

Legal Brief



Control Your Risks When Bringing Third Parties Into the Workplace

Maintenance, repairs, construction, inspections and evaluations are just a few reasons why businesses must allow third parties into the workplace. These third parties vary from sole proprietors or independent contractors to large corporations. With these activities comes increased risk of workers' compensation claims, personal injury claims, property damage claims and business interruption, to name a few.

Most often these risks are allocated among the parties with contracts or terms and conditions contained in purchase orders or invoices. All too often, however, these documents do not adequately address a party's financial ability to meet its contractual obligations. One way to ensure that the appropriate parties have the financial ability to meet their financial obligations is to have the appropriate insurance coverage in place prior to any worksite activity.

Certificates of Insurance

Businesses often require vendors, independent contractors and other third parties entering the worksite to present a Certificate of Insurance. These certificates typically pertain to comprehensive general liability insurance and/or workers' compensation coverage.

A common misconception about Certificates of Insurance is that they convey coverage on the holder. They do not. The naming of a business on a Certificate of Insurance is not evidence that coverage exists for that business, nor does it guarantee the business is an additional insured under such a policy. At best, the Certificate of Insurance is evidence that a policy of insurance exists. It is the language of the insurance policy, not the Certificate, which governs coverage and whether an entity is afforded the status of an additional insured.

A better way to show that an entity has the financial ability to meet its contractual obligations regarding liability is to obtain a copy of the insurance policy or, at a minimum, the Declarations Page that outlines the coverage and limits. Consideration also should be given to requiring the third party to have your business identified as an "additional insured" on the Third Party's Declarations Page. If your business is identified as an "additional insured," the underlying policy should have an "additional insured" endorsement.

Consideration also should be given to the Pennsylvania Construction Misclassification Act (PCMA), which took effect on February 10, 2011. The Act was intended to address employers attempting to avoid labor costs, including withholding income taxes and paying Social Security, Medicare and Unemployment taxes. Many times, vendors performing services for a business will identify themselves and their associates as "independent contractors." Under the terms of the new PCMA, an individual who performs services in the construction industry for remuneration is an independent contractor only if:

- The individual has a written contract to perform such services.
- The individual is free from control or direction over performance of such services, both under the contract of service and in fact.
- The individual is customarily engaged in an independently established trade, occupation, profession or business.

An individual is considered to be "customarily engaged in an independently established trade, occupation, profession or business" if the individual possesses the essential tools and equipment; may realize a profit or suffer a loss as a result of performing the services; performs services through a business in which the individual

has a proprietary interest; maintains a business location that is separate and apart from the location of the person for whom the services are being performed; previously performed the same or similar services for another person or holds himself out to other persons as available and able; and, in fact, is available and able, to perform the same or similar services. Lastly, the individual must maintain a liability insurance policy of at least \$50,000.

If the vendor is not a true independent contractor, your business may be exposed to increased workers' compensation liability for any injury involving the so-called independent contractor or the contractor's employees. ☆

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