

Employment Issues - But We Do Not Have Any Employees

Have you ever attended an association meeting in a room that was set up by the association maintenance man, where the board has stated that it has no employees?. Most boards do not want to believe that they have an employee, that they have a potential for significant claims against them as a result of any acts or omissions of that individual; or as a result of injury to that individual; or tax obligations as a result of that individual's failure to properly account for and/or pay taxes. All of those possibilities are real and probable. They cannot be swept away by the board's opinion, even if the individual, at some point in time, agrees to be an independent contractor.



INDEPENDENT CONTRACTOR

An independent contractor is someone that is independent and not an employee. That is, they are not dependent upon any particular entity for whom or to whom they provide services. A good measure of independence is if the individual or entity receives less than fifty percent (50%) of their income from one source. There are other criteria such as, is there control over the coming and going, the work specifics and timing.

One way to try and determine if someone is an independent contractor is if they have

established an entity other than a sole proprietorship to provide services. That entity should be incorporated and has a separate tax identification from any of the individuals providing services as a part of that entity. It should have insurance, including liability, property damage, and workmen's compensation coverage for each employee that provides services of any type and for each activity. Generally, it would have its own equipment supplies and vehicles with insurance for those vehicles. Again, it controls the timing of work and the personnel.

EMPLOYEES

Generally, employees are individuals or entities that receive a substantial part of their total compensation from a single source. They do not control their time or activities. The entity they work for controls their time and activities. They are provided with facilities and equipment. Under Illinois Law, there are other definitions of an employee that can apply and will automatically apply in different circumstances. Consequently, someone such as a maintenance person, who works primarily for one association, may be an employee as a result of receipt of a substantial portion of the individuals' income from a single source. If that individual or entity has facilities at the association that they utilize or occupy, that is a further confirmation of employment. If they utilize the association vehicles and equipment that would show they are an employee. If there is a code of conduct, procedures, rules, policies or schedules that they are required to follow or utilize and/or if they had

specific hours at the site, they may be an employee. If they work for the employer more than a thousand hours a year, then they more likely than not are an employee notwithstanding any representations, agreements, or documentations to the contrary.

Illinois Workmen's compensation law makes many individuals employees if they are injured or killed in the scope or course of employment. Under workmen's compensation law therefore, the definition of an employee is very broad. An independent contractor company that does not have workmen's compensation insurance generally, or for the employee providing services at the association, will result in the individual providing services being considered an employee of the association under the workmen's compensation law, if that individual is injured or killed in the scope or course of the work for the association. That might include traveling to or going from the association, or on an errand to secure a part. Careful review of the contractors workmen's compensation policy is important to avoid potential liability. Most associations do not have their own workmen's compensation coverage but they should. A board member

going to the hardware store to get some parts for the association who is injured or killed during that activity may be considered an employee under

Illinois workmen's compensation laws. A volunteer association member installing flowers in the common elements as a community project that injures their back during that process may be considered an employee under Illinois workmen's compensation

CAUTION
PAYMENT TO UNIT OWNERS
FOR SERVICES MAKE THEM
EMPLOYEES

laws and may be entitled to compensation for that injury notwithstanding the fact that they are not paid and are a volunteer. Most certainly any payment of an owner for any service makes them an employee for all purposes. Any payment of a board member for performing services other than board related functions payment for acting as a board member, makes those individuals employees. Consequently, the board should look very cautiously at its activities and the activities of the board members, or owners on behalf of the association.

Contractors and subcontractors are not automatically exempt from being an employee. One must always look at the basic definitions as identified above. A contractor can qualify as an employee and have employee rights. Caution and careful review of the relationships of each entity and/or individual is necessary; along with careful review and confirmation of their insurance and other documentation. For example if someone claims to be an independent contractor, ask them for their federal identification number. Have them fill out a W-2 form for tax purposes. Check with the Secretary of State to determine whether they are incorporated and in good standing. If the work and scope of work are substantial, or if the amounts are substantial, ask them to provide a certificate of good standing and their entire insurance policy. If they are a contractor, carefully review the contract to make sure it confirms the relationship along with many other items that need to be checked and confirmed. If they are a subcontractor, you need to see the same documentation plus their contract and agreement with the contractor.

HIRING/FIRING

The ability to fire is determined less by the nature of the relationship, than by the nature of the agreement between the parties, whether or not in writing. In Illinois generally employees work at the will and of the determination of the employer. That is, employees can

be terminated at any time without cause. If there is a written employment agreement that specifies terms of employment and time periods, then firing cannot be done except in accordance with the provisions of that written agreement. That is true both for employees and for independent contractors. If you want the right to fire that must be specifically set forth in any written agreement with either the employee, if they have a written agreement of employment, or with the independent contractor. If you have an employee manual, then the employee manual may preclude you from firing except in accordance with the provisions of the manual. If the employee is a union employee, then the only method of termination is in accordance with the union procedures, or by permission of the union if outside of the union procedures.

TAXES, TAXES, WHO PAYS THE TAXES



If you are an employer, you must withhold taxes from an employee's pay in accordance with the state, federal, and other governmental requirements. That money must be deposited with the appropriate governmental agencies in accordance with the laws that are established. If they are not, then you as an employer can be penalized. In addition to the amounts withheld, employers pay additional amounts on behalf of the employee. Those amounts also must be deposited.

Independent contractors generally pay their own taxes, benefits, and other obligations. They pay the tax obligations on behalf of their employees. They make union contributions and governmental payments, including the amounts

that they are obligated to pay, independently. However, if they do not make those payments or pay those obligations on behalf of their employees out of funds the association pays them, and if the association and the independent contractor are not truly independent, then the association may be liable for all of the amounts or deposits that the contractor did not pay, and for any and all penalties that become due as a result of the failure to make those payments.

WAIVERS DO NOT WORK

We are often asked whether we can prepare different types of waiver of liability or waiver of obligation on behalf of an association that wishes to identify their employees as independent contractors. In our opinion, that alone will not work. Additionally, because the state and federal government focus is to protect employees from losses as a result of injury or death, these types of agreements will not negate liability under workmen's compensation laws or to third parties. They may be somewhat useful to try and prove independence, but of course, there is much more that must be included and considered in order to have actual independence. Even when there is independence and they are independent contractors, the association must be diligent in its dealings and secure all of the necessary documentations and confirmations to insure independence and minimize liability. Even then, it should have all of its insurance protections and other association protections and documentations in place.

Please feel free to contact any of the firm members of Dickler, Kahn, Slowikowski & Zavell, Ltd., for assistance in dealing with contractors, subcontractors, and all types of contractual, employment and business matters.

