

Section	Policy
30	35.10.50

Section Title: Finance, Assessments and Administration - *Assessments*
Subject: Status of Workers, Independent Contractors and Employers
Effective Date: For Decisions Made after July 1, 2019

A. POLICY PURPOSE

To be eligible for compensation under *The Workers Compensation Act* (the "Act"), a person must fall within the Act's definition of worker. Determining whether someone is a worker under the Act is therefore a key component in any decision relating to entitlement to compensation. It is also a key factor in determining who is responsible for paying for a person's WCB coverage.

The definition of worker found at subsection 1(1) of the Act is complex. It sets out several types of worker, including:

- a person who enters into or works for another under a contract of service or apprenticeship;
- a person who has purchased his or her own optional coverage; and a person who the WCB deems to be a worker.

In many traditional employment relationships a service provider works for a principal and the principal pays the service provider wages resulting in the issuance of a T4 slip. In such cases it is clear that the service provider is a worker within the meaning of the Act. It is also clear that the principal is an employer who is responsible for paying for the worker's coverage. Employers do so by including the worker as part of the assessable payroll and paying WCB premiums on their behalf.

In industries where contractors and subcontractors are prevalent, the relationships are less clear. In such circumstances the WCB must determine if the service provider is a worker, an independent contractor, or an employer.

This policy:

- describes when the WCB will allow individuals to purchase their own optional coverage and the consequences that flow from such a purchase;
- explains that, for the purposes of determining entitlement to compensation, the WCB must be satisfied that a service provider is a worker within the meaning of the Act in the context of the working relationship he or she was involved in at the time of injury; and
- outlines the circumstances in which the WCB will deem a service provider to be a worker under the Act and the consequences that flow from this in terms of who is responsible for paying for the service provider's coverage.

The policy also provides guidance on how to determine the amount of a worker's assessable earnings when he or she does not receive a T4 slip from the employer.

The relevant legislative provisions and glossary of key terms are contained in Appendix A.

APPLICATION

This policy applies to all employers, workers, and independent contractors in every industry covered by the Act.

B. POLICY

1. Key Principles

- a. The WCB has exclusive authority to make all necessary determinations under the Act, including:
 - whether a service provider is a worker, an independent contractor, or an employer;
 - whether a service provider is a deemed worker of a principal, who is then considered to be the service provider's employer; and
 - the amount of a worker's assessable earnings in a situation where the worker does not receive a T4 slip, as is often the case in contract-based industries.
- b. A service provider may be involved in several different types of working relationships simultaneously and play different roles in each of them. For example, he or she may be in a traditional working arrangement with an employer in one relationship, act as an independent contractor providing services to a consumer in another, and function as an employer in another.

The WCB decides whether a person is a worker, employer or independent contractor at the time that coverage is requested, as described in section 2 of this policy. For the purposes of determining a person's entitlement to compensation, however, the WCB decides whether a person is a worker, employer or independent contractor, as well as whether someone is a deemed worker, based on the nature of the working relationship at the time that the person suffers a workplace accident. In other words, the relevant working relationship is the one the person was specifically engaged in at the time of his or her injury.

- c. In making its determination regarding a service provider's status as a worker, employer or independent contractor, the WCB will look at all of the facts. The manner in which the parties characterize the working relationship between them, through written contract or otherwise, will be considered but will not determine the matter.
- d. Other agencies, such as Canada Revenue Agency and the Employment Standards Branch of the Manitoba government, also make determinations regarding worker, employer and independent contractor status. While the WCB may consider those determinations and the basis on which they are made, determinations by other agencies do not determine a person's status under the Act.

2. Determining Eligibility to Purchase Optional Coverage under the Act

To be eligible to receive compensation in the event of a workplace accident, a person must meet the definition of "worker" found in the Act.

Service providers who purchase their own optional coverage (i.e. coverage for themselves, personally) are brought within the definition of "worker" under the Act.

In industries where contractors and subcontractors are prevalent, the WCB is frequently approached by service providers who wish to purchase their own optional coverage. They may want to purchase coverage in order to ensure that they will be covered in the event of a workplace accident. Alternatively, they may want to purchase coverage because they have been informed by a principal that the purchase of optional coverage is a necessary pre-condition to the contract.

The Act permits, but does not require, the WCB to sell optional coverage to both independent

contractors and employers. As a matter of policy, the WCB will sell service providers their own optional coverage if they can satisfy the WCB that they are one of the following:

- a. **independent contractors who do not work for the commercial benefit of others** -- these are self-employed service providers who do not employ others, and who provide their work or services as an end product to a consumer such as a homeowner.
- b. **independent contractors who qualify as independent businesses** -- these are self-employed service providers who may work for the commercial benefit of others, but exercise a level of autonomy and degree of control that qualifies them as independent businesses. This independence makes it inappropriate for the WCB to conclude that those for whom they perform work are their employers. The Administrative Guidelines to this policy set out factors the WCB will consider in determining whether or not an independent contractor operates an independent business.
- c. **employers in covered industries** -- employers in covered industries must buy coverage for their workers, but it is not mandatory that they purchase coverage for themselves.

In cases where these principals pay their service providers in excess of the minimum annual earnings (i.e. what a person would earn each year if they received minimum wage, working a 40 hours work week for 52 weeks a year) the WCB will consider these principals to be employers who operate independent businesses and will sell them optional coverage so that they themselves are covered in the event of a workplace accident.

In cases where these principals pay their service providers less than the minimum annual earnings, the WCB will consider these principals to be employers, but will sell them their own optional coverage if they qualify as an independent business. The Administrative Guidelines to this policy set out the factors the WCB will consider in determining whether these individuals are employers who operate independent businesses.

Once independent contractors or employers have purchased their own optional coverage, they are brought within the definition of "worker" under the Act. If they suffer a compensable injury while working in the capacity for which the WCB allowed them to purchase optional coverage, they will be entitled to compensation, and their own optional coverage will be the source of their coverage.

Policy 35.10.120, *Terms and Conditions of Optional and Personal Coverage*, provides more detail on this topic, including the maximum amounts of optional coverage which may be purchased.

3. Determining Whether a Service Provider is a Worker

If a service provider sustains a workplace injury and makes a claim for compensation, the WCB must determine whether the person is a worker within the meaning of the Act. This determination is based on what he or she was doing, for whose benefit, at the time of the injury. The relevant working relationship is the one in which the person was engaged at the time that he or she was injured.

A good example would be a self-employed individual who provides end products to consumers, (e.g. works as a plumber for homeowners) who also has one contract to provide services to a general contractor as part of a large construction project, but who does not qualify as an independent business.

If he or she were injured while working as a plumber for a homeowner and had purchased optional coverage, he or she would fall under the Act's definition of worker and be entitled to coverage. If optional coverage was not purchased, he or she would not be a worker under the Act for the purpose of this working relationship and would not be entitled to compensation in the event of a workplace accident.

If he or she were injured while working as a plumber for the general contractor, however, the WCB would evaluate the relationship between the general contractor (principal) and the self-employed service provider. If the service provider was working for the commercial benefit of the general contractor under a contract of service or apprenticeship, the WCB would determine the service provider to be the worker of the general contractor, and the general contractor to be the employer.

As the employer, the general contractor would be liable to pay WCB premiums in relation to that service provider. In other words, the source of the individual's WCB coverage for the purposes of this accident would not be the optional coverage that he or she purchased as an independent contractor, but coverage that the general contractor would be required to purchase as his or her employer.

In summary, if the WCB determines a service provider to be a worker within the meaning of the Act, he or she will be entitled to coverage. The source of that coverage will depend on what the service provider was doing, and for whose benefit, at the time of the accident.

4. Use of the Deemed Worker Provision

If the WCB determines that, at the time of the injury, the service provider who sustained the injury was not a worker within the meaning of the Act, the WCB may, nevertheless, deem that service provider to be a worker.

In accordance with section 60(2.1) of the Act, the WCB may only exercise its deeming authority where the service provider:

- is not a worker under the Act (i.e. does not otherwise fall within the definition of worker found at section 1(1) of the Act): and
- is working for the commercial benefit of another.

One of the main principles that underpins the workers compensation system is that workers in mandatory industries are entitled to coverage. The deeming provision exists to prevent employers from reorganizing their work force in order to avoid responsibility for paying worker's compensation premiums.

One circumstance in which the deeming provision is used is where a service provider is injured while working for the commercial benefit of someone else, but the WCB has determined that the service provider in question is not a worker. This occurs when an independent contractor or employer operates an independent business and is eligible to purchase optional coverage on that basis, but for some reason chose not to do so.

By not purchasing optional coverage, he or she is not a worker within the meaning of the Act. Because he or she is working for the commercial benefit of someone else and is working in a mandatory industry, however, the WCB is of the view that he or she should still be entitled to coverage. In such circumstances, the WCB will deem the service provider to be a worker, and will deem his or her principal to be his or her employer. As the employer, the principal will be required to pay WCB premiums in relation to this deemed worker.

Some principals choose to pay premiums for all those service providers whom they engage for their commercial benefit, regardless of whether or not one or more of these service providers might be eligible to purchase their own optional coverage under the Act. The WCB's practice is to allow this, and to consider these service providers to be workers for the principals who have paid their premiums.

5. Calculating the Assessable Earnings of a Worker Who Doesn't Earn T4 Income

Once the WCB has determined that a service provider is a worker within the meaning of the Act, and that his or her principal is an employer, the WCB must determine the amount of assessments the employer is required to pay in relation to that worker.

When a worker is paid T4 income, it is relatively easy to determine a worker's assessable earnings. In circumstances when a worker is paid under a contract, assessable earnings can be more difficult to calculate. The WCB has developed a Labour Percentage Schedule to separate the labour portion of a contract from the price of materials and equipment. It is important to note that the Labour Percentage Schedule reflects a general guide for various industries. The WCB will also consider documentation provided by employers and/or workers when determining a worker's assessable earnings. The Labour Percentage Schedule is included in the Administrative Guidelines.

C. REFERENCES

The Workers Compensation Act, subsections 1(1), 60(2.1), 68(1), 74(3) and section 75
Manitoba Regulation 201/2009, *Minimum Annual Earnings Regulation*

Policy 35.10.120, *Terms and Conditions of Optional and Personal Coverage*

History:

1. Independent Contractors - Criteria approved by Board Order 23/85 on February 6, 1985.
2. Policy 35.10.50 approved by Board Order 44/89 on March 15, 1989, effective February 24, 1989.
3. Definition of "Homeowner" in Policy 35.10.50 amended by Board Order 42/90 on November 29, 1990.
4. Assessment Schedule for Contract Labour amended by Board Order 16/93 on April 30, 1993.
5. Policy revised by Board Order 24/08 on June 26, 2008, effective July 1, 2008. Policy was rewritten in plain language, obsolete terms were removed, and excessive detail and industry-specific procedures were deleted from the policy and incorporated into operational guidelines.
6. Policy revised by Board Order 08/11 on April 28, 2011, effective June 1, 2011. The Labour Percentage Schedule in Appendix B was referenced in the policy. Please contact the WCB at 954-4655 for a copy of the guidelines.
7. Minor formatting and grammatical changes were made to the policy and the effective date was clarified, June 27, 2012.
8. Reference section updated to reflect Manitoba Regulation 201/2009, August 24, 2016.
9. Reference to the WCB Telephone number to call to receive a copy of the policy guidelines was deleted in September 2016 as the policy guidelines are available on the WCB website.
10. Policy revised by Board Order 18/19 on June 20, 2019, effective for Decisions Made after July 1, 2019. Policy revised to provide greater clarity about its application and to improve flexibility in addressing alternative work arrangements.
11. October 2019 Appendix A was updated. Previously, the minimum wage was set out in a regulation under *The Employment Standards Code*. Sections 7 and 8 of this Act determine minimum wage.
12. Minor formatting changes made to the policy January 2021.

APPENDIX A - LEGISLATIVE PROVISIONS AND KEY TERMS

Commercial Benefit: This term is used to describe circumstances when a service provider's work contributes to the economic activity of a principal's trade or business.

Consumer: A principal who purchases work or service from a service provider that is intended for consumption (i.e., an end product), rather than for further commercial benefit. Consumers are not considered to be employers.

Deemed Worker and Employer: These terms are defined in subsection 60(2.1) of the Act: "Notwithstanding the other provisions of this Act, where a person who is not a worker under this Part performs work for the benefit of another person, the board may deem the first person to be a worker, and the second person to be the employer of the first person, within the meaning of this Act."

Employer: This term is defined in subsection 1(1) of the Act. For the purposes of this policy, the relevant part of the definition is contained in sub-clause (a)(i): "a person who has in service under a contract for hiring or apprenticeship, written or oral, expressed or implied, a person engaged in work in or about an industry" and clause (c) "a person that the board has determined under subsection 60(2.1) to be an employer".

Independent Contractor: This term is defined in subsection 75(3) of the Act as "a self-employed person, including a partner in a partnership, who carries on or engages in any industry, and who does not employ any workers in connection with that industry."

Minimum Annual Earnings: An amount of earnings established by the WCB Board of Directors under the *Minimum Annual Earnings Regulation*. The minimum annual earnings level is linked to the minimum wage established under The *Employment Standards Code*. The amount is equivalent to what a person would earn a year, if they were paid minimum wage, and worked a 40 hour work week for 52 weeks a year.

Principal: A person for whom work is performed before a determination is made as to whether that person is an employer or a consumer.

Service provider: A person who provides work or services for a principal before a determination has been made as to whether the person is a worker, employer or an independent contractor.

T4 Slip: A statement of remuneration that summarizes a person's employment earnings as well as their income tax and other deductions, such as contributions towards various statutory benefit programs, for the year. The statement is prepared and issued by the employer and provided to both the Canada Revenue Agency and the person who earned the money.

Worker: This term is defined in subsection 1(1) of the Act. For the purpose of this policy, the relevant definition is contained in clauses:

- (a) "a person, whether or not under the age of 18, who enters into or works under a contract of service or apprenticeship, written or oral, expressed or implied, whether by way of manual labour or otherwise."
- (d) "a person deemed to be a worker under subsection 60(2.1)."
- (e) "an employer who is admitted by the board as being within the scope of Part I under subsection 74(3)."
- (f) "an independent contractor who is admitted by the board as being within the scope of Part I under section 75."