

**STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
WORKERS' COMPENSATION DIVISION**

In the Matter of the Proposed
Adoption by the Minnesota Department
of Labor and Industry,
Workers' Compensation Division,
of Rules Governing Independent
Contractors

**STATEMENT OF NEED
AND
REASONABLENESS**

Introduction

Rules regarding independent contractors are authorized by Minn. Stat. § 176.041, subd. 1, and by Minn. Stat. § 176.83, subd. 11. The goals of these rules are twofold. First, the rules promote certainty in business planning, business relationships, and payroll auditing. Toward this end, the rules establish safe harbor criteria for independent contractor and employee status. Second, the rules are intended to reduce litigation regarding the issue of whether an injured worker is an employee or an independent contractor. The criteria developed by case law are essentially the common law criteria set forth in the Restatement of Agency.¹ Restatement (Second) Agency, Section 220 (2). The generality of the common law criteria invite litigation in their application, while the specificity of these rules promotes resolution without litigation.

Workers' compensation coverage is required only for employees. While coverage for independent contractors may in some cases be elected (Minn. Stat. § 176.012(e)), only employees are covered as a general rule. Thus, the first step in determining coverage is to determine whether the work relationship is that of employee-employer or independent contractor. See Minn. Stat. § 176.021, subd. 1.

¹The common law factors are:

1. The right to control the means and manner of performance,
2. The mode of payment,
3. The furnishing of material or tools,
4. The control of the premises where the work is done and,
5. The right of the employer to discharge.

Guhlke vs. Roberts Truck Lines, 268 Minn. 141, 143; 128 NW 2nd 324, 326 (1964).

The determination is important both before injury and after injury. For employers and insurers, workers' compensation insurance premium is payable only on employees, and not on independent contractors. Thus, in auditing an employer's payroll for insurance exposure base purposes, an auditor must distinguish amounts paid to independent contractors from amounts paid to employees. Without the specific rules to distinguish employees from independent contractors, neither the insurer nor the employer knows whether the premium charged fairly reflects the exposure.

After an injury has occurred, the injured worker's status as an employee or an independent contractor determines whether benefits are available to the injured worker under Chapter 176. It is in this context that most of the case law has arisen in Minnesota. Typically an injured worker files a claim for benefits under Chapter 176, and the insurer or self-insurer denies liability on the grounds that the worker was an independent contractor. The specificity of these rules promotes resolution of this issue without litigation.

Most of the descriptions of business relationships for specific occupations are derived from a federal publication, Employer-Employee Relationship - Policies and Procedures, U. S. Department of Health and Human Services, P.O.M.S. part 3, chapter 021, sub-chapter 01, hereinafter "Social Security Guidelines". As the Social Security Guidelines generally reflect common law rules, the basic precepts of the Social Security Guidelines are readily transferable to the state workers' compensation context.

PART 5221.0010 PURPOSE.

This provision explains the general framework for the rules. The rules identify specific occupations. For each occupation, a safe harbor is established for independent contractors and for employment status. The safe harbor concept is necessary to promote certainty in business relationships and, where injury occurs, to aid resolution of disputes regarding independent contractor status.

In order to limit the employee safe harbors to the independent contractor context, the use of term employee is explained.

PART 5222.0020 ARTISANS.

Subpart 1. Definition. This subpart defines artisans following the commonly understood usage of the term. The definition is necessary to establish the scope of the rule. The definition essentially distinguishes skilled from unskilled tradesmen. Training indicates that the artisan is capable of determining the means and

manner of performance. Skilled tradesmen have gone through a learning stage where they were necessarily subject to the close supervision and control of an employer. After completion of training, they frequently go into business for themselves.

Most artisans work in the building construction business. Many are self-employed and work in connection with repairing, altering, remodeling, or constructing buildings on a single job basis. Many work for construction contractors and for firms in the home improvement business. Others work as maintenance personnel in factories, hotels, department stores, and other large establishments. In many cases, the artisan alternates between wage employment for contractors and self-employment on small jobs.

Subpart 2. Independent Contractor. Item A stresses the artisan's freedom to determine the means for obtaining a finished product which conforms to specifications. This item states one of the common law criteria. Item B, freedom to select others, indicates responsibility for the result.

Items C, D, E, and F are indices of an independent businessman. Since most artisans furnish their own tools, this factor indicates neither employment nor an independent contractor relationship. Thus, item D states that the artisan furnishes equipment and incurs expenses beyond simply furnishing his own tools. Under item E, a substantial investment indicates a capital investment to generate a return. Under item F, the artisan holds himself out to the public as an independent contractor. This assists both parties to the business relationship in understanding the status of the artisan.

Item G, payment on a job basis, indicates responsibility for a result. Provision of lien waivers, item H, indicates that the artisan is considered the person responsible for payment of all supplies and materials used on the job.

Subpart 3. Employee. The safe harbor criteria for employment essentially mirror those for independent contractor status. Items A and B indicate the employer's authority to control the work by the employee.

Item C relates to the method of payment. Independent contractors are paid on a job basis, while employees are paid a wage regardless of the amount of work accomplished.

Items D and E indicate the lack of a substantial business investment. Only independent business persons risk personal profit or loss by exercising their independent judgment.

Item F indicates the lack of profit or loss possibilities. While an employee may well exercise independent judgment, the profit or loss is sustained by the employer rather than by the employee.

Item G, lack of liability for noncompletion, indicates that the artisan is not responsible for accomplishing the result desired by the purchaser of his services. This lack of responsibility for the final result is one of the common law criteria for employment.

PART 5222.0030 BARBERS.

Subpart 1. Definition. To provide consistency with other regulatory provisions, barbers are defined as persons who are licensed barbers under Minnesota Law. Apprentices are expressly excluded from the definition of barbers because, while in the learning stage, apprentices are necessarily subject to the close supervision and control characteristic of an employment relationship.

Subpart 2. Independent contractor. Items A and B indicate that the risk of profit or loss is on the barber rather than on the employer. Item C is necessary because the chair rental often includes the furnishing of linen and supplies. Item D reflects the Restatement control criterion, and the level of service is specified for the reason set forth in subpart 3 G below. A written agreement, Item E, permits the parties to plan their business and insurance arrangements in advance.

Subpart 3. Employee. Item A, payment on a salary or commission basis, indicates control by the employer. While some barbers work as employees of shop owners on a salary basis, the existence of a percentage wage arrangement is fairly common, and in itself does not rule out employment status.

As with artisans, some tools are furnished by the employee. Items B and C thus specify the level of equipment which is typically furnished by all barbers. The furnishing of the specified items is common among both employee and independent contractor barbers.

By not advertising, Item D, the barber is not holding himself out to the public as an independent business person.

Item E indicates the employer's right to terminate the employment relationship.

Item F is necessary to permit the parties to control the nature of their business relationship and to make their insurance arrangements accordingly.

Item G reflects the Restatement criterion. Specifying the level at which control may be exercised provides guidance to the parties in determining whether control is present.

Subpart 4. Factors Excluded. Many shop rules are the same for both employee and independent contractor barbers because they are required by unions or regulatory agencies. The employer's requirement that all workers abide by these rules thus is not the exercise of control by the employer over the means and manner of performance. As a result, these factors are not considered in determining whether barbers are employees or independent contractors.

PART 5222.0040 BOOKKEEPERS AND ACCOUNTANTS.

Subpart 1. Definition. The lack of a statutory definition of a bookkeeper requires the definition by rule. The typical duties of a bookkeeper are set forth in the definition. In general, the services of a bookkeeper are less complex than those of an accountant. Because accountants are defined by statute, it is reasonable for regulatory conformity to rely on the statutory definition. As accountants and bookkeepers are treated identically for the purposes of this rule, it is unnecessary to distinguish between them. For ease of use, the term "bookkeeper" is used to encompass both professions.

Subpart 2. Independent contractor. Item A, the renting of an office, indicates that the bookkeeper may incur a profit or loss in the provision of services. Making services available to the public, Item B, indicates the bookkeeper's status as an independent business person. Working for a number of clients on a fee basis, Item C, indicates lack of control by an employer. Payment of expenses, Item D, indicates that the bookkeeper may incur a profit or a loss. Item E, freedom to achieve results in whichever way the bookkeeper chooses, is one of the Restatement criteria for independent contractors. Performing services on premises other than those of the purchaser of the services, Item F, indicates lack of control over the performance of the services by the purchaser.

Subpart 3. Employee. Items A through F describe the usual pattern under which bookkeepers and accountants render services as employees. The performance of services for a single business at regular intervals, Item A, indicates an ongoing relationship rather than a relationship intended to terminate at the completion of a job. Similarly, working for a fixed salary indicates that payment is based on time rather than production.

Item B reflects the Restatement criteria regarding the furnishing of materials, supplies, and helpers. The fact that a bookkeeper does not advertise or maintain an office, Item C, indicates

employment because the bookkeeper is not in business for himself or herself. Receipt of fringe benefits and working fixed hours, Item D, are indications of employment under the Restatement criteria regarding the method of payment.

The fact that the bookkeeping system is not set up by the bookkeeper, Item E, indicates that the bookkeeper is not free to exercise professional judgement regarding the type of bookkeeping system. Item F also relates to the extent to which independent judgment may be exercised by the bookkeeper.

PART 5222.0050 BULK OIL PLANT OPERATORS.

Subpart 1. Definition. Items A through D list the common characteristics of bulk plant operators. This definition is necessary to determine the scope of the application of the rule.

Subpart 2. Independent contractor. Item A, being in complete charge, indicates that the operator is not subject to the control of an employer. Item B, the contract provisions, describes provisions typically found in the operator contract with the oil firm. These provisions are further indications of the operator's freedom of control. Item C, advertising, indicates that the operator's profit or loss is dependent on his or her own efforts. Item D, fixing hours and hiring personnel, indicates the operator's freedom from control.

Subpart 3. Employee. Item A reflects the method of payment criterion and the furnishing of equipment criterion from the Restatement. Furnishing equipment and payment of a salary are indicators of employment. A requirement to work fixed hours, Item B, indicates control by the employer. Item C, inclusion in employee benefit plans, evidences the parties' understanding that the operator is an employee. Item D, compliance with firm instructions, indicates control by an employer. Item E, obligation for wages and expenses, indicates that the operator has no profit or loss interest in the operation of the business. Item F, hiring for management on a salary basis under instructions regarding method of manner of performance, reflect the Restatement criterion regarding control.

PART 5222.0060 COLLECTORS.

Subpart 1. Definition. This subpart defines the scope of the rule's application. The rule is not limited to only collectors who work for collection agencies. The rule also covers businesses which maintain their own collection staffs.

Subpart 2. Independent contractor. Because of varying practices in the collection industry, this subpart is divided into two independent parts, Items A and B. Item A applies to individual collectors who actively solicit payments. Item B applies to persons, generally store owners, who agree to accept payment of bills on behalf of a business.

For the individual collector who actively solicits, Subitems 1, 2, and 3 indicate the extent of control permissible in order to maintain an independent contractor status. The purchaser of the collector's service assigns territories and dunning lists. The collector however, may set his or her own hours and schedule of contacts.

Subitem 4 also indicates lack of control by the purchaser of services as the collector reports to the office only to turn in collections and receive new dunning lists.

Subitems 5 and 6 relate to the method of payment. The collector's income is dependent on the amount of effort and skill which he puts into the work. Subitem 7, the freedom to work for other firms, is an indication of an independent business status and lack of employer control over the collector's time.

In Item B, covering the collector who accepts payment of bills, Subitems 1, 2, and 3 indicate freedom from control by the purchaser of the service. Subitem 4 indicates the extent of the collector's obligation to the purchaser. Subitem 5 permits the purchaser to furnish some equipment and supplies. The requirement to purchase a surety bond, Subitem 6, indicates that the collector is free from control by the purchaser of the collector's services. Subitem 7 indicates that payment may be either by salary or on a percentage basis. This reflects the practice in the industry. Subitems 8 and 9 indicate that the collector is free from control by the purchaser of the service.

Subpart 3. Employee. Item A, integration into the employer's business, is indicative of direction and control by the employer. When the success or the continuation of a business depends to an appreciable degree upon the performance of certain kinds of services, the persons who perform these services must necessarily be subject to a certain amount of control by the owner of the business. Item B, performing services pursuant to the employer's schedule, also indicates control.

Having first call on the collector's time, Item C, is a factor of control because it shows that the worker is not free to follow his own routines and schedules.

Insignificant business expenses or investments, Item D, is indicative of dependence on an employer for office facilities, and indicates that the employee has no right of control of the facilities.

Payment on a commission or salary basis, Item E, indicates an employment relationship in the collecting business. While a commission basis may indicate that the collector's gains are determined by the collector's efforts in conducting his work, other indicators of a profit or loss potential, in particular the use of capital, are not present in an employment relationship.

The right to establish the means and methods used in collecting, Item F, indicates control by the employer. Item G, the right to interfere with the order of services, also indicates that the employer has the right to control the means and methods by which the service is provided.

Item H, reporting regularly to the firm's offices, is applicable where collectors work from premises other than the employer's premises. This does not indicate an independent contractor relationship where regular reporting to the office is required.

Item I, a prohibition against hiring helpers, indicates an employment relationship because the contract is for personal services.

Item J, grounds for termination, relates to discharge criteria. An independent contractor is responsible only to meet a specific goal, such as a production quota. An employee may be dismissed for reasons other than completion of a specific job.

PART 5222.0070 CONSULTANTS.

Subpart 1. Definition. The definition of consultant is broad because of the variety of fields in which consultants work. The key to the definition is the special skill and training which the consultant brings to the workplace.

Subpart 2. Independent contractor. Maintaining an office, Item A, indicates lack of control by an employer. Advertising, Item B, is an indication that the consultant has a profit or loss potential in the conduct of his or her business. Freedom to hire helpers, Item C, indicates freedom of control in accomplishing the work tasks. Item D, success dependent on personal efforts, is indicative of the profit or loss potential from the consultant's services. Item E, a set fee, indicates that payment is for completion of a particular job. Item F, service for a specified period of time or purpose, also indicates that the consultant's service is for the purpose of accomplishing a specific job.

Freedom to work for others, Item G, indicates lack of control by an employer. Freedom to work his or her own hours, Item H, also indicates lack of control. Item I, J, K, and L indicate that the purchaser of the service lacks control over the consultant.

Subpart 3. Employee. Integration of the consultant's services into the business operation, Item A, is indicative of direction and control by the employer. A requirement to do the work personally, Item B, is an element of control because it indicates that the employer is interested in the methods as well as the results. Unavailability to the public, Item C, indicates control by the employer over the work time of the consultant. Lack of investment, Item D, indicates dependence on the employer for business facilities. A continuing relationship, Item E, indicates employment rather than an engagement for a single job or for sporadic or infrequent jobs.

The right of first call on the consultant's services, Item F, indicates control by the employer over the consultant's time. The right to quit at any time, Item H, indicates an employee relationship that can be terminated without incurring liability. Payment on a salaried basis, Item I, indicates a continuing relationship that is independent of the completion of a particular job.

Item J, the lack of a profit or loss potential, indicates an employment relationship because the consultant's returns are not dependent on the exercise of his or her ingenuity, initiative, or judgment in conducting a business or enterprise of his or her own.

PART 5222.0080 DOMESTIC SERVICE.

Subpart 1. Definition. The definition of domestic service is intended to be broad to include all household services. Because of the wide variety of services provided and the variety of conditions under which the services are provided, a broad definition is necessary.

Subpart 2. Independent contractor. Item A, the fact that the domestic is retained to perform a specific job and is not to perform services regularly over a considerable period of time, gives support to an independent contractor relationship. Freedom to work for others, Item B, indicates lack of control by the employer. Freedom to hire helpers, Item C, indicates that the control over the means and methods of the work lies with the domestic and not with the employer. Payment on job basis, Item D, indicates that the domestic is retained to complete a job, and that the employment relationship is not intended to be an ongoing relationship.

Subpart 3. Employee. Item A excludes household members and immediate family members from the definition of employee because of the likelihood that payment for domestic services to these persons is a gratuitous money allowance rather than a payment of wages specifically for services rendered. Item D, claiming as a tax dependent, is also excluded from employment because it indicates that the relationship is not established at arms length.

The fact that services are performed regularly and over a considerable period of time, Item B, supports an employment relationship.

The payment of \$500.00 as wages for any three month period pursuant to Minn. Stat. § 176.041, subd. 1, establishes an employment relationship. If Item C is met, other criteria need not be considered.

Payment on a time basis, Item E, indicates that an employment relationship exists, because the payment is not for the completion of a specific job. Contributions to household expenses, Item F, indicate that the relationship is not employment but rather a family or personal relationship.

PART 5222.0090 BABYSITTERS.

Subpart 1. Definition. Licensed day care centers are excluded from the definition of babysitters because these centers are business entities which are independent contractors with respect to the parents who bring their children to these centers.

Subpart 2. Independent contractors. Item A, working on premises of someone other than the purchaser of the service, indicates lack of control by the employer. Item B, instructions given to the babysitter, indicates that the method and means are left to the babysitter, an indication of independent contractor status. Item C, exercising judgment, also indicates lack of control by an employer and freedom to determine the means and methods of doing the work. Item D, performing household chores, indicates that the babysitter's time is not subject to control by the purchaser of the sitter's services.

Subpart 3. Employee. Performing services on the employer's premises indicates control by the employer, Item A. Item B, devoting services exclusively to the performance of the employer's work, indicates control by the employer. Item C also indicates control by the employer.

Subpart 4. Babysitter services contracted through agencies. This subpart is necessary to determine whether the babysitter is an employee of the agency or of the parents. Where Items A through E are

substantially present, the agency is the employer because the existence of these factors forms a reasonable basis on which to conclude that the agency retains a right to exercise sufficient direction and control over the services of the babysitter to establish the relationship of employer and employee under the usual common law rules.

PART 5222.0100 INDUSTRIAL HOMEWORKERS.

Subpart 1. Definition. Industrial home workers are generally piece workers who manufacture or assemble articles in their homes. Typical articles handled by homeworkers are listed to increase the specificity of the definition.

Subpart 2. Independent contractor. The contract between the purchaser and the worker, Item A, indicates lack of control by the purchaser where the worker is only required to produce a final product at a particular time. Item B, furnishing materials by the purchaser, is the standard practice in the homemaker industry and does not indicate employment. Payment on a piecework basis, Item C, indicates that the purchaser is buying a completed product and does not have control over the worker's time. Item D, the lack of a requirement that the worker give preference to the purchaser's work, also indicates lack of control by the purchaser. Freedom to work for others, Item E, is also indicative of lack of control. Item F, the remedy for unsatisfactory work, indicates that the worker is to produce a completed product which meets specifications and that time is within the worker's control. Item G, hours of work and supervision, are also indicative of lack of control by the purchaser.

Subpart 3. Employee. Item A, integration into the employer's business, indicates direction and control by the employer. Item B, treating the worker as an employee, indicates an employment relationship. Item C, furnishing large tools and equipment, indicates lack of capital investment, and thus an employment relationship.

Payment on an hourly basis, Item D, indicates that the employer has control over the worker's time. Item E indicates this also. Item F indicates control over the means and method of performing.

The reporting requirement, Item G, indicates that the worker is not free to schedule his or her own time. The right to terminate prior to completion of the assignment, Item H, indicates an employment relationship rather than an independent contractor relationship. The ability to change the worker's assignment, Item I, indicates control by the employer over the means and methods of accomplishing the work.

PART 5222.0110 LABORERS.

Subpart 1. Definition. Laborers are broadly defined to include unskilled workers. Many of them perform menial tasks and odd jobs. They are present in virtually all fields of industry.

Subpart 2. Independent contractor. Item A, use of business judgment, indicates freedom from control by an employer. A requirement that services need not be performed personally, Item B, also indicates lack of control because the purchaser of these services is interested only in the results, and not in the methods used in obtaining that result. Availability to the public, Item C, indicates lack of control by an employer. Independent contractors, unlike employees, are in a position to regulate their working time or to divide their services as they see fit.

Freedom to hire and direct assistants, Item D, indicates responsibility only for the attainment of a result, and that the employer does not control the method by which the result is obtained. Furnishing of tools, Item E, indicates that the purchaser of the services is not free to determine the tools which the worker is to use.

The means by which work is obtained, Item F, indicates availability to the public. Responsibility for completion and freedom to use personal means and methods, Item G, indicates lack of control by an employer.

Lien waivers, Item H, indicates that the laborer is responsible for payment of all materials or supplies used on the job.

Subpart 3. Employee. A requirement to perform services personally, Item A, is an element of control because it indicates that the employer is interested in the methods as well as the results.

Working on the employer's premises, Item B, indicates control by the employer over the services of the worker. Payment on a time basis, Item C, indicates an employment relationship because the employer assumes the hazard that the services of the worker will be in proportion to the regular payments, thus warranting the assumption that the employer has a right to control the performance of the worker's services.

Item D indicates the ways in which the employer exercises control over the means and method of doing the work. Lack of liability for noncompletion, Item E, indicates lack of an independent contractor relationship because independent contractors are responsible for completion of particular jobs.

PART 5222.0120 MUSICIANS; GENERAL.

The contract form of the American Federation of Musicians includes a standard recitation to the effect that the purchaser of the musicians' services is an employer. This standard language is not relevant to determining the actual relationship between the parties to the contract. The rule thus provides that it is not relevant.

PART 5222.0130 MUSICIANS; COOPERATIVE ORCHESTRAS.

Subpart 1. Definition. This definition describes the typical arrangement of smaller groups which are usually loosely structured.

Subpart 2. Independent contractor. The manner of payment and use of proceeds, Item A, shows that the members are retained on a job basis and that they realize a profit or loss from their activities. Freedom to work for others, Item B, is incompatible with the extent of control and direction generally exercised by an employer. Item C, the purchaser's inability to discharge a member, indicates that the purchaser does not have the control over group members that the purchaser has over employees. Where liability for damages is present, Item D, the relationship is not terminable at will and is thus not an employment relationship.

Subpart 3. Employee. Direction and control are usually present if services are integrated into the business operation of the purchaser. Where the purchaser's reputation is enhanced, Item A, performance of the musical services requires control by the purchaser.

A long term relationship, Item B, is more likely to be an employment relationship because the musicians are not engaged for a single job or for sporadic or infrequent jobs.

The restrictions described in Item C are typical of the degree and extent of control exercised by an employer. The method of payment and the responsibility for expenses, Item D, reflect control by the purchaser of the services.

PART 5222.0140 MUSICIANS; ORCHESTRA LEADER.

Subpart 1. Definition. The definition is consistent with the generally understood usage in the industry. The term union contractor is the term typically used in the music business for the musician who assembles a group composed of union members.

Subpart 2. Independent contractor. The freedom to select assistants, Item A, indicates lack of control by an employer, and is generally present in independent contractor situations.

Item B, availability to the public, indicates an independent contractor. Services of independent contractors are generally available to the public. One who is able to make his services available to the public is free from the control of services usually exercised by employers.

The right of control, Item C, indicates that the purchaser of these services does not have the control typically exercised over the provision of services by the employer.

The responsibility for expenses, Item D, shows that the leader is in a position to realize a profit or suffer a loss as a result of his management activities. The leader is responsible for a profit or loss through the use of ingenuity, initiative, and judgment in conducting the business. The manner of payment, Item E, indicates that the group has been retained to complete a job. Payment on a job basis rather than a time basis generally points to an independent contractor relationship, provided that the method of payment is not simply a convenient way of paying a lump sum agreed upon as the cost of doing a job.

By dealing only with the leader, Item F, the purchaser of the music demonstrates a lack of control over other members of the group.

The extent of control retained by the purchaser, Item G, is of such a general level as to not warrant a finding of an employment relationship.

Subpart 3. Subcontractor. This subpart explains the operation of the statutory liability for subcontractors in the context of musicians. The specific reference is helpful in this context because the subcontractor question is likely to arise where groups are involved in the contract relationship.

Subpart 4. Employee. By specifying the number, instruments and price, the purchaser is exercising the control over the assembler which an employer would exercise. Where Item A is met, the group is assembled according to the wishes of the purchaser rather than the orchestra leader.

Item B, the right of the purchaser to designate the leader, indicates the extent of control which the purchaser exercises over the assembler of the group. This degree of control is representative of an employment relationship.

Where the purchaser's control extends to making changes in the personnel of the musical group, Item C, the right to control as an employer is present.

Item D, payment on an hourly basis, is usually present in an employment relationship. The musician is responsible for the time spent in providing service rather than for the accomplishment of a specified result. Responsibility for business expenses means that the leader does not have an opportunity to realize a profit or loss through the exercise of management discretion.

PART 5222.0150 OUTSIDE COMMISSION PEOPLE OR MANUFACTURERS' REPRESENTATIVES; GENERAL.

The factors listed in this part are common to both independent contractor and employment relationships of outside commissioned salespeople. For this reason, these factors are not helpful in determining the nature of the relationship. Because these factors may be present in either relationship, additional criteria must be examined to determine the nature of the relationship.

PART 5222.0160 TRAVELING SALESPEOPLE.

Subpart 1. Definition. This definition describes characteristics of both independent contractor and employee salespersons. These criteria are described in the definition so that they are not considered indices of the nature of the employment relationship.

Subpart 2. Independent contractor. The freedom to develop one's own schedule, Item A, indicates a lack of control by an employer. Freedom to choose the means of transportation and responsibility for costs, Item C, indicates lack of control by an employer over scheduling and expenses. Responsibility for expenses, Item D, is present in independent contractor situations where the exercise of business judgment affects the return to the salesperson.

Subpart 3. Employee. Regularly reporting at the employer's offices, Item A, is a method used by employers to exercise control over the activities of the salesperson. Control is also present where the employer determines the hours or times that the salesperson must work, Item B. A salesperson who must follow and report on leads, Item C, is not free to accept or reject assignments as an independent contractor would be. Training or meeting requirements, Item D, are typically imposed by employers in order to upgrade the quality or output of their employees. An independent contractor would be responsible for his or her own training.

Requiring the salesperson to canvas territory at regular intervals, Item E, is control exercised by an employer over the means and method of performing the work.

Item F, dependence on salespersons for disposing of merchandise applies, indicates integration. The salespersons become a vital cog in the firm's machinery and control over them consequently becomes necessary in order to move the merchandise.

PART 5222.0170 HOUSE-TO-HOUSE COMMISSION SALESPEOPLE.

Subpart 1. Definition. House-to-house commissioned salespeople are used by a wide variety of businesses. Because the criteria for this group differs from that of the house-to-house dealer salespeople, the definition includes the principle characteristic distinguishing this group from the dealer group, see Part 5222.0250.

Subpart 2. Independent contractor. By not assigning exclusive rights to the salesperson, Item A, the purchaser of services signals the lack of dependence on the efforts of the salesperson.

There is a lack of control by an employer when the salesperson is not required to work at specified times or during fixed hours, Item B.

Lack of training, Item C, demonstrates a lack of investment in the salesperson by the purchaser of services. Freedom to establish schedules and the methods and means of selling are present where an employer is not exercising control over these salespersons' performance of duties.

Payment of expenses, Item D, means that the return to the salesperson may be increased or decreased by the judgment exercised in regard to expenses. This is generally present in independent contractor situations.

The lack of minimum performance standards and the right to refuse leads, Item E, are present in situations where an employer does not have the right to control the performance of services by the salesperson.

Subpart 3. Employee. Working full time for one company, Item A, provides the opportunity for control over the salesperson.

Reliance on the salesperson, Item B, indicates integration. When the success or continuation of a business depends to an appreciable degree upon the performance of the salesperson's services, the salesperson must necessarily be subject to control by the business.

The lack of freedom to reject leads or assignments, Item C, is a factor in establishing control by an employer. The employer can direct the means and manner of performance where the salesperson must follow leads and instructions.

Regular reporting, Item D, is also an element of control. It enables the employer to determine productivity and the extent to which instructions are being followed.

The requirement to regularly canvas the territory, Item E, is also a means by which an employer establishes control over the salesperson's performance of the job.

Item F, the requirement to attend salesmeetings and training courses, is a factor in establishing control. It also demonstrates reliance on the salesperson's activities and an investment by the employer in maintaining or increasing the quality of service obtained from the salesperson. Item H, a production quota, is an element of control and reflects the minimum performance standards set by the employer for continuation of the relationship.

PART 5222.0180 HOUSE-TO-HOUSE DEALER SALESPEOPLE.

Subpart 1. Definition. Dealer salespersons are distinguished from house-to-house commissioned salespersons, Part 5222.0240, in that they normally have an investment in the merchandise which they sell.

Subpart 2. Independent contractor. The requirement to work fixed hours, Item A, is a factor in control by the employer over the performance of the dealer's activities. Scheduling freedom indicates lack of the requisite control to establish an employment relationship.

Inventories and delivery vehicles, Item B, represent capital investment on which the dealer may recognize a profit or loss through the management of these resources.

The freedom to employ others, Item C, means that the services need not be performed by the dealer personally. The requirement to perform services personally is generally present in an employment relationship.

The lack of a requirement to comply with instructions or to attend sales meetings, Item D, indicates lack of control by an employer.

A dealer who is free to accept or reject suggestions from the firm, Item E, is operating relatively free of control by an employer. This factor thus tends to establish an independent contractor.

The payment of expenses, Item G, and the presence of a loss possibility indicate that the return to the dealer depends on the exercise of the dealer's judgment. Poor judgment may result in a loss to the dealer.

Item H, dependence on personal efforts and ingenuity account for a livelihood, also indicate that the dealer's return is dependent on management skills and the exercise of good business judgment. These factors tend to establish an independent contractor relationship.

Subpart 3. Employee. A requirement to report regularly, Item A, is present in most employment relationships because the employer exercises control over the means and manner of performing the work.

Item B, a requirement to report for salesmeetings, also indicates control by the employer over the dealer's time and methods of performing the work.

A quota requirement, Item C, is a minimum standard set by an employer for the performance standard necessary to continue their relationship. The quota is an indicator of the employer's reliance on the services of the dealer for the employer's business success. A restriction from selling on credit, Item D, means that the dealer is not free to exercise judgment in the granting of credit and thus does not suffer a risk of loss from selling on credit. This risk is retained by the employer. Returnable merchandise, Item E, means that the dealer does not have a substantial capital investment in the business or does not risk loss from sales not made. The lack of a capital investment factor tends to indicate an employment relationship.

A requirement to follow-up on leads, Item F, is a control factor by the employer. An independent contractor is generally free to follow leads or not as the contractor deems in his own best interests. The requirement to follow schedules and to promote certain products reflects the level of control exercised by the employer over the performance of the activities of the dealer.

Item H, instructions on how to increase sales, reflects the investment which the company has in the dealer and also indicates the reliance of the company on the dealer's activities.

The lack of freedom to hire assistants, Item I, means that the dealer's personal services are required and that helpers, if any, are provided by the company rather than by the dealer. The presence of this factor indicates an employment relationship.

Termination at will and without liability, Item J, is an indicator of an employment relationship. An independent contractor is generally liable for damages for non-completion if the relationship is severed prior to completion of the job.

Payments to the dealer for training others, Item K, means that control is exercised by the firm and not by the dealer. This factor is present in employment relationships but not in independent contractor situations.

PART 5222.0190 AGENT DRIVERS.

Subpart 1. Definition. The definition of agent driver describes the typical delivery and selling characteristics of these drivers and includes examples for clarity.

Subpart 2. Independent contractor. The requirement to do the work personally is an element of control because it indicates that the employer is interested in the methods as well as the results. Item A, agreeing to buy only a certain amount of the firm's products, indicates that the firm's interest is in the results and not in the manner in which it is obtained.

The right to hire and pay helpers, Item B, shows lack of control by the firm over the means of performance. As with personal services, the firm's primary interest is in the result rather than in the manner of performance.

Freedom to select working hours, Item C, also indicates lack of control by an employer.

In an employment relationship, the employer would select customers, set prices, and determine credit worthiness. The driver's responsibility for these factors, Item D, indicates lack of control by an employer. The importance of exercising good business judgment in cost control, Item E, indicates the possibility of a profit or loss risk on the part of the driver.

The risk of profit or loss resulting from business decisions is also apparent when Item F, inability to return unsold products, is present.

Unlike most independent contractor situations where the contractor is responsible for completion of a job, the continuing nature of the relationship in the agent driver case is such that the driver can generally terminate without incurring any liability. This factor, Item G, is thus not helpful in determining the nature of the relationship, and is present in the criteria for the employee's safe harbor also.

Subpart 3. Employee. Route assignments and scheduling are factors indicating control and thus an employment relationship, Item A. Where this item is present, a driver is not free to determine the means and methods of performance.

The requirement for personal services, and a restriction on hiring substitutes or helpers, Item B, are present in employment relationships and not in independent contractor relationships. The employer's interest is not only in obtaining a result, but also in the means of accomplishing the result.

Because the driver does not purchase the goods for resale, prices are set by the company, Item C. The presence of this factor results from the lack of capital investment by the driver and is a factor indicating control by the employer.

A driver who cannot work for others, Item D, is subject to control by the employer regarding the means and manner of performance.

The requirement to keep records, Item E, is a means of exercising control over the driver and monitoring the performance of the driver.

The prohibition on credit sales, Item G, means that the driver does not have discretion in the granting of credit. The determination of credit worthiness is made by the firm because the firm bears the risk of loss if the buyer does not pay.

The requirement to report and return unsold goods, Item H, indicates control by the employer and lack of a capital investment by the driver.

The requirement to follow leads, Item I, is present in employment relationships as a factor in the control by the employer of the means and manner of performance. Item J, soliciting new customers and adjusting complaints, indicates the level of discretion exercised by the driver. This discretion is not sufficient to establish an independent contractor status.

Termination at will and without liability for damages for noncompletion, Item K, is an indicator of an employment relationship. This factor is not significant in the agent driver context because it is also generally present for agent drivers who are independent contractors.

Treating the driver as an employee for fringe benefit purposes, Item L, indicates that the firm considers the driver to be an employee.

PART 5222.0200 PHOTOGRAPHERS' MODELS.

Subpart 1. Definition. The term photographer's model is fairly descriptive, and the definition limits its scope to persons who are professional. The requirement for knowledge or training tends to indicate the presence of professionalism.

Subpart 2. Independent contractor. A booking agent, Item A, indicates a lack of control by an employer regarding assignments.

Negotiation by the agent of the fees for the model's services, Item B, indicates that fees are not set by an employer. Control of the working hours by the model, Item C, means that control is not exercised by an employer in this important factor in determining an employment relationship. The purchaser of the services does not have an exclusive claim to the model's time. Releasing property rights, Item D, indicates that the model has a proprietary interest in the results of the services rendered. This is not the case in an employment situation.

Item E, supplying the wardrobe, shows that the tools of the profession are provided by the model. Freedom to work for others, Item F, indicates lack of control by an employer. Engagement on a job basis, Item G, shows that the model is hired for a job and that an ongoing employment relationship is not contemplated.

Items H and I indicate lack of control by the purchaser of the model's services.

Subpart 3. Employee. Item A, payment and work hours, indicate control by the employer. Item B also indicates control in the performance of the work. Salary payment on a full time or part time basis, Item C, indicates a long term relationship and an income that does not depend on the model's business skills. Item D indicates artistic control by the employer. Item E, termination, indicates that the model is not liable for damages for failure to complete an assignment.

PART 5222.0210 PROFESSIONAL PERSONS.

Subpart 1. Definition. The definition reflects the common understanding that professions are those occupations that require education or training and restricted entry regulated by the state. Persons such as professional sports players would not be professionals under this definition because entry to the field is not statutorily controlled and there are no educational requirements.

Subpart 2. Independent contractor. Maintaining one's own office, Item A, indicates lack of control over the professional. In the typical employment situation, the provision of offices on the employer's premises provides the opportunity for control by the employer.

The hiring of assistants, Item B, indicates freedom to determine the means and manner of obtaining the desired results. Control by an employer is lacking.

Payment of expenses, Item C, means that the professional's profit or loss is dependent on the professional's business judgment. Offering services to the public, Item D, is an indication that an employer does not control the services of the professional. Rather, the professional is free to work for others.

Scheduling freedom, Item E, also indicates lack of control by an employer and the absence of an employer interest in the means and methods used to accomplish the result.

Dependence for a livelihood on the time, energy and ingenuity of the professional, Item F, means that the profit or loss of the business is directly related to the efforts of the professional. The professional retains a risk of loss, unlike an employment situation.

Subpart 3. Employee. Integration into the employer's business, Item A, is a factor in establishing control. When the success or continuity of a business depends to an appreciable degree on the performance of the professional's services, the professional must necessarily be subject to control by the owner of the business.

Providing office facilities, Item C, implies that the employer may direct and supervise the professional's work. Payment on a salary basis, Item D, means that the professional bears no risk of loss in the exercise of professional judgment. Supervision, Item E, is a means of controlling the provision of services by the professional and is present in an employment relationship.

A prohibition on hiring substitutes or helpers, Item F, means that the purchaser of the services wants the personal services of the professional. This is a factor present in employment situations.

Terminability at will, Item G, is present in employment relationships and means that the professional is not liable for failing to complete a job.

A lack of capital investment, Item H, is present in employment relationships. The professional bears no risk of profit or loss in the employment of capital.

Employment relationships are often continuing, Item I, because the professional has not been retained to complete a specific job or accomplish a particular result.

PART 5222.0220. DOCTORS OF MEDICINE; PART TIME SERVICES FOR INDUSTRIAL FIRMS.

Subpart 1. Definition. Reliance on the statutory licensure provisions provides specificity, consistency with other statutory requirements, and brevity.

Subpart 2. Independent Contractor. Item A, lack of interest in a personal service and lack of an employment relationship in the contract, indicates the parties intent to establish an independent contractor relationship.

Item B, the right to leave the firm's premises, shows lack of control by an employer over the time of the doctor.

Item C, the right to send a substitute, is a factor tending to establish an independent contractor relationship. An employment relationship is generally a contract for personal services. The fact that the contract obligations can be met without the doctor's personal service indicates lack of an employment relationship.

The lack of a right to terminate on short notice, Item D, also indicates lack of an employment relationship. Employment relationships are generally terminable at will, while independent contractor relationships require the completion of a job.

The lack of direct supervision and control, Item E, demonstrates lack of employer control over the means and methods of performing the services. This is a characteristic of independent contractor arrangements.

Subpart 3. Employees. Material integration, Item A, indicates an employment relationship because the services are of sufficient significance to the employer that the employer controls the provision of services as part of its business management.

Working on a regular and continuing basis, Item B, means that the doctor generally must schedule definite hours and must follow the schedule without substantial deviation.

Supervision and control, Item C, is a factor in establishing an employment relationship. The employer has the right to supervise the means and method of performance.

Treating the doctor as an employee, Item D, tends to indicate an employment relationship because it demonstrates that the parties view their relationship as an employment relationship.

Subpart 4. Definition of factors. This definitional section is necessary to expand upon the general employment criteria of subpart 3 in the context of the doctor-firm relationship. Thus, the subpart takes each of the employment criteria and describes its application to the relationship. This section increases the specificity of the rule and assists parties in applying the rule.

PART 5222.0230 REAL ESTATE AND SECURITIES SALESPEOPLE.

Subpart 1. Definition. The definition relies on the statutory licensing criteria in order to provide specificity and consistency in the state-wide treatment of the status of these salespeople.

Subpart 2. Independent contractor, real estate. The items described in this section, taken together, evince a coordination function by the broker rather than the direction and control necessary to establish an employment relationship. While some direction is present, it is not sufficient to establish employment under the common law test. Reference to the federal standard is included to provide consistent treatment of this group.

Subpart 3. Independent contractor, securities. As with the real estate broker, the function of the securities dealer is that of a coordinator in the independent contractor situation. There is some direction exercised by the dealer, but it is not sufficient to establish the control necessary for an employment relationship.

Engaging the salesperson in the furtherance of the business, Item A, means that the services are integrated into the business operation of the firm. While this provides an opportunity for control, the degree is not sufficient to establish control.

Item B, licensing to a particular dealer, is a characteristic of the dealer-salesperson relationship. This factor does not in itself indicate an independent contractor relationship, but rather is included because it is descriptive of the relationship.

Item C, the furnishing of office equipment and supplies, tends to show the existence of an employee relationship in other contexts. However, in the securities business, it is typical of the relationship between the dealer and the salesperson and does not establish a basis for controlling the services of the salesperson.

Control is exercised by the dealer at the level indicated in Item D. Control at this level of generality does not establish control over the means and manner of performing the salesperson's work.

The freedom to work one's own hours, Item E, indicates lack of control by the dealer over the means and manner of performing the work. Item F, concluding sales in the name of the dealer and paying the proceeds to the dealer, is descriptive of the relationship between the salesperson and the dealer. It reflects the level at which control is exercised by the dealer. Payment on a commission basis, Item G, is a strong indication that an employer/employee relationship is not present. It indicates that the dealer does not have the right to direct and control the performance of the salesperson's services for the purpose of getting a fair return for the wages paid.

Item H, the opportunity for a loss, generally occurs where a salesperson has not complied with regulatory requirements. Where losses result, the dealer may charge the losses to the salesperson. The possibility of a loss as a result of the salesperson's work tends to establish an independent contractor.

Voluntary attendance at sales meetings, Item I, shows lack of control over the salesperson's services. Where the dealer does not have the right to require attendance, the dealer lacks control over the salesperson's use of his or her time.

Item J, income dependent on initiative and effort, indicates that the salesperson is free to use ingenuity, initiative and judgment in performing the services. Control by the dealer is lacking where this occurs.

Subpart 4. Employee. Payment of a salary or guaranteed minimum wage, Item A, indicates an employment relationship. The dealer assumes the hazard that the services of the salesperson will be in proportion to the regular payment; thus, in order to protect its investment, the dealer has the right to direct and control the performance of the salesperson's services.

Requiring the employee to work fixed hours, Item B, prevents the salesperson from being the master of his or her own time, and provides the dealer with the opportunity to control the employee.

Item C, the requirement to work on the dealer's premises, implies that the dealer has control over the means and manner of doing the work. The employee is physically within the employer's direction and supervision.

Item D, requiring attendance at the employer's office at specific times, establishes the extent of the employer's control over the time of the salesperson.

Item E, the right to interrupt or set the order of services, shows that the salesperson is not free to follow his or her own pattern of work but must follow the established routines and schedules of the employer. This indicates control by the dealer.

Training, Item F, is a factor of control because it indicates that the employer wants these services performed in a particular method or manner.

Item G, the requirement to report on activities, shows that the salesperson is compelled to account for his or her actions. The reports are of use to the dealer for monitoring performance to determine whether instructions are being followed and whether the salesperson is following the appropriate means and manner of performing.

PART 5222.0240. REGISTERED AND PRACTICAL NURSES.

Subpart 1. Definition. The definition relies on licensing under Minnesota Law so that reliance on the statutory definition ensures conformity with existing practice and permits reliance on criteria which are established and generally well understood.

Subpart 2. Independent contractor. Item A, holding oneself out to the public, evidences that the services are performed in the conduct of an independent trade, business, or profession.

Item B, discretion in administering services, indicates lack of control by an employer. The supervision by a physician is characteristic of most nursing services, and thus is not a factor distinguishing independent contractors from employees.

Item C, an expectation that the job will terminate, indicates an independent contractor status because the nurse is hired to do a particular job.

Item D, availability to other employers, indicates lack of control by a single employer. A nurse who is free to work for others is not subject to control by an employer regarding the nurse's time.

Subpart 3. Employee. Item A, a full time position on the regular staff, shows integration into the business of the employer and indicates control by the employer over the time of the nurse.

Item B, payment on a salaried basis and fixed hours of work, are attributes of an employment relationship. The salary indicates a continuing relationship typical of employment relationships. Where the hours of work are set by the employer, the employee is not the master of his or her own time, and is thus subject to control by the employer.

Item C, integration, is present when the success or continuation of a business depends to an appreciable degree upon the performance of the nurse's services. Where this is the case, the nurse must necessarily be subject to a certain amount of control by the owner of the business.

Item D, the right to set the order of services, indicates control over the means and method of performing the work. It shows that the nurse is not free to follow his or her own pattern of work, but is subject to direction from an employer.

PART 5222.0250 UNLICENSED "NURSES".

This part is needed to clarify the treatment of persons whose services are often referred to as nursing services but who are not licensed as nurses. The nature of the services provided is similar to that provided by domestics, and it is thus reasonable to determine the status of these persons pursuant to the rule for determining the status for domestic service.

PART 5222.0260 TAXICAB DRIVERS.

Subpart 1. Definition. Fee for services distinguishes the taxi driver from other auto drivers who may provide personal transportation to persons gratis. The reference to auto transportation is necessary to distinguish the taxi driver from other drivers who provide transportation by bus or van. The reference to providing service within a limited area is necessary to distinguish taxi drivers from persons who provide inter-state transportation.

Subpart 2. Independent contractor. Owning or leasing the cab, Item A, evidences an investment in the means by which the service is provided.

Item B, freedom to select shifts, means that the hours of work are not set by an employer and the driver is free from control over his or her time.

Item C, compensation, means that the driver's income depends on his or her own ingenuity in getting fares.

Item D, compliance with government regulations, is included to clarify that a requirement to comply with these regulations does not evidence control by an employer.

Item E, the lack of a requirement to report or to be subject to instructions, evidences lack of control by an employer over the means and methods of performing the work.

Item F, the lessor's monetary interest, indicates that the lessor does not stand to gain a profit or loss through the driver's operation of the cab. The lessor's interest is only in receiving a rental for the cab or in some cases payment for supplies used.

Item G, the risk of profit or loss, is with the driver in an independent contractor situation because the profit depends on the driver's skill and judgment in the means and manner of performing the work.

Subpart 3. Employee. Item A focuses the control test on those elements of control which are present when the driver is in the cab. This is the time period that is material because the driver's activities in the cab determine the success or failure of the cab as a business.

Item B indicates that the employer also exercises some control when the driver is not driving, such as assigning work hours or ordering passenger pickups.

The requirement to account for fares collected, Item C, means that the driver is not taking in the money for himself only, as an independent contractor would. Rather, the driver is collecting fares on behalf of the employer.

Item D, the requirement to perform services personally, indicates an employment relationship because the driver is not free to hire or assign someone else to get the job done. Rather, the services of the driver are required.

Item E, giving instructions on appearance, routes, and so forth are the ways in which the employer exercises control over the means and method of performing the work.

Payment on a salary basis, Item F, indicates that the employer assumes the hazard that the driver's services will be in proportion to the income generated by the driver's work. The risk of profit or loss is borne by the employer.

The requirement to report regularly, Item G, is an element of control. It shows that the driver is compelled to account for his or her actions. The reports are a form of supervision by the employer in that they enable the employer to determine whether instructions are being followed.

The absence of business expenses, Item H, is an indication that an employer has the right to control the methods and means of doing the work, and thus has control of the expenses.

Item I, the right to terminate, is generally present in an employment relationship where the employee is not responsible for completing a job. An independent contractor, on the other hand, is responsible for completion of a job and may not terminate the relationship prior to completion of that job without facing liability for damages for noncompletion.

The lack of an opportunity for profit or risk of loss, Item J, means that the driver is not generally free to use his or her own ingenuity, initiative, or judgment in conducting the business. The driver simply follows the instructions of the employer, and the risk that those instructions may lead to a loss is with the employer.

PART 5222.0270 TIMBER FELLERS, BUCKERS, SKIDDERS AND PROCESSORS.

Subpart 1. Definition. This definition describes the work of fellers, buckers, skidders and processors in a manner consistent with the general practice in the logging field.

Subpart 2. Neutral factors. This subpart lists factors which are generally present in both employment and independent contractor situations. They are thus not helpful in determining the nature of the relationship. This subpart is necessary to eliminate from consideration factors which might otherwise be presumed to indicate an employment or independent contractor status.

Subpart 3. Independent contractor. The exclusive rights, Item A, means that the worker has contracted to complete a job. This indicates that an independent contractor status is present because an independent contractor is responsible for completion of jobs.

Bargaining for jobs, Item B, indicates an independent contractor status because the worker is responsible for completing a job and for doing so by his or her own methods.

Item C, payment to obtain a result, is similar to Items A and B. It indicates an independent contractor status because the worker is responsible for completion of a job.

Item D, freedom to hire others, means that the worker is not required to render personal services, but is required to complete a job and may obtain the assistance of others to do so. Responsibility for expenses indicates an independent contractor because the worker controls the incurring of expenses, and thus the means and method of performing the work.

Item E, supplying necessary equipment, indicates that the worker has an investment in the business and is thus an independent contractor.

Item F, determining the hours of work, indicates that the worker has control over his own hours and that he is responsible for the hours of his helpers. The worker is the master of his or her own time, which is an attribute of the independent contractor.

Item G, holding oneself out to the public and working for several others, means that there is not an employer who controls the time and work assignments of the cutter or skidder.

Opportunity for profit or loss, Item H, means that the cutter or skidder must use ingenuity, initiative and judgment in conducting the business.

Item I, responsibility for final results, is typical of an independent contractor relationship.

Subpart 4. Employee. Item A, the assignment of work, indicates that the worker is under the control of an employer.

Item B, assignment of workers and orders regarding the kind and size of trees, demonstrates the level of control exercised by the employer.

Item C, inspection by the company foreman, indicates an employment relationship because the workers may be reassigned.

Item D, shifting of crews, indicates an employment relationship because the employer has control over the time and place of performance of the work.

Item E, selecting hours of work, is typical in the industry. However, it does not indicate an independent contractor status because the worker is required to complete a strip within a certain time.

Item F, payment on a piecework basis, is the standard in the industry for employment situations.

5222.0280 SAWMILL OPERATORS.

Subpart 1. Definition. This definition provides a general description of the sawmill operator's job. The description is consistent with the practices in the industry.

Subpart 2. Independent contractor. Item A, a substantial investment, indicates that the operator has a risk of profit or loss and thus has the right to control the means and methods of performing the work.

Item B, the contracts entered into, indicates an independent contractor relationship because the profit or loss depends upon the operator's judgment in entering into contracts which are performable at a profit.

Item C, the use of judgment, experience, and training, indicates an independent contractor who must exercise his or her own initiative and judgment in order to realize a profit on the business.

Item D, the contract and controls, demonstrates that the operator is free to use his own judgment in determining the means and method of performance.

Item E, the right to hire assistants, indicates an independent contractor. Payment and direction of these crews show that the operator is responsible for the means and method of performance.

Item F, the lack of a requirement for doing the work personally, means that the operator is not an employee. Responsibility for completion of a job is an indicator of an independent contractor.

The opportunity for profit or loss, Item G, indicates an independent contractor relationship because the operator must exercise his or her judgment in manipulating assets to realize a profit. In order to do this, the operator must have control of the means and methods of performing the work.

Item H, freedom to work for others, means that an employer does not have control of the operator's time.

Item I, the lack of restriction on activities, indicates that the operator's responsibility is completion of a job. This is present in independent contractor situations.

Subpart 3. Employee. Item A, the purchaser's payment of operating expenses, indicates an employment relationship. The operator's lack of responsibility for expenses indicates a lack of control over the means and method of performing the work.

Item B, the company's payment and firing of the crew, indicates the right of control over the means and methods of the crew's performance of the work. The exercise of this right lies ultimately with the company rather than the sawmill operator.

Item C indicates the level at which control by the employer is exercised over the operator. The operator's hours of work are set, the operator is told the kinds of products to produce from day to day, and he is required to keep records.

The company's moving of the mill, Item D, indicates control by the company over the time and place of performing the work.

Item E, payment on a salary or piecework basis, means that the risk of profit or loss is with the employer rather than with the operator. The operator can to some extent increase his or her pay by increasing output, but the profit potential is limited because the operator is not working with large amounts of capital where the risk of loss is substantial.

The termination requirements, Item F, indicate an employment relationship because the operator is not responsible to complete a job.

Item G, the lack of business expenses, indicates that the operator has no risk of profit or loss and is thus not an independent contractor.

Item H, the lack of freedom to work for others, means that the employer has control over the time of the operator.

PART 5222.0290 TRUCK OWNER-DRIVERS.

Subpart 1. Definition. This definition is adapted from that used by the Department of Economic Security in its rules governing independent contractors. Minn. Rules Part 3315.2200. Consistent with the practice in the industry, leases are included in the definition of owner-drivers.

Subpart 2. Independent contractor. The criteria in this section are those of the rules of the Department of Economic Security. Minn. Rules Part 3315.2200 A.-G. These criteria are used to promote consistency in the handling of workers' compensation and unemployment compensation. An owner-driver who is an independent contractor for workers' compensation purposes should be an independent contractor for unemployment compensation also.

Subpart 3. Employee. Item A, the payment of compensation, indicates that an employer has control over the driver's time and that the driver is essentially treated as an employee.

Item B, fringe benefits, is also an indicator of employment. The driver receives the same benefits as those offered to others who are employees.

Item C, working defined hours, indicates that an employer has control over the driver's time.

Item D, the requirement to perform the work personally, is present in nearly all employment relationships.

Item E, the lack of choice in accepting or rejecting a load, means that the employer has control over the work to be performed by the driver and the driver has no opportunity to exercise judgment with respect to whether a load is profitable.

Item F, the lack of a written contract, is typical of most employment relationships. If there is a written contract it does not specify that the relationship is that of an independent contractor. This provision is necessary to cover those situations where a contract for employment exists.

PART 5222.0291 WASTE MATERIALS HAULERS.

This rule is needed to clarify the treatment of truck owner-drivers who haul waste materials. Because of the similarity between these owner-drivers and those who haul freight, the safe harbors for freight owner-drivers are applicable to the waste materials haulers.

PART 5222.0292 MESSENGERS/COURIERS.

Subpart 1. Definition. To provide consistency with regulatory provisions and to limit applicability, messenger/couriers are defined in terms of the licensing laws.

Subpart 2. Independent Contractor. Item A, vehicle ownership, indicates lack of control over the work and the opportunity for profit.

Item B, freedom to accept or reject jobs, is indicative of lack of control over the worker's time.

Reimbursement on a job basis, Item C, indicates that the worker is hired to complete a job and that an employer does not control the worker's time.

Payment of expenses, Items D and E, mean that the worker has an opportunity for profit based on cost control. The risk of loss indicates lack of control by an employer.

Determining the details of the work, Item F, means lack of control by an employer.

Responsibility for completing a job, Item G, indicates an independent contractor.

Subpart 3. Employee. Item A, work assignment, means the employer has control of the worker's time.

The method of payment, Item B, indicates an on-going relationship of employment.

Reimbursement for expenses, Item C, indicates that the worker does not bear the risk of loss or have an opportunity for profit.

Furnishing the vehicle, Item D, indicates control over the means and methods of performing the work.

Item E, lack of investment risk, indicates an employment relationship.

Item F, insurance, indicates employer responsibility for expenses.

PART 5222.0300 VARIETY ENTERTAINERS.

Subpart 1. Definition. This definition of variety entertainers describes the typical activities of the entertainers in show business.

Subpart 2. Neutral factors. The reference to the contract of the American Federation of Musicians is necessary because of its widespread use in the business and its form language regarding an employment relationship. Because a contract is used in both employment and the independent contractor situations, it is not helpful in distinguishing the status of the relationship, and is thus a neutral factor.

Subpart 3. Independent contractor. Item A, short term engagements for a number of purchasers, indicates that the entertainer is free to work for others and that his or her time is not controlled by a single employer.

Item B, the contract clauses, indicates that an employment relationship is not present because there are no requirements regarding the means and methods of performing the work.

Furnishing music and props, Item C, is similar to the furnishing of tools in other occupations. The fact that the entertainer provides these indicates an independent contractor status.

The act that is not an integral part of the purchaser's business, Item D, indicates an independent contractor relationship. The entertainment is peripheral. If the entertainer's services were vital to the business, the entertainer would be retained on a long-term basis as an employee.

Item E, individual's reputation, indicates an independent contractor status because the entertainer's success is a result of the efforts of the entertainer in performing the work.

Subpart 4. Employee. Item A, supervision, indicates the level of control exercised by the employer. By exercising this control, the employer dictates the means and method of performing of work.

Item B, changing the act to suit the employer, also indicates control. The employer changes the act to suit his or her own purposes.

Item C, integration into the employer's business, is present in employment situations. The entertainer's services are vital to the continuation of the business.

Item D, long-term engagements, indicates employment. Continuing services imply that the relationship is permanent and that the employer has control over the entertainer's time and for whom the entertainer may work.

Item E, prohibition against working for others, means that the employer has control over the entertainer's time. This is present in employment relationships.

Item F, the lack of an opportunity for profit, indicates an employment relationship.

The right to discharge at any time, Item G, indicates that the employer has not engaged the entertainer to complete a specific job.

The prohibition against hiring helpers or substitutes, Item H, indicates that the entertainer's services are personally required and that if helpers or substitutes are necessary, they are the prerogative of the employer to hire rather than of the entertainer.

PART 5222.0310 SPORTS OFFICIALS.

Subpart 1. Definition. This definition describes sports officials as referees in organized competition where the referee must be certified. This definition is intended to exclude persons who may referee in games at lower levels of competition. At the lower levels of competition, the sports officials generally are volunteers and are typically uncompensated.

Subpart 2. Independent contractor. The requirement for a written contract, Item A, permits the parties to state their understanding of their relationship. This is helpful in permitting the parties to establish the relationship that they desire.

Item B, payment on a set fee basis, indicates an independent contractor because the official is paid to complete a job, namely, officiating a particular game.

Item C, freedom to reject assignments, is an indicator of an independent contractor status. An employee is required to accept whatever assignments are given him by the employer.

Item D, freedom to work for others, indicates that the employer does not control the time of the sports official.

Subpart 3. Employee. Item A, payment on a time basis, is typical of employment relationships. Payments on a time basis indicate that an employer has the right to control the activities of the employee during the time paid for.

Lack of freedom to reject assignments, Item B, means that which jobs are selected is not the choice of the official. Rather, the official is controlled by an employer.

Lack of freedom to work for others, Item C, indicates an employment relationship because someone other than the official directs the work activities of the official. Independent contractors, on the other hand, typically provide their services to more than one purchaser.

Termination without liability, Item D, evidences lack of responsibility for completing a job. As an employee, the official may quit at anytime without liability for noncompletion.

PART 5222.0311 JOCKEYS.

Subpart 1. Definition. The definition relies on the statutory licensing provisions for consistency and ease of use. Apprentice jockeys are included because they usually use agents to make their business arrangements and their relationships to trainers and owners are virtually indistinguishable from those of jockeys.

Subpart 2. Independent contractor. Use of an agent, Item A, indicates that the jockey works for several purchasers of his or her services. An employee, who generally works for only one person, has no need of an agent.

Freedom to ride the horses of others, Item B, indicates that the jockey may work for others, and that there is not an employer who controls the selection of rides for the jockey.

Item C, freedom to reject calls, means that the jockey may reject requests to ride. Selection of jobs is an attribute of independent contractors; employee jockeys must accept calls from their employer.

Providing the saddle, Item D, is similar to the providing of equipment in other occupations. Furnishing equipment tends to indicate control over the means and methods of performing the work.

Trainer instructions, Item E, are given to all jockeys. Independent contractor jockeys, however, are not bound to follow the instructions of the trainer. Selecting the means and methods of running the race is the jockey's prerogative.

Item F, payment on a per race basis, is similar to payment for job completion in other occupations. The jockey is hired to run a race and payment for that race fulfills the contract. As both an employee and an independent contractor jockey would participate in the winner's purse, receipt of a percentage of the winnings is not relevant to determining the jockey's status.

Subpart 3. Employee. Riding only for the employing trainer, Item A, means that the trainer controls the time of the jockey, and the jockey is not free to select his or her own jobs.

Lack of freedom to reject the employer's call, Item B, indicates control by an employer over the jockey's providing of services.

Payment for the saddle, Item C, indicates employment where this critical piece of equipment is provided by the employer.

Trainer instructions, Item D, may not be disregarded by an employee jockey. The trainer's orders regarding the running of the race must be followed. In the racing business, however, the jockey's paramount rule is safety. Thus, trainer's instructions are not followed when the safety of jockeys or horses is threatened.

Payment on a salary basis, Item E, generally indicates an employment relationship. The employer has the right to control the order and means of services on a relatively long-term basis.

PART 5222.0312 TRAINERS.

Subpart 1. Definition. Reliance on the statutory licensing provision provides consistency and ease of use.

Subpart 2. Independent contractor. The method of payment, Item A, indicates that the payment is intended to cover most of the trainer's costs of providing service. The daily fee covers ordinary expenses and provides a return on capital to the trainer.

Item B, payment of expenses, means the trainer does not have to account to an employer for the expenses incurred, and is free to establish the methods and means of work.

Capital investment, Item C, implies the right to control the use of the investment in providing services. The capital investment of trainers is extensive.

Management of the horse, Item D, indicates that the trainer is in control of the means and methods of performance. An owner may occasionally give instructions regarding care of the horse, and the trainer generally complies. If the trainer disagrees, however, he or she may refuse to comply with the order.

Item E, the stabling of horses owned by others, means the trainer works for several owners. This indicates an independent contractor because there is not an owner who has control of the trainer's time.

Subpart 3. Employee. Item A, payment on a salary basis, typically is present in employment relationships. The control of expenses and risk of loss are borne by the owner.

Item B, supplies, means that the trainer has no control over or personal financial interest in expenses, as they are the responsibility of the employer.

Item C, ownership of the stables, indicates lack of capital investment by the trainer.

Item D, a requirement to comply with instructions, eans the trainer's only remedy in the event of disagreement is to quit or be terminated. As the owner generally relies on the experience of the trainer, the presence of this item may be difficult to determine.

Item E, lack of freedom to train horses owned by others, indicates control over the time and provision of services by the trainer.

Item F, hours of work, also indicates control over the trainer by the employer.

PART 5222.0320 GENERAL CRITERIA FOR NONSPECIFIED OCCUPATIONS.

This rule is needed to explain the relationship between the criteria for specific employment as described in the preceding body of these rules and the general criteria for non-specified employment. The general criteria serve two purposes. First, where all of the safe harbor criteria for an employment are not met, the general criteria are used to fill in the gaps. Second, where the specific occupation is not addressed in the rules, the general criteria are used to determine whether the relationship is that of independent contractor or employment.

PART 5222.0330 CONTROL OF METHOD AND MANNER OF PERFORMANCE.

This rule describes the common law control test. The existence of control is generally considered to be the most important factor in determining the nature of the working relationship. Guhlke vs. Roberts Truck Lines, 268 Minn. 141, 128 N.W. 2nd 324 (1964). The factors to be considered in determining control are derived from the rules of the Department of Economic Security, Minn. Rules 3315.1000. It is reasonable to use the Economic Security criteria for two reasons. First, the criteria have been used by that department for several years and have proven workable. Second, use of these criteria promotes consistency of results in determinations by the Department of Labor and Industry and by the Department of Economic Security.

PART 5222.0340 INDEPENDENT CONTRACTOR OR EMPLOYEE, FACTORS TO CONSIDER

This rule is based on the rule of the Department of Economic Security, Minn. Rules 3315.1100. Again, the rules of the Department of Economic Security are used to promote consistency of results and because of their proven workability.

IMPACT ON SMALL BUSINESS

The Commissioner has considered the impact of these rules on small businesses and has determined that the effect will be favorable. The rules will assist small businesses in their planning, and in determining whether services are provided by employees or by independent contractors. As required by Minn. Stat. § 14.115, subd. 2, the Commissioner has also considered methods for reducing the impact of the rules on small business. The rules do not establish compliance or reporting requirements, or schedules or deadlines for compliance or reporting requirements. Nor do they establish design or operational standards. The methods set forth in Minn. Stat. § 14.115, subd. 2 a.-d., are thus not applicable to this proceeding.

The Commissioner has considered exempting small businesses from all requirements of the rule pursuant to Minn. Stat. § 14.115, subd. 2e. An exemption is not appropriate. A large percentage of the labor force in this state is employed by small businesses. These small businesses can benefit from the criteria established by these rules in their business planning. Further, exempting small businesses would defeat one of the purposes of the rules of assisting in the disposition of litigation after an injury has occurred. It would not be reasonable to provide that the rules do not apply where the purchaser of these services is a small business.

FISCAL IMPACT ON LOCAL PUBLIC BODIES

The Commissioner has considered the fiscal impact of these rules on local public bodies pursuant to Minn. Stat. § 14.11, subd. 1, 1984, and has found none. No additional financial burdens are placed on local public bodies, as the adoption of these rules will not require the expenditure of public monies by local public bodies.