



# ROLE OF THE INDEPENDENT CONTRACTOR

Dissecting the implications for employers and employees

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Right of way professionals serving the private sector traditionally work in one of two ways. One is as an employee of an operating and services company, and the other is as an independent contractor working directly for an operating company or through a placement firm. There are implications that result from the independent contractor approach for both the operating company and the employee. To help clarify some of the major differences between service company employees and independent contractors, it's essential to address the key issues that affect those hiring and being hired for a contract role.

## FOR THE OPERATING COMPANY

There are two primary concerns for operating companies utilizing independent contractors. The first is the issue of co-employment and the second is liability.

### Co-Employment Issues

Complex issues can arise when two separate business entities exert some control over one person's work assignment or condition of employment. Even though a company may employ a temporary worker through an agency, in some cases companies using the services of temporary employees have been found to be co-employers in the eyes of the IRS and various courts. Such a finding of co-employment can have costly ramifications and cause unexpected taxes, as well as unanticipated claims for employee benefits.

One of the basic tests used by the IRS to determine if a worker should be considered an employee subject to withholding and possibly eligible for benefits is specifically related to their level of responsibility. The IRS will ask how much control the worker has in performing the tasks to which they are assigned, whether the worker is setting their own schedule and if they are the one determining how a particular duty should be performed.

When in need of a right of way professional, the use of a financially sound and reputable service provider is the best way to avoid any co-employment issues. For protection, a company should ensure that the right of way service provider retains the following duties:

1. Final hiring and firing
2. Assigning the worker to a specific job; reassigning as necessary
3. Establishing pay and benefits, along with proper tax withholding
4. Negotiating work hours and duration of assignments with the worker
5. Disciplinary duties as needed
6. Evaluation of performance; provision of any necessary counseling

The right of way placement organization can always cut corners and hire an independent contractor. However, exercising proper control over them is a risk that may not be worth taking. For the right of way service provider to perform the six duties mentioned, it is imperative that they use direct employees to perform the client's services rather than using independent contractors. Only then can the service provider exercise proper control.

### Liability Issues

“Respondeat Superior” is a well established common law stating that an employer is vicariously liable for the actions of its employees who are acting within the scope of their employment. Such a clear line of responsibility does not exist if the worker is an independent contractor. With that in mind, if something goes wrong and a placement organization is utilizing independent contractors rather than direct employees, who can the client look to for financial responsibility?

Contracts between client companies and service providers generally include language establishing an independent contractor relationship between the client and the service provider. With true service companies, this serves as a division between the client and the provider and its employees. A contract for the services between the client and the placement organization can assign risk. The question for the client is whether liability insurance of the placement organization covers the work and actions of an independent contractor. If liability insurance does not cover the work and actions of an independent contractor, is the placement organization or the individual independent contractor financially strong enough to shoulder its indemnity obligations alone? Again, these questions are avoided if the service provider utilizes direct employees.

The client company can protect itself by demanding the same contractual terms, insurance types and coverage amounts from all providers, including service companies, staffing organizations or individuals. Those companies and persons who cannot meet these criteria may not provide the protection the client needs.

### FOR THE RIGHT OF WAY PROFESSIONAL

Right of way professionals need to seriously consider the issue of working as an employee versus working as an independent contractor. There is a long history of people working as independent contractors, especially in the oil and gas industry, but also in support of utility companies and their projects. In the latter case, the rise in the level of professionalism and the proliferation of service companies using true employees has reduced the incidence of independent right of way contractors over the past twenty or so years – until fairly recently.

## “Ask the right questions to help make the decision that works best for you.”

With the spike in the industry driven by various shale developments, we are seeing an increase in independent contractors in right of way roles. This is partly due to upstream and midstream companies' preexisting relationships with oil and gas lease agents, who are used to handle right of way work. Increased activity has resulted in the creation of numerous start-up companies and has also encouraged both oil and gas staffing companies and traditional public sector providers to move into the pipeline right of way arena. Smaller exploration and production companies may have limited experience in right of way, so it is probably natural for them to consider land work as land work. However, those of us in the industry understand that the skill sets are in fact very different.

### Considering the Implications

When a right of way professional is offered employment, there are some crucial questions to ask the potential employer, some of which include:

#### a) Will I be a W-2 employee or a 1099 worker?

- If the latter, are you equipped to file your own income taxes to avoid trouble with the IRS?
- How will you maintain your Social Security and Medicare payments?
- Have you done this before?
- Are you aware of the implications?

#### b) Are benefits available with the offer?

- Will you be eligible for health insurance for you and your family?
- Is life insurance and disability offered?
- Do you qualify for paid vacation and/or holidays?
- What about 401K or savings options?

c) Will you get paid weekly, semi-weekly, monthly or when your employer gets paid by the client?

d) How is the quoted pay broken out?

- Will I be paid by the day, hour or month?
- Is a per diem included or separate?
- Is the rate in accordance with IRS (CONUS) rates?
- If in excess, will overpayment be on a 1099?

e) Does pay or per diem include compensation for:

- Cell phone?
- Computer and peripherals?
- Mileage and travel to/from the job?
- Other expenses?

If the answers are not to your liking, you may want to reconsider the offer. There are other issues to take into account, such as personal liability and the independent contractor requirement to carry a particular level of professional liability and/or errors and omissions insurance. The right of way professional needs to consider all of these issues when an offer of employment is made - understanding that a high day rate may carry with it some unforeseen problems.

Ask the right questions to help make the decision that works best for you.

### Advantages of the Consultants Council

Operating companies who utilize members of the Right of Way Consultants Council (RWCC) can be assured that personnel working on projects or in-house support roles are employees and not independent contractors. The RWCC's Qualifications for Membership state that, "Members must be in compliance with all applicable Federal, State and local withholding laws and regulations (including but not limited to IRS Publication 15-A)."

RWCC members provide a higher degree of security for operating companies than might be the case with independent contractors or those working through placement services as independent contractors. Employees working for RWCC companies can rely on the fact that these companies must withhold taxes and Social Security and pay employers' social security and issue W-2 forms, not 1099 forms.

We encourage operating companies to visit the RWCC website at [www.rowcouncil.org](http://www.rowcouncil.org) to view the entire list of member qualifications.

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