

Who Goes There? Who is on Site and What Obligations do you owe Them?

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Maine Safety & Health Conference
October 19, 2022



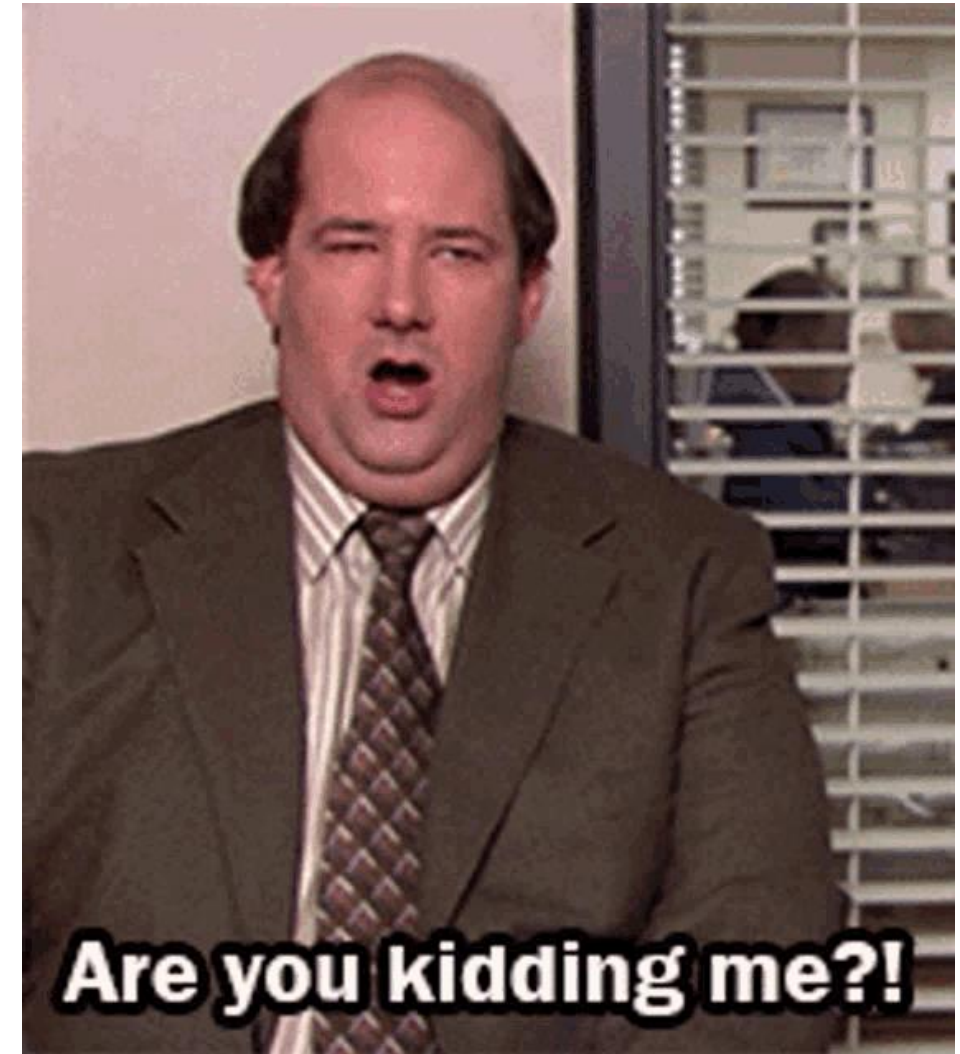
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Essentially, any legal issue at a worksite will always involve a consideration of whether the involved parties are employees or independent contractors.



- Proper classifications changes what duties are owed to them and the scope of liability for you and the company.



Why it Matters

- OSH Act
 - The OSH Act covers all *employees*, regardless of their title, status, or means of compensation.
 - Independent contractors *are not* covered under the OSH Act.
 - Example:
 - “Rust” set shooting.

Why it Matters cnt.

- Harassment
 - Employees
 - Much more clear cut.
- Independent contractors
 - Many fail to realize that a company *can* also be liable for the inappropriate actions of third parties *i.e.* independent contractors.

Why it Matters cnt.

- Personal injuries/torts.
- Common issues
 - Car accidents to and from work/work site.
 - History of unsafe practices/recklessness.
 - Individuals being impaired due to drugs or alcohol at work and leaving.

The Nuts and Bolts

- Central question: Who has **control** over how work is performed, the worker or the employer?
- An employer maintains significant oversight in **how and when** the work of an employee is performed .



The Nuts and Bolts cnt.

Required Factors – Answer Must Be Yes To All

Is the individual free from direction or control of the employing unit?

Does the individual have the essential right to control the means and progress of the work except as to final results?

Is the individual customarily engaged in an independently established trade, occupation, profession or business?

Does the individual have the opportunity for profit and loss as a result of the services being performed for the other individual/entity?

Does the individual hire and pay his or her assistants (if any) and to the extent that these assistants are employees, supervise the details of their work?

Does the individual make their services available to some client or customer community even if their right to do so is voluntarily not exercised or is temporarily restricted?

*For Workers' Compensation Board and Maine Department of Labor (not IRS or MRS)

The Nuts and Bolts cnt.

Must ALSO Meet Any Three of These Factors

The individual has a substantive investment in the facilities, tools, instruments, materials & knowledge used by the individual to complete the work.

The individual is not required to work exclusively for the other individual/entity.

The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.

The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual/entity prior to completion of the work.

Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual.

Such work is outside the usual course of the business for which the services are performed.

The individual has an IRS Determination (SS-8) of independent contractor status.

- What is said
 - Called an independent contractor.
 - Agreement says so.
 - No taxes withheld.
 - Has always “been” an independent contractor.
- Yeah, but.....



- Will is engaged in delivering plumbing parts to construction sites.
- Bob is employed by the General Construction Co. Bob oversees all deliveries.
- One morning, Will is backing up his truck to make a delivery at a General Construction Co worksite. Will hits Bob and Bob is seriously injured.
- General Construction Co. gave instructions on where to deliver the plumbing parts, to whom they were to be delivered, and by what time they were to be delivered.
- General Construction Co. did not control his method of delivery.
- Will supplied his own car, his own gas, and paid for his own insurance. Will's pay came directly from the General Construction Co.
- Will's contract with General Construction Co says he is an independent contractor.

- Company A owns and operates a stone yard.
- Company B is a regional sales company that specializes in direct sales to worksites for commercial kitchens.
- Company C is a construction company and often buys Company A's products through Company B.

- Pat works for Company A as a delivery person. Chuck is Company B's leading salesman. Jim is a project manager for a worksite operated by Company C.

- Pat makes multiple deliveries to the Company C worksite.
 - Multiple times, Jim witnesses Chuck using racial slurs describing Pat. Jim is not sure if Pat heard these comments.
 - Jim's other co-workers generally know that Chuck makes frequent inappropriate racial comments.
 - Jim is not aware whether Pat has made any formal or informal complaints to Company A, B, or C.

Site Control & Risk Management Considerations

- OSHA
 - 29 CFR Part 1910. “Occupational Safety and Health Standards”
 - 29 CFR Part 1926. “Safety and Health Regulations for Construction”
- Contract Obligations
 - See e.g. A201 – Sections 3.3.1, 10.1-10.4.

Site Control & Risk Management Considerations

- Legal Duty
 - To Whom?
 - Commercial Reasonableness?
 - Who decides?

Legal Responsibility

- Workers Compensation
- Fault
- Indemnification
 - To the Extent of Fault
 - For another's negligence
 - Limitations



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