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## **If you only engage independent contractors to perform maintenance do you need WC insurance?**

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If you only engage independent contractors to perform maintenance and repairs, do you need Workers Compensation (WC) insurance? Absolutely.

When is an independent contractor not an independent contractor? When he/she fails the Commonwealth's three-prong test and becomes an "employee" in the eyes of the Commonwealth.

The Mass. Workers Compensation Rating and Inspection Bureau (WCRIB) recently posted on its website (<https://www.wcribma.org>) a revised advisory from the attorney general's office on the Mass. Independent Contractor Law that every property owner should read. There will be applied a three-prong test to every situation involving independent contractors to ascertain whether they are, in fact, independent or whether they will be considered employees. To paraphrase the Advisory, the three tests include:

- \* Control and Direction: Is the individual free from control and direction in connection with the performance of the service, both contractually and in fact?
- \* Duties and Function: Is the service being provided by the individual outside the usual course of business of the party engaging the contractor?
- \* Nature of Service vs. Trade: Is the service being provided by the individual of the same nature as the individual's trade or expertise?

If the answers to the above questions are all "Yes," then the individual will likely be considered to be an independent contractor, but if any answer is "No," then the contractor will likely be deemed to be an employee.

The first prong is relatively straightforward. If you direct the person and oversee the work that is being done and how it is being done, then the individual is not going to be considered to be "independent." It won't matter that the contract calls for that person to work independently; if in fact direct supervision or control is exercised the test will fail.

The second prong is perhaps not quite as straightforward as the first. If you are a carpenter and you engage an independent contractor to perform carpentry for you, that person will be deemed to be an employee since you and he both do the same thing. If you are a builder and you hire a plumber to do all of the plumbing because you don't do plumbing, then that person will probably be considered independent. But what if you are a landlord and you and your staff routinely perform such services as landscaping, janitorial, maintenance, etc., and you also engage contractors to either do those functions or supplement your efforts? Would the contractors be deemed to be performing functions outside of those that you perform?

The third prong seems to be included to as a means to foil crafty plans. In this case, if you engage a landscape contractor to perform all landscaping, since you don't landscape, thus seemingly making the contractor independent, and you then have the contractor's employees go up on scaffolding to

wash your windows, then the contractor would be providing service outside of its established trade thereby making employees of everyone holding a squeegee instead of a trimmer.

It's obvious that anyone who has "employees" needs WC insurance, and the recommendation should always be that you carry WC whether or not you have "employees" because an independent contractor can become an employee in a heartbeat. What may not be obvious, however, is that employees of independent contractors are entitled to WC benefits and, while you may not be considered to be their "employer" since they work for a firm that you have engaged to perform independent contracting, if their direct employer does not carry WC, or if it has been cancelled or is otherwise not in force, the injured employee of the contractor can look to your coverage or, worse if you don't carry coverage, you.

So, the best rule of thumb is to maintain your own WC policy whether or not you have direct employees because that policy will automatically extend to cover any employer-employee relationship that may arise during its term. You can avoid paying WC premium on amounts paid to contractors you engage by requiring certificates of WC insurance from each and every one of them that demonstrate that WC coverage was in force for the entire term of your policy. If you are unable to obtain certificates that encompass your entire policy period, then your insurer will charge you WC premium based upon the amounts you paid to those contractors during the period(s) for which certificates were unavailable.

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