

THE UOSH
SAFETY LINE
SEPTEMBER
2010

Utah Occupational Health and Safety Division (UOSH)
160 East 300
South Salt Lake
City, UT 84111

Compliance
801-530-6901

Consultation Program
801-530-6855

Utah Labor Commission
801-530-6800

Work related fatalities, serious injuries, and imminent danger situations are to be reported to UOSH within 8 hours of the injury. Report seven days a week by calling 801-530-6901.

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AM I AN "EMPLOYEE"?

DEFINING THE EMPLOYMENT RELATIONSHIP

This article by Alan Hennebold is a reprint from the Labor Commission's quarterly newsletter "ON THE JOB."

<http://www.laborcommission.utah.gov/AdministrativeServices/Newsletters/index.html>

Every organization—whether it's a large manufacturer or a small non-profit—depends on the skill, Muscle, and intellect of workers to accomplish the organization's objectives. In turn, workers depend on their work as a means to earn a living and contribute to society. So, for most of us, the world of work is critically important.

Work can be organized and accomplished in different manners. An individual might work as a business owner, a partner, or an independent contractor. But most often, work is performed by "employees" for "employers." We don't often worry about defining the employer/employee relationship—we just know it when we see it. This gut-level approach is usually adequate because most work is performed under circumstances that plainly constitute employment, there is no need to consider the matter further. But sometimes it is not so clear whether a particular individual should be classified as an employee or as something else. Usually, the question is whether the individual is an "employee" or an "independent contractor."

Significance of employer/employee relationship.

This distinction between employee and independent contractor has important consequences for both the business and the individual. For example, the protections provided for employers and employ-

ees by Utah's workers' compensation system do not generally extend to independent contractors. State and federal antidiscrimination laws cover employment and application for employment, but not independent contractors. Likewise, state and federal laws regarding payment of wages and occupational safety and health do not extend to independent contractors.

Employment relationship defined.

Because the Utah Labor Commission has responsibility for enforcing these laws, it must decide whether, under the particular circumstances of a specific case, an individual is an employee or an independent contractor. In judging these cases, the Commission first looks to the definitions provided by statute—for example, § 34A-2-103 of the Utah Workers' Compensation Act provides a four-part definition of independent contractor. But Utah statutes do not attempt to provide detailed definitions of "employer" or "employee." Instead, the statutes defer to the judicial definitions that have been developed over time by the Utah Supreme Court.

One of the important cases defining the employer/employee relationship is *Bennett vs. Industrial Commission*, 726 P.2d 427 (Utah 1986). There, the Utah Supreme Court observed that: "... it will almost always follow that if the evidence shows that an employer retains the right to control the work of the claimant, the claimant is the employer's employee Certainly, the right to control is not to be rigidly and narrowly defined . . ." The Court then identified several factors that frequently resolve this question of "right to control": actual supervision, extent of supervision, method of payment, furnishing equipment, and the right to terminate.

The Utah Supreme Court's decision in *Bennett vs. the Industrial Commission* is consistent with the law in

other states. As Professor Larson observes in his multi-volume treatise, *Larson's Workers' Compensation Laws*, Vo. 3, §61.01: "It is almost always said . . . that the fundamental test of employment relation is the right of the employer to control the details of the work, and that all other tests are subordinate and secondary." Accordingly, the ultimate question in evaluating a work relationship is the employer's **right** to control the details of the work—not organizations may have to provide assistance for misclassified workers who have been injured or who have not been paid wages. Employers who have acted responsibly by obtaining workers' compensation coverage for their employees may be required to contribute to the cost of benefits for the misclassified employees of uninsured employers. This is only a partial list of the harms that result from worker misclassification.

Existing remedies and possible legislative action.

As noted above, the Commission is not bound by the labels parties give to their work relationships. If the facts demonstrate an employment relationship, the Commission will enforce the rights and duties that attach to that relationship. The Commission may also penalize employers who have failed to provide workers' compensation coverage, pay wages, or fulfill other obligations as a result of their misclassification of employees.

The remedies currently available to the Commission can be significant in individual cases, but the Legislature's Business and Labor Committee is currently evaluating the issue of worker misclassification to determine the nature and extent of the problem, and whether additional legislation should be proposed in the 2011 legislative session to further address the problem. ■

SWEET CANDY COMPANY RECEIVES SHARP RECOGNITION



Sweet Candy Company is a family-owned and operated company that has been in business since 1892. The company specializes in the production and distribution of more than 250 quality candy items nationally and internationally. The company moved its operations in Portland, Oregon to Salt Lake City in 1900 and finally to its current location in 1999.

In 2003, Sweet Candy Company had the distinction of being Utah Occupational Safety and Health's **first** recipient of the prestigious SHARP award. The SHARP (Safety and Health Achievement Recognition Program) award is a formal recognition of small employers that are able to establish and maintain an outstanding safety and health management system as well as maintain employee injury/illness rates lower than the national average for their industry. Since 2003, Sweet Candy Company has maintained a tradition of excellence in preserving that strong safety culture established so many years earlier. On December 5, 2009, the company was officially granted approval for SHARP status, this being their **third** renewal! Sweet Candy Company was recognized for this achievement in a ceremony at their facility on August 3, 2010. The Labor Commission would like to once again congratulate this outstanding company for their achievement and continued efforts to maintain a safe and healthful working environment for their employees.



Health and Wellness

Watch out for Carbon monoxide poisoning

Carbon Monoxide (CO) is a colorless, odorless, toxic gas which interferes with the oxygen-carrying capacity of blood. CO is non-irritating and can overcome persons without warning. Many people die from CO poisoning, every year, usually while using gasoline powered tools and generators in buildings or semi-enclosed spaces without adequate ventilation.

The Effects of Severe CO Poisoning are: neurological damage, illness, coma and death.

Symptoms of CO Exposure are: headaches, dizziness and drowsiness. You may also experience nausea, vomiting, and tightness across the chest.

Some Sources of Exposure are: Portable generators/generators in buildings. Concrete cutting saws, compressors, power trowels, floor buffers, space heaters, welders, and gasoline powered pumps.

Preventing CO Exposure Never use a generator indoors or in enclosed or partially enclosed spaces such as garages, crawl spaces, and basements. Opening windows and doors in an enclosed space may prevent CO buildup.

Make sure the generator has 3-4 feet of clear space on all sides and above it to ensure adequate ventilation. Do not use a generator outdoors if placed near doors, windows or vents which could allow CO to enter and build up in occupied spaces.

When using space heaters and stoves, ensure that they are in good working order to reduce CO buildup, and never use in enclosed spaces or indoors.

Consider using tools powered by electricity or compressed air, if available.

If you experience symptoms of CO poisoning, get to fresh air right away and seek immediate medical attention.

Safety Compliance Corner

Question: Are the face masks/dust masks available at home improvement stores, and other outlets, considered respirators by OSHA/UOSH?

Answer: Yes, this type of face mask is considered a respirator **if it has a NIOSH certification**, such as N95, N98, or N100 printed on the mask. (It is not considered a respirator if it does not have the NIOSH certification.) These respirators are considered a tight-fitting face-piece respirator and can be fit tested for particulates. Most of these are meant to be one-use, disposable respirators. Any employer who requires their employees to wear a tight-fitting face-piece respirator while working must comply with the OSHA standard. As with all respirators, the employer is required to assess the hazards in a workplace and have a written respirator program that includes: (1910.134(c)(1)(i through ix)

- (i) Procedures for selecting respirators for use in the workplace;
- (ii) Medical evaluations of employees required to use respirators;
- (iii) Fit testing procedures for tight-fitting respirators;
- (iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
- (v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding and otherwise maintaining respirators;
- (vi) Procedures to ensure adequate air quality, quantity, and flow of breathing are for atmosphere-supplying respirators;
- (vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
- (viii) Training of employees in the proper use of respirators, including putting on and removing them, and limitations on their use, and their maintenance, and
- (ix) Procedures for regularly evaluating the effectiveness of the program.