

## **MARYLAND WORKERS' COMPENSATION LAW REGARDING EMPLOYEE V. INDEPENDENT CONTRACTOR**

When a worker is injured and there is a question as to whether the employee is an independent contractor or an employee of the direct employer or general contractor, several factors need to be considered to determine whether an employer/employee relationship exists. If the facts of the case demonstrate that the worker is an independent contractor, the general contractor may not be held liable for the worker's injury. The court has recently addressed the factors that are considered to determine whether an employer/employee relationship exists and has noted that the key consideration is the level of control the employer has over the employee.

*Maryland Labor and Employment* § 9-202 provides that "An individual, including a minor, is presumed to be a covered employee while in the service of an employer under an express or implied contract of apprenticeship or hire." "To overcome the presumption of covered employment, an employer shall establish that the individual performing services is an independent contractor in accordance with the common law

or is specifically exempted from covered employment under this subtitle."

Maryland case law has addressed the factors which establish an employer/employee relationship under the traditional common law test. A worker will be deemed a "covered employee" unless it is established that he or she is an "independent contractor" under the common law rules. The courts have considered the following factors to determine the existence of an employer/employee relationship (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer. *Whitehead v. Safway Steel Products, Inc.*, 304 Md. 67, 77-78, 497 A.2d 803, 808-09 (1985).

The Court has noted that none of these factors alone is decisive, except the power of control. For example, in *Whitehead*, the court held that an employer/employee relationship existed when an employer instructed the worker on his tasks, could assign him to other duties, and supervised and directed his actions and rate of work. The Court held that the employer's right to control and direct the employee in the performance of the work and in the manner in which the work is to be done is the 'decisive' or 'controlling' test. *Whitehead v. Safway Steel Products, Inc.*, 304 Md. 67, 77-78, 497 A.2d 803, 808-09 (1985). In addition, the level

of control necessary to be deemed an employer may be shown by the amount and type of employee rules and regulations that are imposed upon an individual. In *Mackall*, an employer subjected a worker to the same rules and regulations that were applicable to a regular employee of the company, including the requirement to wear a smock with the company logo. The court held that the evidence showed that the company exercised adequate control over the worker for the worker to be considered an employee of the company. *Mackall v. Zayre Corp.*, 293 Md. 221, 225-26, 443 A.2d 98, 100 (1982).

The most recent case discussing the factors that establish an employer/employee relationship is *Elms v. Renewal by Andersen*, 439 Md. 381 (2014). Mr. Elms was a licensed home improvement contractor who owned and operated Elms construction. Elms had insurance as a sole proprietor but the only named employee on the policy was his son Richard Elms. Mr. Elms himself was employed by Renewal to install windows and doors. He was injured while installing a window at Renewal's customer's home. The Commission held that Mr. Elms was an Independent contractor and that an employer/employee relationship did not exist between Elms and Renewal.

The Court of Appeals of Maryland held that the Commission misconstrued the law as applied to the facts when it determined that Elms was an independent contractor. *Elms v. Renewal by Andersen*, 439



*Md. 381 (2014).* The Court noted several factors that established an employer/employee relationship in this case. Renewal provided detailed training and instructions to Elms regarding how to complete the installations, including how to install the insulation and the types of shims, screws, caulking, and molding to use around the windows. Additionally, Renewal did not directly supervise Elms in the performance of the work but Renewal did engage in “spot checking” of Elms’s work. Renewal also required Elms to wear clothing bearing the “Renewal” logo and place a Renewal sign in the customer’s yard at job sites. Renewal expected Elms to adhere to the policies and instructions contained in the “Installation Job Expectations” manual. Renewal also required customers to rate

Elms’ performance on report cards at the end of each installation. Additionally, Renewal provided Elms with a schedule of jobs that included the address of the sites, the names of the residents, and the time frame for each job. The Court held that the facts of the case demonstrated Renewal’s exercise of control over Elms which established an employer/employee relationship.

In conclusion, in cases where a question arises as to whether an employer/employee relationship has been established with a direct employer or principal employer several factors need to be considered. However, the most crucial element to consider is the level of control that the employer has over the employee. If a majority of the facts demonstrate

that the employer has control over the employee’s actions, the court is more likely to find an employer/employee relationship exists.



*KALBAUGH, PFUND & MESSERSMITH, P.C. wishes to thank our clients and friends for allowing us the opportunity to earn your business. If you are not currently a client of our firm and would like more information on our progressive and aggressive approach to the practice of law, please call or e-mail Janeen Koch at 804-320-6300 or [janeen.koch@kpm-law.com](mailto:janeen.koch@kpm-law.com). We also invite you to visit our website at [www.kpmlaw.com](http://www.kpmlaw.com) for valuable information and links.*

This publication is intended for general information only and is not intended to serve as legal advice. For legal questions the reader should consult legal counsel to determine how applicable law relates to specific facts or situations. While all articles are thoroughly researched, no warranty is given for their accuracy.

ADDRESS SERVICE REQUESTED

Serving Virginia, Washington, D.C., and Metro Maryland.

**KalbaughPfund & Messersmith**  
Attorneys at Law

