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Guidelines for Determining Worker Status: Insurance Sales Industry

The following are guidelines used by the Unemployment Insurance Division, the Division of Labor Standards, and the Division of Safety and Health to establish whether the relationship between an insurance salesperson and the agency engaging their services is an employment relationship or that of an independent contractor.

Independent contractors are excluded from coverage under the Unemployment Insurance Law and are not afforded the protections provided by Labor Standards and Safety and Health requirements. A person is an independent contractor only when free from control and direction in the performance of services.

Many insurance agents enter the field through a traineeship during which the company exercises or reserves the right to exercise sufficient supervision, direction and control over the "trainee" to establish an employment relationship. Once an agent's training period is concluded, the company enters into a new contract with the agent. In some instances, a training allowance contract and a commission schedule contract are entered into at the time the agent is first engaged; the training allowance contract then terminates, leaving the agent to operate solely under the commission contract. It is at this point that the status of the agent as an employee or independent contractor may be in question.

Section 511.21 of the Unemployment Insurance Law provides that the term "employment" shall not include the services of a licensed insurance agent or broker if the agent or the broker is engaged as an independent contractor under article twenty-one of the Insurance Law, substantially all of the remuneration for the services performed by such agent or broker is directly related to sales or other output rather than to the number of hours worked, and such agent is not a life insurance agent receiving a training allowance subsidy. The agent or broker must perform services under a written contract not executed under duress, which contains all of the provisions stipulated in the law.

Agents or brokers who do not perform their services under a written contract, or the contract does not meet all the conditions of Section 511.21 of the Unemployment Insurance Law, will have their worker status determined by the enclosed guideline factors obtained from common law tests of master servant based on case law including court decisions and the decisions of the Unemployment Insurance Appeal Board. An individual's exposure to a risk of profit or loss as evidenced by investments made or costs assumed, may also be a factor, and is considered in these guidelines. No one single factor is controlling, nor do all factors need be present to establish the nature of the relationship.

The Department of Labor is implementing the common law application of the guidelines with an effective date of July 1, 2000. Therefore, employers may discontinue reporting individuals for unemployment insurance purposes where the application of the common law guidelines results in a status of independent contractor as of the third quarter of 2000. Please note the prospective nature of the implementation. As a result, the Unemployment Insurance

Division will not issue redeterminations and refunds for previously reported individuals. Section 511.21 of the law providing for conditions under which the services of an insurance agent or broker shall not be included in the term "employment" is effective for services rendered on or after November 23, 2002. Employers may discontinue reporting insurance agents or brokers where all the provisions of Section 511.21 are met as of November 23, 2002.

Employers may request a formal determination of the status of individuals performing services for unemployment insurance purposes by writing to the Liability and Determination Section and furnishing complete details of the relationship. An employer who assumes an individual performs services as an independent contractor and does not report and pay contributions based on that assumption may find they are subject to a retroactive assessment, interest, or penalty, if it is later determined through an audit, a claim for benefits, or some other review, that there was an employment relationship. Therefore, it is to the employer's advantage to request a determination when the status of life insurance agents is in question.

Employers with questions regarding application of Section 511.21 of the Unemployment Insurance Law or the interpretation or application of the common law indicators outlined in these guidelines in relation to an unemployment insurance matter may contact the Liability and Determination Section at (518) 457-2635. Employers with questions in relation to a Division of Labor Standards issue should call (518) 457-4321. Division of Safety and Health issues may be referred to (518) 457-1212.

Insurance Agents or Brokers

I. Section 511.21

The term "employment" shall not include the services of a licensed agent or broker if it is proven that:

1. Substantially all of the remuneration for the services performed by the agent or broker is directly related to sales or other output rather than the hours worked.
2. The agent is not a life insurance agent receiving a training allowance subsidy under the Insurance Law.
3. The services performed by the agent or broker are performed pursuant to a written contract executed between the agent or broker and the person for whom the services are performed and the contract was not executed under duress and contains all of the following provisions:
 - a. The agent or broker is engaged as an independent contractor associated with the person for whom the services are performed pursuant to article twenty-one of the Insurance Law and is treated as such for all purposes including but not limited to federal and state taxation and withholding (other than FICA which is required for full-time life insurance agents), Unemployment Insurance and Workers' Compensation.
 - b. The agent or broker shall not receive any remuneration related to the number of hours worked.
 - c. The agent or broker is paid a commission on gross sales without deduction for taxes with the exception of FICA taxes required for full-time life insurance agents.
 - d. The agent or broker is permitted to work any hours he/she chooses.
 - e. The agent or broker is permitted to work out of his/her home/office or the office of the person for whom services are performed.
 - f. The person for whom the services are performed may provide office facilities, clerical support, and supplies for the use of the agent or broker, but the agent or broker otherwise bears his/her own expense, including but not limited to automobile, travel, and entertainment expenses.

- g. The person for whom the services are performed and the agent or broker shall comply with the requirements of article twenty-one of the Insurance Law and the regulations pertaining thereto, but such compliance shall not affect the agent's or broker's status as an independent contractor nor should it be construed as an indication that the agent or broker is an employee of the person for whom the services are performed for any purpose whatsoever.
- h. The agent or broker shall not be treated as an employee with respect to such services for federal and state tax purposes (other than FICA taxes required for full time life insurance agents pursuant to the federal internal revenue code).
- i. The contract and association can be terminated by either party at any time with notice to the other party.

II. Common Law

If the conditions of Section 511.21 are not met, the worker status of the agent or broker will be determined by an examination of the following indicators:

Indicators of Independence

The strong indicators an insurance agent or broker is an independent contractor are:

1. The agent or broker is not prohibited by contract from selling insurance for other companies.
2. The agent or broker is not assigned a territory.
3. The agent or broker schedules his/her own workday and comes and goes as he/she pleases.
4. The agent or broker makes appointments or authorizes the company to make appointments on the agent's or broker's behalf.
5. The agent or broker has no withholdings deducted from earnings, except for life insurance agents who have social security deductions.
6. The agent or broker is not covered under the company's Worker's Compensation policy.
7. The company does not provide the agent or broker with leads or names of policyholders unless specifically requested by the agent or broker.

Other factors that lead to independence are:

8. The agent or broker is paid on a straight commission basis with no drawing account. If the company pays an advance against commissions, overdrafts must be repaid.
9. The agent or broker does not receive any reimbursement for expenses except as authorized under the Insurance Law.
10. The agent or broker is not required to attend sales meetings or report to the company on his/her sales activities.

Indicators of Employment

The strong indicators an insurance agent or broker is an employee are:

1. The agent or broker is prohibited from selling insurance for other companies.
2. The agent or broker is required to work a certain number of hours per week, even if there is no regular schedule and no requirement to report daily.
3. The company can reject policies obtained by the agent or broker.
4. The company reimburses the agent or broker for expenses other than those authorized under the Insurance Law.
5. The agent or broker is covered under the company's Worker's Compensation policy.

6. The agent or broker is assigned a territory.
7. The company requires that all appointments be made through the company.
8. The company furnishes leads and the agent or broker must follow up on the leads and report the results to the company.

Other factors that lead to employment are:

9. The agent or broker must submit weekly reports of sales activities.
10. The company deducts withholdings, other than social security, from the agent's or broker's earnings.
11. The company makes a contribution to a pension plan for the benefit of the agent or broker.

Neutral Factors

Factors that neither point to an employment or independent contractor relationship include:

1. The company sets the commission schedule.
2. The agent or broker is required to follow the company's rules and regulations.
3. The agent or broker is required to concentrate sales activities on behalf of the company.
4. The agent or broker may share space in the company's office, as well as phone and support staff.
5. The agent or broker may participate at his/her own expense in the company pension plan.
6. The agent or broker must keep records and accounts on company forms, and the company provides business cards and sales promotional materials.