



ON-THE-JOB

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AM I AN "EMPLOYEE?" DEFINING THE EMPLOYMENT RELATIONSHIP

By Alan Hennebold

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 employees 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 v. Industrial Commission*, 726 P.2d 427 (Utah 1986).

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Workers' CompCheck

By Ron Dressler

As many of you are aware, in the Fall of 2008 the Division of Industrial Accidents, with the help of the National Council of Compensation Insurance (NCCI), implemented a new on-line workers' compensation verification tool.

This tool is appropriately called "Workers' Comp-Check" and conveniently allows interested parties to verify workers' compensation insurance coverage.

Medical providers need to know who to bill, attorneys need to know who to contact to manage workers' compensation cases for clients, and injured workers want to know if their employer is covered.

Before this tool was available Industrial Accident's staff would field hundreds of calls a week relating to coverage verification. Now, not only has this tool made the process more convenient for our stakeholders but as state and local governments are working towards becoming more efficient, the Industrial Accident's staff has more time available for other important tasks.

The coverage information contained therein relates back to 1986. Earlier information will have to be obtained from the Industrial Accidents staff.

Over the past year this tool has averaged over 1,200 hits with 5,000 searches per month, proof of the effectiveness of this resource.

Defining the Employment Relationship

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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* 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 whether the employer actually exercises that right.

An experienced worker may not receive much supervision on a day-to-day basis, "yet it will often be found that the employer, in any showdown, would have the ultimate right to dictate the method of work . . ." *Larson's* at §61.02. Furthermore, the labels the parties themselves attach to their relationship are not ordinarily controlling. Instead, the Commission will look to the actual facts of the relationship. Where the evidence shows a right to control the details of the work, an employer/employee relationship exists.

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Easy tool to use: On the home page of the Utah Labor Commission as well as the Division of Industrial Accidents, there is a red and blue box

that says "Ensure you're Insured, click on Workers CompCheck."

This will take you to a page with information as well as our disclaimer, then when you click on the link on this second page another window opens in your browser connecting you to NCCI's site. Here you can enter information regarding an employer about which you wish to verify coverage. It defaults to today's date, however, you can enter a different date.

PREDATORY LENDING



By Dan Singer

The Utah Antidiscrimination and Labor Division of the Utah Labor Commission investigates claims of housing discrimination. With the volatility of the housing market in recent years, one steadily increasing type of discrimination is lending discrimination. Discrimination in mortgage lending is prohibited by the State and Federal Fair Housing Acts and the UALD actively enforces those provisions of the law.

The Fair Housing Act makes it unlawful to refuse to make a mortgage loan, or impose different terms or conditions on a loan (for example, setting different interest rates, points, or fees) based on race, color, national origin, religion, sex, familial status or disability.

Subprime Lending

Subprime loans play a significant role in today's mortgage lending market, making homeownership possible for many families who have blemished credit histories or who otherwise fail to qualify for prime, conventional loans. While the subprime mortgage market serves a legitimate role, these loans tend to cost more and sometimes have less advantageous terms than prime market loans. Additionally, subprime lenders are largely unregulated by the federal government.

Predatory Lending

Some lenders, often referred to as predatory lenders, saddle borrowers with loans that come with

outrageous terms and conditions, often through deception. Elderly women and minorities frequently report that they have been targeted, or preyed upon, by these lenders. The typical predatory loan is: (1) in excess of those available to similarly situated borrowers from other lenders elsewhere in the lending market, (2) not justified by the creditworthiness of the borrower or the risk of loss, and (3) secured by the borrower's home.

Here are some tips for avoiding becoming the victim of a predatory lender, and for making an informed loan purchase.

1. Interview several real estate professionals (agents), and ask for and check references before you select one to help you buy or sell a home.
2. Get information about the prices of other homes in the neighborhood. Don't be fooled into paying too much.
3. Hire a properly qualified and licensed home inspector to carefully inspect the property before you are obligated to buy.
4. Shop for a lender and compare costs. Be suspicious if anyone tries to steer you to just one lender.
5. Do NOT let anyone persuade you to make a false statement on your loan application, such as overstating your income, the source of your down payment, failing to disclose the nature and amount of your debts, or even how long you have been employed. When you apply for a mortgage loan, every piece of information that you submit must be accurate and complete. Lying on a mortgage application is fraud and may result in criminal penalties.
6. Do NOT let anyone convince you to borrow more money than you know you can afford to repay.
7. Never sign a blank document or a document containing blanks. If information is inserted by someone else after you have signed, you may still be bound to the terms of the contract. Insert "N/A" (i.e., not applicable) or cross through any blanks.

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PREDATORY LENDING

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8. Be suspicious when the cost of a home improvement goes up if you don't accept the contractor's financing.

9. Avoid using a lender or investor that tells you that they are your only chance of getting a loan or owning a home.

If you believe that you are the victim of predatory or discriminatory lending practices based on your race, color, national origin, religion, sex, familial status or disability, please contact the Utah Antidiscrimination & Labor Division at 801-530-6801. Intake staff are available to explain your rights and help you file a claim of discrimination.

You can find additional information on lending discrimination at http://www.hud.gov/offices/fheo/MarketingMaterial/HUD_Booklet_042309.pdf



constitute a uniform under the Commission's definition. The Court of Appeals also noted that the Labor Commission had itself rejected Mr. Juricic's claim several years earlier. The Court of Appeals observed that the Commission's interpretation of its own rule defining a "uniform" was entitled to deference.

APPELATE DECISIONS

The Utah Court of Appeals has recently issued four decisions—one published, three unpublished—in Labor Commission cases. The Court of Appeals' decisions are summarized below; their full text is available at www.utcourts.gov/courts/appell/.

Juricic v. AutoZone, Inc., (2010 UT App 109, issued April 29, 2010). Mr. Juricic argued in district court that AutoZone's dress code constituted a requirement of an employee "uniform" as defined by Labor Commission Rule 610-3-21.A, and that AutoZone was therefore required to pay the cost of such clothing. When the district court rejected his argument, Mr. Juricic appealed to the Court of Appeals.

The Court of Appeals noted that the Labor Commission's rule defined a "uniform" as an article of clothing "of a distinctive design or color" required by an employer to be worn by employees. The Court of Appeals agreed with the district court that AutoZone's requirement--red golf shirts with black pants, skirts, and shoes--was not so distinctive as to

Wood v. Labor Commission, et al. (2009 UT 74, unpublished memorandum decision issued June 10, 2010.) Mrs. Wood's claim for occupational disease benefits for a mental-stress condition has been before the Court of Appeals twice before. On this third occasion, the Court of Appeals affirmed the Labor Commission's denial of Mrs. Wood's claim on the grounds her work-related mental stress did not predominate over her non-work mental stress.

Mrs. Wood was a sales executive for a Utah radio stations. Her supervisor was difficult, and she was responsible for all aspects of her many customers' advertisements. This forced her to work long hours and remained on-call during evenings and weekends. The working conditions resulted in stress. However, she also experienced stress in her personal life related to personal and family health problems and other difficulties. The Commission appointed an independent panel of medical experts to evaluate the nature and causes of Mrs. Wood's mental stress condition. The panel concluded that her mental stress was attributable equally to work and non-work circumstances.

To qualify for occupational disease benefits for a mental-stress illness, § 34A-3-106 (2) of the Utah Occupational Disease Act requires the claimant to show. . .

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APPELLATE DECISIONS

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“extraordinary mental stress arising predominantly and directly from employment.” The Commission concluded that Mrs. Wood suffered from extraordinary stress, but that the work-related component of that stress did not predominate over her personal, non-work stressors. The Commission therefore denied her claim for occupational disease benefits.



At the Court of Appeals, Mrs. Wood asserted that the Commission had incorrectly characterized some of her work-related stress as personal in nature. She also asserted that the Commission placed too much reliance on the medical panel's opinion that her stress was equally divided between work and personal causes. In summary Mrs. Wood argued that the preponderance of evidence proved her stress was predominately caused by her work.

The Court of Appeals rejected Mrs. Wood's argument and upheld the Commission's decision. The Court noted the well-established principle that it will uphold the Labor Commission's findings of fact if they are supported by substantial evidence. After considering Mrs. Wood's various arguments against the Commission's findings, the Court of Appeals found substantial evidence to support the decision.

Finally, in **Wilkins v. Labor Commission** (unpublished memorandum decision issued April 15, 2010; 2010 UT App 91) and **Waiters v. Labor Commission** (unpublished memorandum decision issued June 24, 2010; 2010 UT App 174), the Court of Appeals summarily disposed of two other appeals of Commission decisions. In **Wilkins**, the Court concluded that the Commission had properly upheld the terms of an agreement between Wilkins and his employer to settle Mr. Wilkins' workers' compensation

claim. In **Waiters**, the Court of Appeals concluded that the Commission correctly dismissed Mr. Waiters' employment discrimination complaint as untimely.

Workplace Safety Awards

By Elena Bensor

One of the main goals of the workplace safety program is to support workplace safety initiatives aimed at reducing accidents in the workplace, and to create strong collaborative relationships amongst workplace safety grant recipients, to maximize the utilization of programs and resources being developed with workplace safety funds.

During FY2011, the Utah Labor Commission received 39 proposals for workplace safety grants. A total of 23 grants were awarded for a total amount of \$623,755.04 to support the development of some notable projects which include:

- Continued support of Safety scholarships available through the Utah Safety Council to local small businesses.
- The Creation of a Farm Safety DVD in collaboration with the Utah Farm Bureau in bilingual format (English/Spanish), aimed to educate farm workers about the dangers of using heavy equipment machinery and improving overall farm safety practices.
- A collaboration with the Latin-American Chamber of Commerce, Alliance Community Services and the Utah Safety Council, designed to increase safety awareness for minority owned businesses, and develop safety programs.
- A grant to support the creation of a workplace safety library and training center at the Ogden-Weber Applied Technology College in Ogden Utah.
- Free Spanish language workshops provided by Alliance Community Services, for business owners with a large Spanish speaking workforce, created in collaboration with the WCF of Utah, the Utah Safety Council and other Hispanic-Latino Community based organizations to increase safety awareness and reduce the number of on-the-job injuries.

RULES CORNER



Pursuant to authority granted by the Utah Legislature, the Labor Commission has recently adopted or is considering the following substantive rules.

If you have questions or concerns about any of these rules, please call the Utah Labor Commission at 801-530-6953.

<p>R614-1-4 Occupational Safety and Health</p>	<p>Incorporation of federal standards—hexavalent chromium. Revises notification requirements in the exposure- determination provisions of existing hexavalent chromium standards.</p>	<p>To be discussed at a Labor Commission Open Meeting on August 25, 2010.</p>
<p>R616-4 Boiler, Elevator and Coal Mine Safety</p>	<p>Safety Codes & Rules for Boilers and Pressure Vessels. Establishes procedures and standards pursuant to § 34A-7-10 to authorize qualified individuals to inspect boilers and pressure vessels as “deputy inspectors,” and to revoke such authority when appropriate.</p>	<p>To be discussed at a Labor Commission Open Meeting on August 25, 2010.</p>
<p>R616-4 Boiler, Elevator and Coal Mine Safety</p>	<p>Coal Mine Safety. Defines terms and sets procedures for the Utah Office of Coal Mine Safety to examine provisions for health and safety in coal mines and respond to any unsafe conditions. Also sets standards for reporting coal mine accidents and establishes requirements for coal mine operators to annually review emergency response plans.</p>	<p>Effective March 11, 2010.</p>
<p>R610-3 Utah Antidiscrimination and Labor Division</p>	<p>Payment of Wages. Would allow payment of wages by use of “paycards.”</p>	<p>Effective March 24, 2010.</p>
<p>R616-4 Boiler, Elevator and Coal Mine Safety</p>	<p>Safety Codes & Rules for Boilers and Pressure Vessels. Incorporates updated versions of ASME and NFPA boiler and pressure vessel codes.</p>	<p>Effective April 7, 2010.</p>

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Misclassification of employees. As noted above, state and federal laws attach important rights and responsibilities to the employer/employee relationship. While these laws benefit employers in some respects (for example, the “exclusive remedy” provided by the workers’ compensation system), they also impose responsibilities. In order to escape these responsibilities, employers sometimes misclassify employees as independent contractors. In this way, the employer hopes to avoid the costs of payroll taxes, workers’ compensation and unemployment insurance, and the coverage of other laws designed to promote safe and fair workplaces.

These misclassifications can have a damaging impact on others. Misclassified employees may lose the protection of various employment laws. This frustrates the Legislature’s objectives in enacting those laws. Government or charitable 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 & 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.