

Who Can Have an Agreement to Establish an Independent Relationship?

Preface: 1) This commentary relates to Texas Workers' Compensation Law, not to any Federal or State Labor or Tax statutes.

2) These rules and forms apply **ONLY for subscribers** (those hiring contractors who carry Workers' Compensation Insurance.)

The law in Texas was changed effective January 1, 1991 and has not been significantly changed since. There are three separate definitions of independent contractor in the law.

Division One – Trucking

An owner operator is an independent contractor, and the owner operator and his employees (if any) are not employees of a motor carrier, if the owner operator has entered into a written agreement with the motor carrier that evidences a relationship in which the owner operator assumes the responsibilities of an employer for the performance of work and the developed form for documentation of the relationship is **DWC-82**. {Texas Labor Code, Texas Workers' Compensation Act, Section 406.123}

Division Two – residential and small (building) commercial construction contractors

This division (Section 3.06 of Article 8308) applies only to work on residential structures, commercial structures under 2,000 square feet and related appurtenances to the structure.

“Independent Contractor” means a person who contracts to perform work or provide a service for the benefit of another and who:

1. Is paid by the job, not by the hour or some other time-measured basis;
2. Is free to hire as many helpers as he desires and to determine what each helper will be paid; and
3. Is free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring employer.

Independent contractors under this statute are free to establish an independent relationship from the hiring contractors. The state developed form **DWC-83** to document this relationship.

Division Three – All other contractor relationships

Section 3.05 or Article 8308 establishes governance for this third division. The law states that a subcontractor and the subcontractor's employees are not employees of the general contractor if the subcontractor:

1. Is operating as an independent contractor; and
2. Has entered into a written agreement with the general contractor that evidences a relationship in which the subcontractor assumes the responsibilities of an employer of the performance of work.

The Texas Department of Insurance has developed form DWC-85 to affirm the subcontractor status as an independent contractor.

This form should NOT be used by subcontractors without employees, as the general contractors is required to cover these individuals – see SUBCONTRACTORS WITHOUT EMPLOYEES below.

Under this statute (different from any other Division), the definition of “**Independent Contractor**” means:

1. Acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
2. Is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employees;
3. Is required to furnish or have his employees, if any, furnish necessary tools, supplies, or materials to perform the work or services; **and**
4. Possesses the skills required for the specific work or service.

**** SUBCONTRACTORS WITHOUT EMPLOYEES**

Unlike Section 3.06 for residential and small commercial contractors, independent subcontractors without employees in section 3.05 are considered to be employees of the general contractor. The general contractor will be responsible for workers’ compensation benefits for these individuals. In this case, the general contractor and the subcontractor may enter into an agreement for the deduction of premiums paid from the contract price, if statutory rules are followed. No agreement can alter the status of the worker being the employee of the general contractor.

Exception – In recent years, one singular exception has been made to this division of the statute. It relates to only one industry and one type of subcontractor. Oil & Gas Lease Operators may enter into an agreement with an individual without employees when that individual performs the duties of a Pumper Gauger and in this one situation, only an individual can establish himself or herself as an independent contractor when the Hiring Contractor is a subscriber and the agreement is made on form **DWC-85**.