

Questions & Answers Regarding Amateur Sport Officials & Referees under the Wisconsin Worker's Compensation Act

Department of Workforce Development
Worker's Compensation Division
201 E. Washington Ave., Rm. C100
P.O. Box 7901
Madison, WI 53707-7901
Telephone: (608) 266-3046
Fax: (608) 266-6827
<http://dwd.wisconsin.gov/wc>
emai:DWDDWC@dwd.wisconsin.gov

Recently, there has been considerable discussion and perhaps some confusion and misunderstanding about the status of amateur sport officials and referees under the Wisconsin Worker's Compensation Act (Act). This document addresses these various issues.

1. Was there a recent law change regarding the status of amateur sport officials under the Worker's Compensation Act?

Answer: No. The worker's compensation law pertaining to the employment status of amateur sport officials and referees under the Act has not changed--nor has the Department of Workforce Development's interpretation of referees' status under the Act changed.

2. When was the current law enacted?

Answer: January 1, 1990. Since 1990, the Act has set forth a nine-point independent contractor test under s. 102.07 (8) (b), Wis. Stats., that an individual must meet to be considered an independent contractor. An independent contractor who meets the nine-point test is not an employee under the Act.

Under worker's compensation, a contractor/independent contractor relationship is determined, in each case, solely by the evidentiary facts relating to the nine-point statutory test. Any worker's compensation claim filed by an independent contractor injured while performing services is also determined on a case-by-case basis according to the facts and circumstances at the time of injury. To be considered an independent contractor and not an employee, an individual must meet the nine-point statutory test.

3. What is the nine-point independent contractor test?

Answer: A contractor/independent contractor relationship is determined based upon the nine-point test. Under s. 102.07 (8) (b), Wis. Stats., an individual is required to meet a nine-point statutory test to be an independent contractor rather than an employee. A person is not an employee of an employer for whom he or she performs work or services if he or she meets the following nine-point test:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Note: The Wisconsin worker's compensation independent contractor nine-point test is nearly identical to the standard checklist currently used by school districts as a guide to check for IRS compliance on independent contractors.

4. Can you give a point-by-point plain-language explanation of the nine-point independent contractor test?

Answer: Yes.

Point 1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

Explanation: The individual must maintain a separate business with his or her own office, equipment, materials and other facilities. Does the worker have what is needed or essential to do their job or are essentials provided by the employing unit? Consider the type of business when determining what business assets are reasonable to expect the individual to have. For instance, it would be reasonable to expect that a machinist would have tools and equipment and a facility other than his or her home from which to work. It would not be as likely that a computer consultant would have a facility other than an office in his or her home, but a computer, modem, and fax would be essential.

Point 2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.

Explanation: The individual must either hold or have applied for a Federal Employer Identification Number (FEIN) or, the individual must have filed federal self-employment or business tax returns in the previous year based on the type of service they're providing to the employing unit or, in the case of a new business, in the year in which such services were first performed. Remember, this is an either or requirement -- either holds or has applied for a FEIN or has filed self-employment income tax returns with the IRS in the previous year.

Point 3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.

Explanation: The individual must operate under contracts to perform specific services for specific amounts of money and under which the individual controls the means and method of performing the services. An agreement between the worker and the employing unit is a contract, whether that agreement is oral, written, or limited to the practices followed. An employing unit may direct what should be done by an independent contractor, but the individual should determine how to accomplish the job.

Point 4. Incurs the main expenses related to the service or work that he or she performs under contract.

Explanation: The individual should incur the main expenses related to the services being performed. If expenses are reimbursed by the employing unit, it is unlikely that the individual will meet this criterion.

Point 5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.

Explanation: The individual is responsible for the satisfactory completion of the services and is liable for failure to satisfactorily complete the services. If rework is necessary, will the worker be required to perform the work at no additional cost to the employing unit? If the work is not completed according to contract, can the employing unit sue for breach of contract? An independent contractor is most likely responsible for completing the job to the satisfaction of the employing unit.

Point 6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

Explanation: The individual receives compensation for services performed on a commission or per job or competitive bid basis and not on any other basis. An individual paid strictly by the hour would not meet this requirement unless the hourly rate is part of a bid or per job agreement.

Point 7. May realize a profit or suffer a loss under contracts to perform work or service.

Explanation: The individual must be able to realize a profit or suffer a loss under contracts to perform services. If the worker has expenses that may exceed income, this criterion would be met. This would be true, for example, if an individual underbid and material costs exceeded money received for the job.

Point 8. Has continuing or recurring business liabilities or obligations.

Explanation: The individual has recurring business liabilities or obligations. If the worker has liabilities that continue whether or not he or she has customers, this item would be met. Some examples of liabilities are lease payments, insurance, advertising, professional fees, rent, and interest.

Point 9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Explanation: The success or failure of the individual's business depends on the relationship of business receipts to expenditures. If success or failure of the worker's business depends on something else, such as a single source supplier or a single employing unit's sales license, this requirement is not met.

5. Can a referee waive his or her right to worker's compensation?

Answer: No. No agreement to waive the right to compensation is valid under s. 102.16 (5), Wis. Stats. Even if an individual signs a waiver, it is not valid and would have no effect on the validity of a worker's compensation claim.

6. What if a school hires a teacher or other school district employee to referee a sporting event. Is that referee an employee or an independent contractor?

Answer: It depends upon the contractual agreement made between the two parties and the referee's status under the nine-point independent contractor test. Under this scenario, a separate contract covering the refereeing duties is key. *Remember Point 3 of the test--an independent contractor must operate under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.*

If a school district employee referees events as part of his or her teaching contract or under no contract at all, the referee is considered an employee of the school district and the referee is covered under the Act.

If a school district employee referees events under a separate contract for each event he or she referees, and he or she meets the nine-point independent contractor test under s. 102.07 (8) (b), Wis. Stats., the referee is considered an independent contractor and the referee is not covered under the Act.

7 Should a separate contract be executed with an individual for each event he or she is hired to referee?

Answer: Yes. A contract is a legally enforceable agreement between two or more parties to create reasonably specific mutual obligations. While a written contract does not automatically make a worker an independent contractor, it helps. A written contract also can alleviate misunderstandings about the scope of work, payment schedule, deadlines, insurance and helps establish a referee's independent contractor status by showing that both you and the referee intended to create a contractor/independent contractor relationship, not an employer/employee relationship. A written contract should set forth the terms of the relationship, such as:

- ✓ a description of the services the referee will perform
- ✓ a description of how much you will pay the referee (usually a fixed fee)
- ✓ a description of how and when you will pay the referee
- ✓ an explanation of who will be responsible for expenses (independent contractors pay their own expenses)
- ✓ an explanation of who will provide materials and equipment (independent contractors usually provide these things, but not always)
- ✓ a statement that you and the referee agree to an independent contractor relationship
- ✓ a statement that the referee has all of the certifications, permits and licenses required to do the work
- ✓ a statement that the referee will pay state and federal income taxes
- ✓ an acknowledgment by the referee that he or she is not entitled to any of the benefits you provide employees
- ✓ a statement by the referee that he or she carries liability insurance and/or disability insurance
- ✓ a description of the term of the agreement (for example, one game, a tournament)
- ✓ a description of the circumstances under which you or the referee can terminate the agreement, and
- ✓ an explanation of how you and the referee will resolve any disputes

Note: It is important to remember that simply having a signed independent contractor contact with a referee does not automatically create an independent contractor status—the referee must meet the nine-point independent contractor test in the course of performing the contractual responsibilities.

8. Can a bona fide contractor/independent contractor referee employment relationship inadvertently evolve into an employer/employee relationship during the course of a contract?

Answer: Yes, it can happen—if you let it happen. If a referee is requested to do something outside the scope of the contract and is injured—he or she could be found to be an employee by asserting that they were performing work outside of the scope of the contract, providing a service unrelated to his or her independent business, under the direction and control of the contractor, as an employee—not as an independent contractor. Even a minor deviation from a contract and/or the nine-point test may affect the status of an employment relationship under the Act. Any deviation from the nine-point test may cause a contractor/independent contractor relationship to evolve into an employer/employee relationship.

It is incumbent on the hiring authority to ensure the duties of a referee are limited to the duties described in the contract.

9. What happens if a referee is injured and there's a dispute as to whether he or she is an employee or an independent contractor?

Answer: Generally, if there is a dispute regarding insurance coverage, remuneration and/or benefits, it is adjudicated by the Worker's Compensation Division on a case-by-case basis according to the facts and circumstances at the time of injury.

If a referee meets the nine-point independent contractor test, the referee is not considered an employee under the Act and thereby, not eligible for worker's compensation benefits.

If a referee does not meet the nine-point independent contractor test, the referee is considered an employee under the Act of whomever hired and paid the referee for his or her services and thereby, is eligible for worker's compensation benefits.

10. In a nutshell, what are the key elements to understand when entering into a contract with an independent contractor?

Answer: 1) The nine-point statutory test set forth under s. 102.07 (8) (b), Wis. Stats., must be met before an individual working under another person is considered an independent contractor. 2) Look at the entire relationship, consider the degree or extent of the right to direct and control, and document each of the factors you used in determining the validity of the independent contractor status. 3) Have a written contract that clearly sets forth the terms of the contractor/independent contractor relationship. 4) It is incumbent on the hiring authority to ensure the duties of an independent contractor are limited to the duties described in the contract. 5) Any deviation from a contract and/or the nine-point test may affect the status of an employment relationship under the Act and may cause a contractor/independent contractor relationship to evolve into an employer/employee relationship. 6) Any worker's compensation claim filed by an independent contractor injured while performing services is determined on a case by-case basis according to the facts and circumstances at the time of injury.

11. Where can I get more information about coverage under the Wisconsin Worker's Compensation Act?

Answer: Contact the Wisconsin Department of Workforce Development - Worker's Compensation Division at (608) 266-1340 or write to P.O. Box 7901, Madison, WI 53707-7901. The Division is located in the GEF 1 State Office Building, Room C100, 201 E. Washington Avenue, Madison. The Division also has a variety of information relating to this and other compliance issues on its internet site at: <http://dwd.wisconsin.gov/wc>