likely Get Mod Factor
- Even if Terminate
- What % Rehired?
- Get Copy of All Modsheets for Company Before Acquiring
- Ask Agent to Project Blended Mod Factor
- Confidentiality Agreements

Manage Your Claims

Embrace Your Injuries
- “Not My Circus – Not My Monkeys”
- “Carrier Rolled Over”
- “Adjuster Caved In”
- “This Was Absolute Fraud”
- Fraud is a Criminal Offense

Partner With Your Broker/Carrier
- Dispute the Claim WHEN REPORTED TO CARRIER
- Move From Blaming
- Be Bold/Innovative
- Integrate Successful Claims Strategies
Manage Your Claims

Early Reporting
Set and Distribute Standard for Your Company
8 Hours? Same Shift? Same Day?
Complete and Detailed First Report of Injury
Designated Medical Provider
Offering Modified Duty
Not For Every Situation
Attend Hearings
Work With Agent EIGHT Mos. Prior to Renewal
Claims Sent to NCCI SIX Mos. Prior to Renewal

Independent Contractors

Transferring the Risk
Demand WC Insurance Certificate
Coverage Can Expire
IC Claims They CANNOT Get Coverage
Assume the Risk
Carrier Adds IC Payroll at Audit
State Penalties for Failure of IC Due Diligence
Injury Impacts Your Mod/Premiums for 3 Years
IC Article Provided to Attendees
Exposures and Suggestions to Abate IC Impact
Professional Employment Organizations

Unique Method to Provide WC Insurance
Appeals to Small Employers or Employers With Debit Mods >1.00
PEO Assumes All Employees
Of the “Client”
Co-Employer
Alternate Employer
Statutory Employer
  WC is Exclusive Remedy
  Protects Statutory ER from Suit
Actual Cases
  PEO Coverage Lapses
  Multiple Veh. Accident
Know Reputable PEOs – Ask for References

National Trends

Recreational and Medical Marijuana Issues
Medical Marijuana Legal in 23 States
(Plus DC and Guam)  
(Source: www.ncsl.org 9/14/15)

Recreational Marijuana Legal in 4 States (Including DC)
(Source: USA Today Aug. 19, 2015)
  Decriminalized in Most States
  Fines/Penalties Minimal

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National Trends

Marijuana Initiatives Failed in 11 States
(Source: NCCI, Sept. 2015 State Adv. Forum)

Marijuana Legislation Expected in 2016
(Source: www.ballotpedia.org, Sept. 2015)
AZ, CA, FL, GA, ID, ME, MA, MI, MS, MO, MT, NE, NV, NM, SD, WY

Employers Have Beefed Up Drug Testing
Some Eliminated Their Drug Testing Program

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National Trends

Marijuana Appellate Cases
- **CO Supreme Court: Coats v Dish Network Case No. 13SC394**
  June, 2015 Termination / Positive Drug Test Upheld
- **Colorado Court of Appeals – Beinar V ICAU Case No. 10CA1685**
  August, 2011 Upheld Denial of Unemploy. Benefits Upon Termination
- **New Mexico Ct. of Appeals Takes a Different Approach**
  July, 2015 Lewis v American General Media
  Carrier Ordered to Pay for Medical Marijuana
  Jan., 2014 Maez v Riley Industrial / Chartis
  Carrier Ordered to Pay for Medical Marijuana
  May, 2014 Vialpando v Ben’s Auto Service / Redwood Fire & Casualty
  Carrier Ordered to Pay For Medical Marijuana

#IRMI2015
National Trends

**Exclusive Remedy** (Source: NCCI Sept. 10, 2015 State Advisory Forum)
- Protects Employers From Suit
- Challenged in Four States in 2015: OK, AR, IL, FL

**States Opting Out of Traditional Workers’ Comp. Systems**
(Source: NCCI Sept. 10, 2015 State Advisory Forum)
- TX and OK
- OK System Challenged in Appellate Court
- Legislation Introduced in 2015 in TN and SC
- Potential Future Legislation in AL, GA, FL, NC
- What Do These States Have in Common?

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National Trends

**Rate Trends** (Source: NCCI Sept. 10, 2015 State Advisory Forum)
- 7 NCCI States With Rate INcreases
- 31 NCCI States With Rate DEcreases
- NE -7.0%
- SD -8.9%
- WV -12.1%
- OK -7.8%
- TX -10.9%
- KS -10.4% in 2015 and -11.2% Proposed for 2016
- CA Rate Decreases in January 2015 and July 2015
### National Trends

**Opioids Prescribed For Work Comp Injuries**
- New Laws Annually
- RX Formularies
- Drug Monitoring
- Phys. Dispensing  
  (Source: [www.mymatrixx.com](http://www.mymatrixx.com), Apr., ’15)

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<td>TX</td>
<td>HB1483 &amp; SB588</td>
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<tr>
<td>UT</td>
<td>SB255 &amp; SB119</td>
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WV – 30 Suits Filed 2010-2012 for Opioid Addiction-WC Injuries  
(Source: [www.businessinsurance.com](http://www.businessinsurance.com) May 21, 2015)

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**Danke Schoen, Darling, Danke Schoen!**  
(Source: Wayne Newton, 1963)
The use of the workers' compensation experience modification factor (or EMR “rate” as it is known in the construction and energy industries), has inappropriately evolved over recent years as a measure of safety. This factor is often used as a qualifying metric to bid a project. A company may be disqualified from bidding on some projects if their modification factor is greater than 1.00. While the intention of this measure is to award contracts to companies that are safe, it may be, inadvertently, awarding them to companies who house large payrolls, instead. The experience modification factor is influenced by numerous external factors, completely unrelated to safety and many outside of the control of the employer.

Various rating organizations, such as the National Council on Compensation Insurance (NCCI), compile the injury and payroll data provided to them by workers’ compensation carriers. However, it is quite common for that information to be reported incorrectly, or for it to be incomplete, resulting in a “contingent” modification factor. These errors often go undetected, leaving an employer’s modification factor incorrect, sometimes for years. It is common to find injuries on an experience mod worksheet that have been reported into the wrong state, or even reported into a mod factor for the wrong employer. Employers may have their policy information inadvertently blended with another employer of the same name, or have estimated payrolls included in the calculation, in lieu of the final audited payrolls. Employers have actually experienced instances in which large claims have been reported by the carrier, with only $1 reported in payroll for that employer, in order that the claim data would not be rejected by the database at the ratemaking organization. These errors illustrate the importance of auditing mod worksheets to assure their accuracy.

For employers working in any of the fourteen “net reporting” states, it is frequent that the carrier fails to report the claims dollars net of the deductible that the employer reimbursed back to the carrier. In addition, few understand that even changing a policy period for a workers’ compensation policy more than 90 days from its original inception, can adversely impact an employer’s mod factor.

Recently, a client company was bidding on a project that required a .80 modification factor. This contractor was completely injury-free for more than six years, but was disqualified from bidding on the project because they had a .85 mod factor. The current actuarial formula for promulgating mod factors does not mathematically develop low mods for smaller contractors, even those who are completely injury-free. Setting these strict experience mod factor thresholds could inadvertently disqualify smaller or midsized companies from bidding on projects, despite their having an excellent safety and injury history.

Some employers do not even qualify for the development of an experience mod factor. Examples would be employers who are exiting a Professional Employment Organization (PEO), employers with minimal premiums, or relatively new, start-up companies that have not met the minimum policy period threshold to have an experience modification factor produced for their companies.

It’s also important to remember that some claims are still open and the injured worker still receiving treatment, at the time the claim dollars are reported to produce the mod factor. In those cases, the full, gross “estimated” cost of the case, once closed, is included in the mod calculation. In those instances, the mod factor will be developed using claims that are open and dollars that have yet to be paid by the carrier. It is not uncommon for such claims to be over-estimated and be closed at a much lower amount, after the carrier has already reported the original, higher estimate to the rating bureau, to produce the employer’s experience modification factor.
Included in the mod factor calculation are injuries that are the result of another’s negligence. If an employee, for example, is injured in a vehicular accident while working for his employer, workers’ compensation benefits are typically the first to respond to the injured worker. After the case is resolved, the workers’ compensation carrier may subrogate against the negligent party to recover the costs of the injury benefits they have expended. Some of these injuries are quite severe and the treatment and cases may take years to conclude. However, even though the injury was the fault of a third party, those costs are still part of calculating an employer’s experience mod factor.

In addition, each year, when rates change in each state, across more than 600 industries, rating bureaus also adjust the Expected Loss Rate (ELR) factor used in an employer’s mod factor calculation. In addition, they may also change the “developed” ratio (D Ratio) with annual rate changes. These ELR and D factors are then used in the formulation of the final experience modification factor. However, some rating bureaus apply these factors, retroactively, to previous policy years, where losses were “expected” to be higher or lower than current trends. Both of these annual changes impact the final EMR for the employer, but are actuarial factors which an employer has no control over.

Beginning in 2013, NCCI introduced a substantial change in their actuarial formula to develop the final experience modification factor for each employer. In the past, the NCCI mod factor formula used the first $5,000 of each claim. This amount was considered the “primary” portion of each injury and was weighted the heaviest in calculating the final modification factor. Every dollar of a claim over the first $5,000 was considered the “excess” portion of an injury cost, so that larger, more severe claims, had weights and ballasts placed against them in the formula to stabilize or lessen their impact to the mod factor. So, prior to 2013, $5,000 per injury was the “split point” of each claim.

In 2013, NCCI doubled that amount to the first $10,000 of each injury that is considered the “primary” portion and given the greatest weight in the mod calculation. In 2014, it was raised to $13,500 in many states and will rise again in 2015 to $15,500 per injury (more than triple the amount used in the mod factor calculation for more than twenty years). Employers who are working in multiple states could, simultaneously, have completely different versions of this formula applied in each state to produce their mod factor. While all of these formula adjustments will absolutely influence an employer’s EMR, it is critical to understand that they are state and industrywide actuarial formula changes by one ratemaking organization. They were not adopted, consistently, by all rating bureaus and are in no way a reflection of an individual employer’s commitment to safety, as employers have no control over such adjustments.

Other formulas are unique to only certain states. More than twenty NCCI states use the Experience Rating Adjustment Plan. In addition to the multiple split point formulas applied above, some states, using this “ERA” formula, will have 70% of all medical-only injury dollars, completely removed from the calculation of the experience mod factor. This could benefit an employer in one state, while their competitor in another state, has the full 100% of their medical injury costs included in their mod factor calculation.

It is important to understand that mod factors are an actuarial tool, designed for insurance carriers to address premium disparities. The modification factor was never designed to be a reflection of an employer’s commitment to safety. There are numerous articles available on this topic, some of which were released by rating bureaus themselves. We are pleased to have recently experienced some well-informed owners, contractors and energy companies seeking more detailed information that is directly related to safety and depending less upon this unreliable number, with some having eliminated its use, completely, from their prequalification requirements.

This document has been produced as a guide only and is not intended to provide legal opinion and should not be relied upon as legal advice. We recommend that you seek legal counsel on all contractual matters.
Risk Exposures and Guidelines for Working with Independent Contractors

Sonja J. Guenther and Lauren Karagozian, IMA Financial Group

The hiring of independent contractors, while beneficial because of the flexibility and cost savings, could lead to liability exposures which employers must consider before hiring independent contractors. This memo is a comprehensive, but in no way exhaustive, outline to the liability exposures when hiring independent contractors and risk management solutions to minimize those exposures.

Who is an Independent Contractor?

An Independent Contractor is a self-employed person or entity that provides goods and services to another entity under terms specified in an Agreement. An independent contractor must be:

1. Free from the business’ control and direction over how the service is performed; and
2. Customarily engaged in an independent trade, occupation, profession, or business related to the service being performed.

Independent Contract vs. Employee

An employee, like an independent contractor provides labor or services to another entity (employer). Unlike in an independent contractor relationship, an employer is responsible for the actions of their employees. An employer retains control over its employees and receives the primary benefit of their employment-related activities. Because the employer receives the primary benefit from the work performed by employees the employer also owes the employee certain rights such as Workers’ Compensation benefits.

There are key points of differentiation between the hiring of an individual as an independent contractor rather than an employee. The following are a list of factors which an employer may consider when assessing an independent contractor. When asserting independent contractor status vs. employee status the employer must consider the ENTIRE relationship between the employer and individual. Under Colorado Law (CRS§‘s 8-40-202(2)(b)(II) and 8-70-115(1)(c)), for an individual to be considered an independent contractor the employer shall not:

1. Require the individual to work exclusively for employer;
2. Establish a quality standard for Contractor; except that employer may provide plans and specifications regarding the work but will not oversee the actual work or instruct individual as to how the work is to be performed;
3. Pay to individual a salary or hourly rate, but rather will pay the individual a fixed or contract rate;
4. Terminate the work during the contract period unless individual violates the terms of the agreement between the parties or fails to produce a result that meets the specifications of the Agreement between the parties;

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5. Provide more than minimal training for individual;
6. Provide tools or benefits to individual; except that materials and equipment may be supplied;
7. Dictate the time of individual’s performance;
8. Pay individual personally; instead, employer will make all checks payable to the trade or business name under which individual does business
9. Combine its business operations in any way with individual’s business, but will instead maintain such operations as separate and distinct.

Risks Associated with Hiring of an Independent Contractor

Misclassification of Individual as an Independent Contractor
There are many associated benefits with hiring an Independent Contractor. Savings in employment taxes and benefits, avoidance of minimum wage and overtime requirement, and reduction of lawsuits for wrongful termination and discrimination claims are all benefits which are achieved through the hiring of an independent contractor. The cost savings of hiring independent contractors has caused contractors to misclassify independent contractors. An employer that misclassifies an employee as an independent contractor with no valid basis for doing so may be found liable for:

- State penalties for failure to complete due diligence on independent contractor’s status
- employment taxes, including amounts that would have been withheld in federal and state income taxes if the person were properly classified as an employee;
- back wages and penalties for violations of minimum wage, overtime and FLSA reporting requirements;
- violations of the Employment Retirement Income Security Act for failure to provide retirement and health benefits;
- Workers’ Compensation benefits for misclassified injured workers; and
- Workers’ Compensation premiums for the independent contractor’s payroll for the project.

Employer’s Liability for Independent Contractor’s Negligence
Employers can be held vicariously liable under the doctrine of respondeat superior for damages arising out of their employees’ tortious acts, if those acts occur within the scope of employment. Traditionally there was a complete exclusion to this doctrine for the liability for the tortious acts committed by independent contractors. The reason for this exception was that the employer had little or no control over the means and methods of the independent contractor’s performance. However, the evolution of the concept of an independent contract has demonstrated that the employer selects the independent contractor, benefits from the work, and is able to assume the potential risks as a cost of doing business. Therefore, exceptions to the exclusion of respondeat superior have developed. Exceptions to the independent contractor rule fall into three general categories. These conditions under which an employer can be held liable for the contractor’s negligence are as follows:

- Control of the Details
• Selection of the Contractor

Dangerous Activity

Control of Details

If the employer retains control over the manner and the means by which the independent contractor performed all or part of its work, the employer may be liable for the independent contractor’s negligence. In general, liability will be found where the employer’s actions impair the independent contractor’s ability to execute the work as it desires. At the same time, however, general oversight or maintenance by the employer is not sufficient to establish a relinquishment of the contractor’s control over a project.

Selection of the Contractor

An employer can be held liable for the negligence of an independent contractor if the employer was negligent in the selection of an incompetent contractor. This is referenced as the “contingent liability.” The law provides that one who employs an independent contractor has a duty to exercise reasonable care in selecting one that is properly qualified for the job. Accordingly, an employer must diligently investigate a contractor’s fitness and ability to perform the particular type of work for which it is hired.

Dangerous Activity

An employer can be held liable for an independent contractor’s performance of an inherently dangerous activity or peculiar risk for which certain precautions should have been taken.

• Inherently dangerous activity: An inherently dangerous activity are those in which unavoidable and foreseeable risks of harm are embedded in the very nature of the activity, demanding that either the employer or contractor take specific precautions to reduce these risks

• Peculiar risk: A peculiar risk is one in which a unique danger stemming from the nature of the work requires that special precautions be taken

The employer cannot escape liability by delegating to the independent contractor the responsibility for ensuring that adequate precautionary measures are taken. On the contrary, the employer can be held liable for the independent contractor’s negligence in the performance of its work. Most states require an employer to ensure that its independent contractors take necessary precautions when the contractor performs a task involving a peculiar risk. An employer will be held liable if, in light of its knowledge and experience, the employer could have foreseen certain risks inherent in the methods of performance and the employer failed to ensure that appropriate safeguards were in place.

Workers’ Compensation

An employer can be held responsible for Workers’ Compensation coverage as related to the hiring of an independent contractor. Under certain situations, the law will hold the employer as a “statutory employer” whereby the Worker’s Compensation of that employer would be subject to respond if an injury occurs. In addition to becoming a part of your permanent loss record and impacting your experience modification factor (for three full years), the carrier who paid the claim may also add the payroll for that worker, upon audit and at the next renewal, which could result in increased premium costs. The law will traditionally err on the side of
providing coverage to the injured individual. The two situations whereby an employer could be responsible for
Workers’ Compensation coverage of an independent contractor are:

- If the individual does not meet the legal definition of independent contractor
- If the independent contractor hires employees or enlists another individual to provide work for the benefit
  of employer

**Individual does not meet the legal requirements to be an independent contractor**
A person hired to perform services for pay is presumed by law to be an employee unless they meet the
definition of an independent contractor or qualify under a specific exemption provided by workers’
compensation laws. As referenced above, if the employer misclassifies the individual or if the individual
negligently or unknowingly identifies themselves as an independent contractor then the employer’s Workers’
Compensation policy could be subject to respond to an injury occur.

**Employees of Independent Contractors**
Most states recognize independent contractors as one person/one individual. Many states do not require
individuals to secure workers’ compensation insurance, as they are the owner and have no employees. Once
they have hired employees, they are no longer an independent contractor. However, each state differs on the
number of employees one can hire, before they are required to obtain workers’ compensation insurance. Some
states allow the hiring of up to five employees, before requiring workers’ compensation insurance. If the
independent contractor hires employees and does not provide Workers’ Compensation insurance, then the
employer’s Workers’ Compensation policy, since it is the only policy in effect, will be subject to respond.

**Third Parties brought on by Independent Contractors**
The Independent Contractor can create an exposure to employer by bringing third parties onto the site to
perform work for the benefit of the employer. If the third parties do not properly fill out independent contractor
forms AND disclaim their rights through contractual agreement, then since they are performing work which
benefits the employer, the employer could be considered the “de facto” employer and employer’s Workers’
Compensation policy will be subject to respond.

**Managing the Exposure of Independent Contractors**
It is important to manage the risk associated with independent contractor exposures in your company. The
exposure to the risk of hiring independent contractors can be avoided or significantly limited through the
following risk management procedures:

1. **Using experienced, well-managed, and verified independent contractors**
   Employers should take steps to investigate the background and years of experience of the independent
   contractor. Examine the contractor’s experience and qualifications to determine whether the contractor is
   competent to carefully perform the required work.

   Additionally, some states, such as Colorado, require that a person claiming to be an Independent Contractor
   register themselves on a formal state website. If they are not registered there, then the state does not
   recognize them as an independent contractor, and they will be required to provide workers’ compensation

This document has been produced as a guide only and is not intended to provide legal opinion and should not be relied upon as legal advice.
We recommend that you seek legal counsel on all contractual matters.
insurance. A quick internet search on a specific state with “workers’ compensation” and “independent contractors” in the search, often provides links to state requirements to start your search. Your legal counsel can also provide additional direction on state requirements in this arena.

2. **Have a Contract**
   Use legal counsel to develop a contract that you can use in subcontract agreements. A contractual agreement with an independent contractor should include, but is in no way limited to, the following:
   
   i. Language whereby the independent contractor acknowledges the independent contractor relationship. Independent Contractor should agree that they are not entitled to and waive any claim against employer for (i) UNEMPLOYMENT INSURANCE BENEFITS, (ii) WORKERS’ COMPENSATION COVERAGE, OR (iii) HEALTH INSURANCE COVERAGE (NOTE: under Colorado State law this acknowledgement must be in bold font and larger than remainder of Agreement)
   
   ii. Language whereby independent contractor obligates to pay federal and state income tax on money earned pursuant to the Agreement
   
   iii. Insurance requirements (see discussion below)
   
   iv. Agreement to provide Worker’s Compensation coverage if hiring employees. And an agreement not to bring other parties on the project site to provide services without the written permission from employer.
   
   v. A specific term of the agreement: start and end date
   
   vi. A provision outlining that independent contractor is free to work for others
   
   vii. A provision outlining the payment terms

If a claim is brought before an employer’s workers’ compensation carrier and they agree to dispute the case in court, the employer will have the burden of proof, to show that the injured party is NOT your employee. It will be crucial to produce detailed documentation showing employer’s agreement with the independent contractor and understanding of how that independent promoted themselves to employer’s company.

3. **Requiring proof of Insurance**
   Independent contractors should provide proof of coverage to the extent required by the independent contract agreement. The certificates allow the employer to determine if the independent contractor can support the risks and obligations of the agreement. The agreement should at minimum require:
   
   − General Liability Coverage. Employer should be included as additional insured and contractual liability coverage to cover the indemnification obligations of the agreement should be included.
   
   − If bringing vehicles on the site, Business automobile liability coverage

Workers’ Compensation coverage will not be provided by all independent contractors. In that case, employers will not be able to secure a certificate of insurance evidencing workers’ compensation coverage.
4. **Have all Parties Sign an Independent Contractor Form and Workers’ Compensation rejection Form**
   The independent contractor should fill out an independent contractor verification form (this is typically provided by employer’s workers’ compensation carrier) and the independent contractor “rejection of coverage by partners and sole proprietors performing construction work on construction sites” form. Again, while no single document will protect an employer from a legal action against them, this document reinforces the intent of the contractual relationship between the parties.

5. **Do Not Provide Tools or Day-to-Day Direction on the Project**
   Providing, replacing or repairing tools, or reimbursing the independent contractor for tools, can be pivotal in finding that a party was actually the employer of the independent contractor. In addition, while employers are expected to provide detail and performance expectations on the project, providing daily or frequent supervision could also create the perception that the independent contractor is actually an employee. Allow the independent contractor to maintain control over the means and methods of its assigned work.

6. **Independent Contractors Should Always Be Free to Work for Others**
   Having an exclusive agreement with a contractor could make them appear to be an employee. That’s why employer’s contractual agreement should have a written understanding that the independent contractor is free to work for others. Employers should also retrieve a tax ID# or invoice from the independent contractor and a business card. These represent that the independent contractor maintains a business, unrelated to employer’s company.

7. **Payment Terms of Your Independent Contractor Agreement**
   If you an employer pays the independent contractor on a weekly or bi-weekly basis, just as they would pay an employee, it may portray the independent contractor as an employee. The employer’s contract should denote if payment will be made as portions of the project are completed, monthly, or upon completion of the entire project. Consider having the independent contractor invoice you, each time payment is due. Your attorney can help you draft a final payment document that will memorialize the completion of the work and the contractual agreement/payment between parties. Consider the risk of paying the subcontractor in their personal name, versus their company name. In accordance with Colorado statutes, independent contractors should be paid in their business entity name or trade name, rather than being paid personally. Therefore, making checks payable to the business entity name or trade name would further evidence an independent contractor relationship. It is advisable to require independent contractors to file a trade name or form an entity.

**Summary**

The benefits of independent contractors can be great to employers and the use of independent contractors is not discouraged, however the exposure for liability of employer when hiring independent contractors should be managed accordingly. Use of the prescribed risk management procedures are not guaranteed to eliminate the exposure to employers but by establishing independent contractor agreement, evidencing independent contractor status, and establishing independent contractor protocol the exposure to risk can be significantly reduced.
Contacts
To find out more how IMA can protect your assets and manage your risk, please contact your IMA associate or:

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Notes
W9. Practical Ways To Cut Workers Comp Costs

Rating scale for all questions:

4 = Excellent  3 = Very Good  2 = Average  1 = Somewhat Disappointing  0 = Very Disappointing

Overall rating for this workshop?  4  3  2  1  0

Sonja J. Guenther
Preparation and quality of information  4  3  2  1  0
Energy and enthusiasm of delivery  4  3  2  1  0
Educational focus (not a sales pitch)  4  3  2  1  0

Comments:

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