



Managing Independent Contractor Liability

OBJECTIVES

The objectives of this large loss claim review are to:

- Examine a CIRMA Liability-Auto-Property (LAP) loss resulting from a resident's injury which occurred during a Town-sponsored Parks and Recreation program.
- Determine the liability, tax and employee benefits implications of mis-categorizing an individual as an independent contractor, instead of an employee.
- Discuss CIRMA's and other resources on reducing overall costs associated with independent contractors.
- Develop specific risk management best practices to either prevent or mitigate future losses for members based on lessons learned.

INCIDENT BACKGROUND

The injured claimant is a 59-year old resident of a CIRMA-Member town, who signed up for the Town's Parks and Recreation program which was a five-week long yoga class. While attending the yoga class, the resident followed the yoga program instructor's directions and suffered a significant knee injury. As a result, the resident sued the Town's Parks and Recreation Department and the yoga program's instructor, stating that their negligence directly led to the resident's injury.

The Town's Parks and Recreation Department classified the yoga program's instructor as an independent contractor; however, upon further investigation that occurred subsequently following the injury, it was determined that the instructor should have been classified as an employee of the Town. Thus, the municipality was found liable for the 59-year old resident's injury and for the yoga instructor's back taxes and employee benefits.

INCIDENT INVESTIGATION

- The CIRMA-Member Town's Parks and Recreation Department offers a number of classes and programs for its residents throughout the year. The department decided to host an introductory beginner-level yoga class to promote physical and mental wellness as part of its summer programming.
- The beginner-level yoga class was:
 - To be instructed by a local resident who was in the process of developing a yoga school (the school had not yet been formed during the summer of the incident).
 - To occur two days per week for five weeks, beginning just after the Fourth of July holiday through the second week of August. The time for the program would be from 4:00

pm to 5:00 pm on each of the days.

- Offered to residents of the Town for \$30 for the five-week program (the yoga instructor would receive \$10 and the Town would keep the remaining \$20 per attendee).
- To take place at the Town's Community Center on a tiled floor.
- Because the yoga instructor was in the process of developing a yoga school, the instructor did not have yoga mats or other resources for the class. Attendees were instructed to bring their own yoga mats if they own one, or would be allowed to use a yoga mat provided by the town from a previous yoga program.
- During the fourth (4th) session of the five-week yoga program, the yoga instructor informed the class that she was, "impressed with how quickly the group" was picking up the beginner-level material and stated that they were, "going to step it up a notch."
- The yoga instructor decided to teach the group how to do the "Dancer Pose," which entails standing on one leg while holding the other leg behind your back and lifting it high into the air.
- The injured resident (Claimant) is a 59-year old female and has been a resident of the CIRMA Member Town for approximately 27 years. The Claimant was one (1) of twelve (12) yoga class attendees, and was one (1) of four (4) yoga class attendees who used a yoga mat provided by the Town.
- During the "Dancer Pose," the Claimant lost her balance and fell to the ground, missing the yoga mat completely and striking her right knee on the tile.
- The Claimant immediately complained of right knee pain and was unable to move her knee or put weight on it.
- Emergency Services (911) was called and the Claimant was transported to a local hospital for medical attention.

INJURY AND DAMAGES

As a result of the fall during the town-sponsored yoga class, the injured resident (Claimant) was diagnosed at the hospital with a displaced comminuted fracture of the right patella, requiring operative intervention for open reduction and internal fixation of patella with patellectomy. The injury also required physical therapy, ongoing doctor's visits, and significant lost time from work. **The total cost of this claim exceeded \$74,000 in medical costs.**

The Claimant filed a notice of intent to sue, naming the CIRMA-Member Town and subsequent Parks and Recreation Department,

as well as the yoga instructor, as defendants. The scope of the thorough investigation by the CIRMA Claims team included a review of the relationship between the Town and the yoga instructor and the resulting injury and damages. During the investigation, it was discovered that the Town had previously classified the yoga instructor as an independent contractor, and the Town relied on this classification to defend itself against any and all liability claims incurred as a result of the yoga class. However, the in-depth investigation, under the guidance of CIRMA's legal representatives, determined that the Town established behavioral, financial and relationship controls over the yoga instructor. Some factors that played a role in this control included:

- The Town establishing the location, time and level of yoga instruction;
- The Town provided the supplies used during the class;
- The yoga instructor had no opportunity for incurring a loss.

As a result of CIRMA's liability assessment, it was determined that CIRMA was 100% liable for the Claimant's injury.

CONCLUSION

In 2021, there were about 23.9 million occasional independent workers in the United States, an increase from 12.9 million in 2017.¹ An independent contractor is a self-employed person or entity contracted to perform work for – or provide services to – another entity as a non-employee.² While the classification of independent contractor vs. employee depends on the facts in each case, the general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.³ A municipality classifying an individual as an independent contractor instead of an employee has tax and insurance implications, not to mention significantly impacts the level of control the municipality has on the individual. Furthermore, there are additional liabilities on the municipality when an individual is miscategorized as an independent contractor.

KEY RECOMMENDATIONS/ACTION ITEMS

CIRMA Risk Management has developed recommended best practices to help prevent these types of incidents from occurring and advises CIRMA members to review the following:

- Establish an Independent Contractor Program:

1. Identify Independent Contractors (vs. employee)

- Consider utilizing the current IRS Guidelines to determine if the individual is an independent contractor or an employee.⁴ According to the IRS, the keys are to look at the entire relationship and consider the extent of the right to direct and control the worker. Consider documenting each of the factors used in coming up with the determination.

2. Consider properly vetting the Independent Contractor

- Consideration should be given on conducting a comprehensive background check on the Contractor.
- Consider requiring the Contractor to provide proof of credentialing or training in the applicable field.

3. Develop written contract (MOU)

- Consider including language stating that the Town will only control or direct the result of the work by the Independent Contractor, and the Town will not control or direct what will be done and how the work will be done by the Contractor.
- The Contractor acknowledges that he / she is an independent contractor for all purposes and is not, in any respect, an employee of the Town and thus not eligible for Workers' Compensation benefits under the Town's Workers' Compensation policy.
- The Contractor acknowledges that he / she is solely responsible for reporting and paying all taxes, Federal or otherwise, upon all compensation paid hereunder.
- The Contractor further acknowledges that:
 - The Town will make no contributions toward Social Security benefits in the name of the Contractor; it being the sole obligation of the Contractor to make any contributions that may be required by law.
 - The Contractor is not eligible for Unemployment Compensation benefits upon the termination of this Agreement.
 - The Town will not provide any liability or other insurance coverage for the benefit of the Contractor.
 - The Town will not provide any medical, retirement, or other benefits beyond the compensation outlined.
 - The Contractor shall also be responsible for the cost of Workers' Compensation, general liability, and Unemployment Compensation insurance as may be required by law.

4. Establish Hold-Harmless and Indemnification Agreement

- Consider entering into a Hold-Harmless and Indemnification Agreement with the Contractor stating that the Contractor will hold the Town harmless for any damages incurred as a result of the Contractor's actions or inactions, and that the Contractor will indemnify the Town for any expenses the town incurs as a result of the Contractor's actions or inactions.

5. Ensure the Contractor is Properly Insured

- Consider obtaining certificates of insurance (COI) from the Contractor, ensuring that the Contractor is properly covered in the event of a possible claim.
- Consider requiring the Contractor to name the Town as an Additional Insured on the Contractor's applicable

¹ <https://www.statista.com/statistics/918285/gig-economy-number-people-working-independently-frequency-us/#:~:text=In%202021%2C%20the%20number%20of,from%2012.9%20million%20in%202017>

² <https://www.investopedia.com/terms/i/independent-contractor.asp>

³ <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>

⁴ <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

insurance policies.

6. Understand the Municipality's Tax Liabilities

- Consider requiring the Contractor to complete the federally mandated Form W-9, Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and Taxpayer Identification Number, or TIN, of the payee. The W-9 should be kept in your files for four (4) years for future reference in case of any questions from the worker or the IRS.⁵
- If you paid someone who is not your employee, such as a subcontractor, attorney or accountant \$600 or more for services provided during the year, a Form 1099-NEC needs to be completed, and a copy of 1099-NEC must be provided to the independent contractor by January 31 of the year following payment. You must also send a copy of this form to the IRS by January 31. Consider reviewing the IRS exemptions for additional information.⁶
- Consider referencing CIRMA's *Independent Contractors Best Practices Guide* when assessing and implementing the Town's Independent Contractor Program.
- Consider utilizing the CIRMA Employment Practices Liability Helpline when assessing and determining Independent Contractors vs. Employees.

For more information on this topic, please contact your CIRMA Risk Management Consultant.

⁵ <https://www.irs.gov/businesses/small-businesses-self-employed/forms-and-associated-taxes-for-independent-contractors>

⁶ <https://www.irs.gov/pub/irs-pdf/i1099mec.pdf>