

Family Life Insurance Co.

INDEPENDENT CONTRACTORS

Insurance agents

The statutory provisions which include as "workers" independent contractors whose personal labor is the essence of the contract were not designed to embrace only "spurious" independent contractors. (RCW 51.08.070, RCW 51.08.180).***In re Family Life Insurance Co., BIIA Dec., 63,147 (1984)*** [dissent] [*Editor's Note: Overruled, In re James Shanley (Northwestern Mutual Life Insurance Co.), BIIA Dec., 87 0485 (1988).*]

Scroll down for order.

1 honored traditional bases. Under the time-honored test (right of control), it contends it exercises
2 little, if any, control over its sales agents. Family Life takes the position that the Department for the
3 first time in the thirty-five years that Family Life has been doing business in Washington, that its
4 agents are "workers" under the statute. It maintains that the Department's position is inconsistent
5 with, and contrary to, other state law (RCW 48.01.030, RCW 50.04.230, WAC 458-20-164 and
6 WAC 458-20-105). Family Life further argues that the Department's position is inconsistent with
7 federal taxation law, citing 26 U.S.C., Section 3306(c)(14).
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12 Frank R. Okoren is an auditor employed by the Department in its Seattle service location.
13 Sometime after October 16, 1979, Mr. Okoren received a written field audit assignment stating that
14 "subject firm (Family Life Insurance Company) was audited in July, 1976, and assessed hours for
15 the insurance agents. However, the firm is still not reporting those agents."
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18 Mr. Okoren testified that his audit consisted essentially of applying Procedure Manual
19 Number 7 (Exhibit 2) to the contents of Family Life's Servicing Agent Agreement (Exhibit 1). Exhibit
20 1 is a blank standard form that Family Life uses in contracting with each of its sales agents. Exhibit
21 No. 2 is a directive or memorandum, internal to the Department's auditors, which was issued on
22 February 23, 1973 by Mr. Vernon Castle. It is intended to be followed by the Department's auditors
23 in determining whether salesmen and insurance agents are in fact employees (workers). Mr.
24 Okoren determined that Family Life's agents were workers under Class 63-3 and computed the
25 eight-quarter arrearages of the employer.
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30 It should be noted that the appeal of the employer does not contest the accuracy of
31 computation of the industrial insurance premiums involved; its appeal solely challenges the
32 determination that its sales agents are its employees (workers).
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34 The pertinent portion of the definition of "employer", found in RCW 51.08.070, has remained
35 unchanged since its amendment in 1977. That portion reads as follows:
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37 "Employer' means any person, body of persons, corporate or otherwise,
38 and the legal representatives of a deceased employer, all while engaged
39 in this state in any work covered by the provisions of this title, by way of
40 trade or business, or who contracts with one or more workers, the
41 essence of which is the personal labor of such worker or workers."
42 (Emphasis supplied)
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44 As pertinent here, that portion of the definition of "worker", found in RCW 51.08.180, has similarly
45 remained unchanged since its 1977 amendment. That portion reads as follows:
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1 "'Worker' means every person in this state who is engaged in the
2 employment of an employer under this title, whether by way of manual
3 labor or otherwise in the course of his or her employment; also every
4 person in this state who is engaged in the employment of, or who is
5 working under an independent contract, the essence of which is his or
6 her personal labor for an employer under this title, whether by way of
7 manual labor or otherwise, in the course of his or her employment."
8 (Emphasis added)
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10 The "personal labor-independent contract" portion of the fore- going definitions had its inception in
11 a 1927 amendment to the definition of "employer", found in Laws 1927, Chapter 310, Section 2.
12 That definition read as follows:
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14 "Except when otherwise expressly stated, employer means any person,
15 body of persons, corporate or otherwise, and the legal personal
16 representatives of a deceased employer, all while engaged in this state
17 in any extra-hazardous work or who contracts with another to engage in
18 extra- hazardous work".
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20 After a 1937 amendment (Laws, 1937 Chapter 211, Section 2), the definition of "worker" (workman)
21 was essentially the same as it is now. It reads as follows:
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23 "The term workman within the contemplation of this Act means every
24 person in this state who is engaged in the employment of or who is
25 working under an independent contract, the essence of which is his
26 personal labor for any employer coming under this Act, whether by way
27 of manual labor or otherwise in the course of his employment."
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29 We note that certain independent licensed contractors were removed from the "personal labor-
30 independent contract" portion of the definitions of worker and employer by the 1981 amendment
31 (Laws 1981, Chapter 128, Sections 1 and 2) to RCW 51.08.070 (defining employer) and RCW
32 51.08.180 (defining worker). Contrary to the urging of Family Life, we have been unable to
33 conclude that the legislature intended, in adopting the "personal labor-independent contract"
34 definition of "worker" and "employer," to embrace only spurious independent contractors. We
35 believe the legislative intent was to include all "personal labor- independent contracts".
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37 We have been able to find no Washington cases interpreting the "personal labor contract"
38 portion of the definition of worker, or of employer, as applied to insurance sales agents.
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40 In Chapter VIII (Sections 43.00 through 56.35) of his The Law of Workmen's Compensation,
41 Professor Arthur Larson exhaustively discusses "Employment Status". At Section 43.54, Professor
42 Larson indicates a trend toward subordinating the concept of "control" to that of the "nature of work"
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1 in determining employment status. He cites Gordon v. New York Life Insurance Company, 300
2 N.Y. 652, 90 N.E. 2d 898 (1950), reversing Gordon v. New York Life Insurance Company, 275 App.
3 Div. 135, 89 N.Y.S. 2d 83 (1949). He notes that in Gordon, every fact relating to control was
4 overwhelmingly on the side of independent contractorship. By written contract, the insurance
5 salesperson was free to exercise her own discretion and judgment with respect to the persons from
6 whom she would solicit applications and with respect to the time, place and manner of solicitation.
7 Her payment was by commission, not by time. She paid her own expenses and used her own car.
8 She was not required to make any report of her activities or to attend any meetings, although
9 meetings were held at which she could attend if she wished. She had no office space. The
10 company, after her initial training period, did not in fact exercise any control over her work, beyond
11 limiting her to a certain territory and forbidding her to sell competing insurance. For good measure,
12 the written contract said explicitly that she should not be an employee but an independent
13 contractor. The Compensation Board held her to be an employee; the appellate division reversed
14 by a 3-2 decision; and the court of appeals restored the award by a 4-3 decision, saying that it was
15 for the Board to choose between conflicting inferences. Professor Larson points out that in Gordon
16 there were no facts whatever showing actual right or exercise of control. The closest thing to it was
17 evidence that the company "suggested" that salesmen work eight hours a day-- but the very word
18 "suggest" implies the absence of control, especially when the contract and the conduct of the
19 parties show that no control over the time of work existed. How, then, can such a decision by
20 explained? The only explanation is that the "control" test was not to be the fulcrum for determining
21 statutory coverage. In its place is the court's unexpressed conviction that the company was getting
22 its basic business accomplished through this employee. The employee was not in an independent
23 business as a general insurance broker might be. She was in continuous service, rather than on a
24 single project. She was not in the kind of business where she might be expected to provide her
25 own protection against injury. In short, she met every "nature of the work" test, and not a single
26 "control" test; and the court without accounting for the result in these terms does in fact reach a
27 most appropriate result in applying liberal construction theories.

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42 We note that in Gordon, discussed above, the decision was reached without the enabling
43 power of a "personal service-independent contractor" definition of employer and worker, such as we
44 have in this state.
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1 Professor Larson comments that to bring theory and practice together, New York ought
2 either to copy the Wisconsin statute (which he sets forth in Section 43.52.) or announce judicially
3 the emergence of the new (nature of the work) test of employment.
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5 Professor Larson also cites Davis v. Home Insurance Company, 291 So. 2d 455 (La. App.
6 1974). There, the claimant worked under a written contract with the insurance company which
7 required a minimum of commissions if he was to receive renewal commissions. The contract
8 purported to exclude representation of other companies, although the latter requirement was not
9 strictly enforced. He was expected to render liaison services between the company and the policy
10 holders, and was included in a group hospitalization plan. Social security deductions were withheld
11 from his commission payments. On the other hand, the contract stipulated that he was an
12 independent contractor. The claimant was held to be an employee.
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14 Looking at Exhibit 1, we are persuaded that the insurance sales agents of Family Life were in
15 fact "workers", within the definition of RCW 51.08.180, when measured against Professor Larson's
16 "nature of the work" test (Sections 43.50 through 43.52), as well as the yardstick of Exhibit 2.
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18 The proposed findings of fact, conclusions of law and order are hereby stricken and replaced
19 by those that follow.
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21 **FINDINGS OF FACT**

- 22 1. On January 8, 1982, the Department of Labor and Industries completed
23 an audit of Family Life Insurance Company for the inclusive period from
24 October 1, 1979 through September 30, 1981. As a result of that audit,
25 the Department asserted that Family Life Insurance Company owed the
26 Department additional premiums in the sum of \$6,735.58 for industrial
27 insurance coverage, for its insurance sales agent who had not been
28 reported as employees during that audit period. On March 4, 1982, the
29 Department by letter issued a demand to Family Life for the payment
30 thereof. On March 12, 1982, the Department received a letter of protest
31 from the employer. On May 17, 1982, the employer filed with the
32 Department a letter requesting reconsideration. On August 11, 1982,
33 the Department issued an order demanding that the employer pay the
34 additional premium as set forth in the Department's letter of March 4,
35 1982, and further ordered the employer to continue to pay premiums on
36 behalf of all workers subsequent to the audit. On October 11, 1982, the
37 Board of Industrial Insurance Appeals received from the employer a
38 notice of appeal from that order dated August 11, 1982. On October 28,
39 1982, this Board issued its order granting the appeal subject to proof of
40 timeliness, assigned it Docket No. 63,147, and directed that proceedings
41 be held on the issue raised therein.
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- 1 2. The envelope containing the employer's notice of appeal, received by
2 this Board on October 11, 1982, was properly addressed to this Board
3 with adequate postage prepaid, and bore a postmark showing that it had
4 been deposited in the mails on October 8, 1982, within sixty days of the
5 issuance of the Department's order dated August 11, 1982.
- 6 3. During the inclusive period from October 1, 1979 through September 30,
7 1981, Family Life was engaged in business within the State of
8 Washington processing insurance applications, underwriting risks,
9 administering insurance policies, collecting premiums, and paying
10 claims.
- 11 4. During the inclusive period from October 1, 1979 through September 30,
12 1981, sales agents under independent contract with Family Life solicited
13 and secured applicants for that company's insurance policies.
- 14 5. During the inclusive period from October 1, 1979 through September 30,
15 1981, those insurance sales agents were working for Family Life, each
16 under an independent contract, the essence of which was his or her
17 personal labor in the course of his or her employment with Family Life.
- 18 6. During the inclusive period from October 1, 1979 through September 30,
19 1981, none of the insurance sales agents under contract with Family
20 Life Insurance Company were reported by the latter to the Department
21 as employees or workers. During that period, no premiums were paid
22 by Family Life to the Department for industrial insurance coverage for
23 any of those insurance sales agents. Family Life Insurance Company
24 owes to the Department the sum of \$6,735.58 as additional premiums
25 for industrial insurance coverage for its insurance sales agents during
26 that inclusive period.

CONCLUSIONS OF LAW

30 Based upon the foregoing findings of fact, the following conclusions are entered:

- 31 1. The notice of appeal, received by the Board of Industrial Insurance
32 Appeals from Family Life insurance Company on October 11, 1982,
33 appealing from an order issued by the Department of Labor and
34 Industries on August 11, 1982, was timely filed within the meaning and
35 contemplation of RCW 51.52.060. This Board has jurisdiction of the
36 parties and the subject matter of this appeal.
- 37 2. During the inclusive period from October 1, 1979 through September 30,
38 1981, Family Life contracted with insurance sales agents, all of whom
39 were (workers" employed by Family Life Insurance Company, within the
40 meaning and the contemplation of RCW 51.08.180.
- 41 3. During the inclusive period from October 1, 1979 through September 30,
42 1981, within the meaning and contemplation of RCW 51.08.070, Family
43 Life Insurance Company was engaged in business in this state and in
44 the course of its business entered contracts with insurance sales agents
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1 as workers, the essence of the contracts being the personal labor of
2 such workers.

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4 4. The order issued by the Department of Labor and Industries on August
5 11, 1982, which ordered Family Life Insurance Company to pay to the
6 Department as additional premiums the sum of \$6,735.58 as set forth in
7 the Department's letter dated March 4, 1982, and which further ordered
8 Family Life to continue to pay premiums on behalf of all workers
9 subsequent to the audit, is correct, and should be affirmed.

10 It is so ORDERED.

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12 Dated this 23rd day of April, 1984.

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14 BOARD OF INDUSTRIAL INSURANCE APPEALS

15
16 /s/
17 MICHAEL L. HALL Chairman

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19 /s/
20 FRANK E. FENNERTY, JR. Member

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22 **DISSENTING OPINION**

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24 I dissent from the Board majority's decision. I do not believe that independent insurance
25 agents appointed by an insurance company to solicit insurance applications in the manner and
26 under the circumstances exemplified by this case are "workers" subject to mandatory workers'
27 compensation coverage within the meaning and historical legislative intent of RCW 51.08.180.

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30 As support for this position, I would be hard-pressed to write an opinion which would improve
31 upon the arguments already made a part of this record by Family Life Insurance Company's
32 counsel, in the form of the Memorandum of Facts and Law submitted at the hearing on June 8,
33 1983, and the Company's Supplemental Brief submitted on July 1, 1983. I quote what I consider to
34 be the most pertinent portions of those documents:
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37 "It is the Company's position that, as a matter of fact and law, its agents
38 are independent contractors whose efforts are not rendered for an
39 employer, but rather themselves.

40 Washington case law is of little help in this case, except to demonstrate
41 by absence of authority the correctness of the Company's position. No
42 Washington court has ever before held that independent insurance
43 agents, licensed and regulated by the state and paid solely by
44 commissions, are included within the RCW 51.08.180 definition of
45 worker.
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1 Washington cases which have dealt with the intent and scope of the
2 subject statute have done so only on a very general basis. The
3 common law test of whether an individual is an employee or
4 independent contractor is used. Clausen vs. Dept. of Labor &
5 Industries, 15 Wn. 2d 62, 129 P.2d 777 (1942). That is a legal test
6 applied to the facts of each case and turns principally upon whether the
7 alleged employee is subject to direction and control as to the methods
8 and details of doing work. Risher vs. Dept. of Labor & Industries, 55
9 Wn. 2d 830, 350 P.2d 645 (1960). Where the requisite right to direct
10 and control is present, an employer-employee relationship is deemed to
11 exist.

12 Id. Where it is not present, the relationship is that of an independent
13 contractor.

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15 The sole purpose of the Legislature in 1937 by adding the phrase
16 pertaining to independent contracts was to eliminate bogus employment
17 contracts in which some employers had hired their work outside by
18 independent contractors in order to avoid premium payments under the
19 Act. See, Lloyd's of Yakima vs. Dept. of Labor & Industries, 33 Wash.
20 App. 745 (1982); Norman vs. Dept. of Labor & Industries, 10 Wn. 2d
21 180, 184 (1941). The Legislature did not intend to bring bona fide
22 independent contracts reflecting a real traditional relationship within the
23 Act. This was confirmed in White vs. Dept. of Labor & Industries, 48
24 Wn. 2d 470, 294 P.2d 650 (1956), where it said that the provision was to
25 apply:

26 in those situations where the work could be done on a
27 regular employer-employee basis, but where because of
28 the time, place, manner, performance and basis of
29 payment it could be urged that the worker was an
30 independent contractor rather than an employee.

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32 Thus, the independent contract provision of RCW 51.08.180 was
33 intended to embrace only spurious independent contractors, not real
34 ones. That is not the situation where traditional insurance agents are
35 entrepreneurial and independent and where such agents hold that
36 status because they want it and have always cherished it.

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38 This case is not a situation where Family Life seeks to transform, for
39 flimsy legal purposes, an employee into a bogus independent
40 contractor. The independent insurance agents appointed by Family Life
41 pose the classic case of a profession that does not lend itself to control
42 as to the methods and details of his work. Once an agent develops a
43 certain proficiency, it is only natural that he alone manage the details of
44 his work. These agents are professionals in their field and as such are
45 expected to act with their own judgment, discretion and initiative in
46 conducting their activities.
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1 Independent agents appointed by Family Life are entrepreneurs, and
2 they have the entrepreneurial spirit. Their earnings depend on how they
3 organize their time, how they get interviews, how many calls they
4 choose to make, when and where they make such calls and how
5 effective they are in their way of selling insurance.
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7 The Insurance Code distinguishes between employees of companies,
8 who need not be licensed as agents although they may assist agents in
9 soliciting, negotiating, and effectuating insurance, and agents, who must
10 be licensed. An individual who may so assist an agent on behalf of an
11 insurer is defined as a person "employed on salary by an insurer" (see
12 RCW 48.17.040). That person is an employee. On the other hand, an
13 agent must be licensed under the provisions of RCW 48.17.010, and
14 that term is defined as a person appointed by an insurer to solicit
15 applications for insurance in its behalf. Obviously, then, the insurance
16 code draws a distinction between the salaried employee, who is, in fact,
17 an employee, and the licensed agent, who is a commissioned,
18 independent contractor and not an employee.

19 Agents here do not perform "personal labor for an employer." Under
20 both federal and state laws, agents are deemed to engage in business
21 for themselves and to hold their services out to the public. Absent the
22 right to exercise immediate control and supervision, which right Family
23 Life does not have over agents, it cannot be said the efforts of said
24 agents are for anyone but themselves.
25

26 And, further:

27 These salespersons are not employees but independent contractors.
28 The written contract which each has with the Company expressly so
29 provides. Exhibit 1 to Hearing. All practical indicia of the relationship
30 strongly confirms the independent contractor status. That evidence was
31 presented through the testimony of Messrs. Paul Johnson and Mel
32 Caudell and is itemized in pages 10-13 of Family Life's Memorandum of
33 Facts and Law. This evidence was uncontroverted by the Department.
34 Further, Mel Caudell testified that the salespersons take pride in having
35 their own business and they would not consent to employee status.
36 Without such consent by one alleged to be an employee, our Supreme
37 Court has said no employment status can exist.
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39 We hold that, in cases involving the issue of whether under
40 Washington's workmens' compensation laws there is an employer-
41 employee relation, such a relation cannot exist without the consent of
42 the workman." Fisher v. Seattle, 62 Wn. 2d 800, 806 (1963).
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44 Under the facts here presented, absent proof of an employee status, the
45 Company cannot be otherwise found liable for industrial insurance
46 premiums under RCW 51.08.180 because the essence of salespersons'
47 labor is not performed for the Company." (Emphasis added)

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Based on the foregoing, I dissent from the Board's majority decision. I would reverse the Department's order of August 11, 1982, and direct that no mandatory industrial insurance coverage be imposed on these independent insurance agents.

Dated this 23rd day of April, 1984

/s/
PHILLIP T. BORK Member