

Misguided

Workers comp and the misclassification of employees

By Cara Gates

The year is 1910. The ponderous William

Howard Taft is President, the Boy Scouts of America is incorporated, the first (unofficial) Father's Day is observed and the first workers

compensation statute in the U.S. is enacted in New York—unleashing a pivotal change in the country's insurance landscape.



Such statutes, now legislated in all 50 states and Washington, D.C., provide essential medical, disability, rehabilitation and death benefits for employees' job-related injuries and diseases, regardless of fault. They remove an employee's ability to sue their employer in exchange for providing no-fault protection and specified payment—but only if the statute applies.

Some statutes exempt employers with less than a specific number of employees. Others exempt employers of a certain type, such as farm labor and domestic workers. Failing to understand the details of employee classification can result in inaccurate reporting, which can lead to an assessment of additional premium after an audit.

Typically, employers are not required to provide workers comp insurance to contractors who receive a 1099 form at the end of the year. However, disputes frequently arise over whether a worker is an employee or an independent contractor.

Employment status is a question of fact, not of law. Courts make determinations on a case-by-case basis and consider a number of factors, such as the duration of employment, the method of payment, the right to exercise control over the work, who supplies the tools and equipment necessary to complete tasks, and who sets the work schedule. Note that historically, courts interpret the definition of "employee" broadly, erring on the side of providing protection to injured workers.

One real-life errors & omissions claim arose when an agency's client had a written independent contractor agreement with an injured worker. Later, it surfaced that the injured party was actually an employee of the client.

The injured party sued the client, which in turn filed a lawsuit against the agency asserting a general negligence claim. Beyond the additional premium, the client claimed damages including expenses paid to the injured worker, as well as business loss because the entity for whom they were completing the job canceled a future contract with the client. The lost business claim significantly increased the settlement value of the case.

As this claim shows, if you fail to secure accurate information from a client at the time of the original application, the damages they may claim against your agency could amount to more than just the additional premium assessed at audit.

Do your homework to avoid misclassification of employees and understatement of payroll. Ensure that the information your workers comp client reports on their application accurately describes their business operation, including proper classification and count of all employees.

Cara Gates is an assistant vice president, claims specialist with Swiss Re Corporate Solutions and works out of the office in Overland Park, Kansas. Insurance products underwritten by Westport Insurance Corporation, Overland Park, Kansas, a member of Swiss Re.

This article is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose. Swiss Re shall not be held responsible in any way for, and specifically disclaims any liability arising out of or in any way connected to, reliance on or use of any of the information contained or referenced in this article. The information contained or referenced in this article is not intended to constitute and should not be considered legal, accounting or professional advice, nor shall it serve as a substitute for the recipient obtaining such advice. The views expressed in this article do not necessarily represent the views of the Swiss Re Group ("Swiss Re") and/or its subsidiaries and/or management and/or shareholders.

Copyright © 2017, Big "I" Advantage, Inc. and Westport Insurance Corporation. All rights reserved. No part of this material may be used or reproduced in any manner without the prior written permission from Big "I" Advantage. For permission or further information, contact Agency E&O Risk Manager, 127 South Peyton Street, Alexandria, VA 22314 or email at info@iiaba.net.