

June 2, 2014

Two Colorado Supreme Court Decisions Address Independent Contractor Relationships

Companies using independent contractors should review their practices in light of two recent decisions from the Colorado Supreme Court: *I.C.A.O. v. Softrock Geological Services, Inc.* and *Western Logistics, Inc. v. I.C.A.O.* Both decisions were issued on May 12, 2014. The decisions clarify the rules under which independent contractor status is analyzed in Colorado and make it slightly easier to be an independent contractor.

At the federal level, the IRS has long employed a test that involves asking at least 20 questions. The IRS calls these the “20 common law factors.”

1. Does the company instruct the person on how the work should be done?
2. Does the company require, much less provide training?
3. Is the work an integral part of the company’s own business?
4. Is the person required to do the work themselves?
5. May the person hire and supervise assistants?
6. Is there a continuing relationship between the company and the person, or is the person retained to work on isolated projects?
7. Does the company set hours when the work is to be done?
8. Does the company require the person to work on a full-time basis?
9. Does the company set the location where the work is to be done?
10. Does the company define the order or sequence in which the work must be performed?
11. Does the company require reports while the work is being done?
12. Does the company pay by the hour, week, or month, or does it pay by the job?
13. Does the company reimburse expenses?
14. Does the company provide tools or materials?
15. Has the person made a significant investment of their own to set up the independent business?
16. Can the person realize a profit or suffer a loss, independently of the company’s own profit/loss?
17. Does the person actually perform more than minimal work for other companies?
18. Does the person make their services available to the public on a consistent basis?
19. Can the company discharge the person, without liability, before the work is done?
20. Can the person quit, without liability, before the work is done?

For the purpose of all these questions, a “person” may be an individual, though independent contractors are often legal entities, such as a corporation or limited liability company.

June 2, 2014

Each state is free to define independent contractors in its own way. Most states take more or less the same approach as the IRS. Colorado law incorporates these basic concepts in its unemployment statutes (C.R.S. 8-70-115), workers compensation statutes (C.R.S. 8-40-202) and wage claim statutes (C.R.S. 8-4-101).

The *Softrock* and *Western Logistics* cases reversed one particularly significant way in which Colorado law had started to vary from this multi-factored approach. The Colorado Department of Labor and Employment, Division of Employment and Training (“Division”) had taken the very strident position that, of all those factors, number 17 was controlling in unemployment cases. The Division said that, even if the putative independent contractor was free to work for others, the test failed if that person did not regularly do actual and significant work for others. This was called the “single factor” test.

In *Softrock* the Supreme Court rejected the single factor approach, calling it a “rigid check-box type” of analysis. In *Western Logistics*, the Supreme Court noted there could be a “myriad of reasons that an independent contractor might not engage in other employment despite being free to do so.”

Instead of a single factor test, the Supreme Court emphasized that the “totality of the circumstances” surrounding “the dynamics of the relationship” must be analyzed, quoting *Western Logistics*. No one fact is controlling. Rather, the entire relationship must be analyzed.

Companies interested in independent contractor relationships should also consider availing themselves of a rebuttable presumption available in the Colorado workers compensation and unemployment statutes. Those statutes say that a rebuttable presumption of independent contractor status will exist if the contract itself contains the following:

1. A recitation of the factors supporting the relationship as listed in those statutes (CRS 8-40-201(2)(b) and CRS 8-70-115(c)), and
2. A conspicuous disclaimer, in bold, underlined or large font, that the independent contractor is not entitled to workers compensation or unemployment benefits and that it is obligated to pay its own federal and state taxes, and
3. Notarized signatures.

Prompted by the Supreme Court’s decisions, the Division is developing internal guidance for state auditors to implement a “totality of the circumstances” standard. Our Government Relations team is closely in touch with the Division as it updates audit guidelines. The Division’s preference is to retool internal guidelines rather than conduct rulemaking or seek statutory changes.

Audits are expensive and time-consuming. While *Softrock* and *Western Logistics* clarify the rules under which independent contractor status is analyzed in Colorado, implementation by the Division and development of reasonable guidelines are necessary to ensure that businesses retain the flexibility to structure their labor force.

June 2, 2014

If you have questions, please contact Bill C. Berger, Lisa Hogan or Christine Samsel in our [Employment Group](#) or Mike Feeley in our [Government Relations Department](#).

[Bill C. Berger](#)

Shareholder

bberger@bhfs.com

T 303.223.1178

[Lisa Hogan](#)

Shareholder

lhogan@bhfs.com

T 303.223.1185

[Christine A. Samsel](#)

Shareholder

csamsel@bhfs.com

T 303.223.1133

[Michael F. Feeley](#)

Shareholder

mfeeley@bhfs.com

T 303.223.1237