

THE EMPLOYEE GROUPS COVERED

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INTRODUCTION

In the adoption of the Workmen's Compensation Act, the Legislature of Ohio has endeavored to establish as broad a classification of employment as practicable in providing for workmen's compensation coverage for those employed in the state or by employers in the state. Originally, it was not considered practicable to provide compulsory coverage with respect to employers having less than five employees. Later in the development of the law, that number was reduced to three, and voluntary coverage has been provided with respect to employers having less than three employees, so that it is legally possible for every person gainfully employed in the service of another in Ohio to be protected by the Workmen's Compensation Act.

Even in the presence of such broad coverage, however, problems of interpretation and legislative intent do arise, and it has been found that the question of whether one is an employee or not, within the meaning of the Workmen's Compensation Act, is not always crystal clear.

STATUTORY MATERIAL

The General Assembly of Ohio, in establishing the scope of the Workmen's Compensation Act, has rather fully defined the categories of "employee," "workmen," and "operative." These classifications include:

- (1) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, except any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education;
- (2) Every person in the service of any person, firm, or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course

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of trade, business, profession, or occupation of his employer.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission for his employment or occupation or to elect to pay compensation direct to his injured and to the dependents of his skilled employees, as provided in section 4123.35 of the Revised Code shall be considered as the employee of the person who has entered into a contract, whether written or oral, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.¹

Policemen and firemen receiving municipal pensions are not eligible to receive workmen's compensation payments unless the pension received is less than the amount of the compensation to which the recipient would have been eligible if no pension had been payable, in which event the amount of the pension received is to be deducted from the weekly compensation.²

Volunteer firemen and other persons performing special services for the state or any political subdivision are covered employees under the act,³ as are civil defense volunteers.⁴

Employees of employers engaged in interstate or foreign commerce are covered under the Ohio act only to the extent that the field of compensation legislation has not been pre-empted by the Federal Congress.⁵

It is possible for an employee to be covered both by the Ohio Workmen's Compensation Act and by the workmen's compensation act of another state. In this event, any compensation paid to the employee by the other state is to be credited against the amount of the award under the Ohio law.⁶ In the event an employee of an employer amenable to the Workmen's Compensation Act is in a situation in which there is a possibility of a conflict between the application of the Ohio act and the application of the workmen's compensation law of another state or states, the employer and employee may agree to be bound by the laws of Ohio or by the laws of some other state in which all or

¹ OHIO REV. CODE § 4123.01(A) (1953).

² OHIO REV. CODE § 4123.02 (1953); State *ex rel.* Van Lieu v. Industrial Comm'n, 165 Ohio St. 545, 138 N.E.2d 301 (1956); State *ex rel.* English v. Industrial Comm'n, 160 Ohio St. 443, 117 N.E.2d 22 (1954); State *ex rel.* City of Columbus v. Industrial Comm'n, 158 Ohio St. 240, 108 N.E.2d 317 (1952).

³ OHIO REV. CODE § 4123.03 (Baldwin Supp. 1958).

⁴ OHIO REV. CODE §§ 4123.031-033 (Baldwin Supp. 1958).

⁵ OHIO REV. CODE § 4123.04 (1953).

⁶ OHIO REV. CODE § 4123.54 (1953). See *Prendergast v. Industrial Comm'n*, 136 Ohio St. 535, 27 N.E.2d 235 (1940); *Industrial Comm'n v. Gardinio*, 119 Ohio St. 539, 164 N.E. 758 (1929).

some portion of the work of the employee is to be performed, provided that such agreement is in writing and is filed with the Industrial Commission of Ohio within ten days after its execution.⁷ On the other hand, an employee who is a nonresident of Ohio and who is insured under the workmen's compensation laws of another state is not entitled to compensation or benefits for an injury sustained while temporarily in Ohio.⁸

While compulsory coverage of employees is limited to those of employers having three or more regular employees any employer may voluntarily pay premiums into the state insurance fund and cover his employees, vesting them with the same rights as those covered under the compulsory provisions of the Workmen's Compensation Act.⁹

A separate category of employee is established for those engaged in "work-relief," in connection with any public relief employment.¹⁰

While it is required that every employer of three or more persons comply with the Workmen's Compensation Act by the payment of premiums or by election to pay compensation direct,¹¹ it is recognized that there will be persons employed by amenable employers who nevertheless do not comply with the act. Such employees are nevertheless covered by the Workmen's Compensation Act, and when the right of such an employee has been established, compensation is paid to him or to his dependents out of the surplus fund.¹² In the event the injured employee is employed by an amenable but noncomplying independent contractor, and that contractor at the time of injury is engaged in work for another employer, the injured employee is entitled to be paid compensation, as an employee of the prime contractor.¹³

PERSONS NOT COVERED AS EMPLOYEES

Persons Employed By Employers Having Fewer Than Three Employees

Of course, under the terms of the statute,¹⁴ employees of persons employing less than three workmen or operatives regularly in the same business or about the same establishment are excluded from compulsory coverage as of right under the Workmen's Compensation Act. The constitutionality of the Workmen's Compensation Act as to its classification of *employers* in this regard has been upheld, both by the Ohio

⁷ OHIO REV. CODE § 4123.54 (1953).

⁸ OHIO REV. CODE § 4123.54 (1953). See *Industrial Comm'n v. Gardinio*, *supra* note 6.

⁹ OHIO REV. CODE § 4123.73 (1953).

¹⁰ OHIO REV. CODE §§ 4127.01-.14 (1953).

¹¹ OHIO REV. CODE § 4123.01 (1953).

¹² OHIO REV. CODE § 4123.75 (1953).

¹³ OHIO REV. CODE § 4123.01 (1953).

¹⁴ *Ibid.*

Supreme Court and the Supreme Court of the United States.¹⁵ It is probable that no person can qualify as a proper party to test the constitutionality from the point of view of an excluded employee, since a holding that the discrimination against employees of employers having fewer than three employees was unconstitutional under the equal protection clause of the federal constitution would not have the effect of extending the coverage of the act to such person. Therefore, any action brought in an attempt to test the validity of this classification would probably fail.¹⁶ As in most fields of the law, there are twilight zones in which it is difficult to determine whether or not an employer does employ three or more workmen or operatives "regularly in the same business or in or about the same establishment."

Regularity of Employment

One of the difficult questions to determine is whether a workman or operative is "regularly" employed within the meaning of the Workmen's Compensation Act. Thus, a full-time steelworker, who uses his spare time to install storm windows for a grocer, is not a "regular" employee of the grocer, either for the purpose of determining his own right to compensation when injured, or for the purpose of determining the amenability of the grocer, with reference to whether he employed three or more workmen or operatives.¹⁷ And a salaried person who engages three persons to build a house for him, unconnected with his employment, does not thereby become an employer within the meaning of the Workmen's Compensation Act, nor do the three persons so engaged become employees.¹⁸ On the other hand, if an employer engages two workmen on a steady basis, in the pursuance of his regular trade or business, and occasionally employs three or more when the work schedule is heavier, the employment of these extra workmen is not casual, but regular, within the meaning of the Workmen's Compensation Act.¹⁹

Although the decisions of the Ohio courts on the question of what constitutes a "regular" or "casual" employee are difficult to reconcile, the courts have laid down some rules which may be followed to determine an employee's status. Therefore, it appears that each case must be considered and decided on its own facts. The Ohio Supreme Court has held that workmen are regular employees within the meaning of the Workmen's Compensation Act so long as they are hired to do work

¹⁵ Jeffrey Mfg. Co. v. Blagg, 90 Ohio St. 376, 108 N.E. 465 (1914), *aff'd*, 235 U.S. 571 (1915); State *ex rel.* Yapple v. Creamer, 85 Ohio St. 349, 97 N.E. 602 (1912).

¹⁶ See concurring opinion of Taft, J., in State *ex rel.* English v. Industrial Comm'n, 160 Ohio St. 214, 217, 115 N.E.2d 395, 397 (1953).

¹⁷ Hoffman v. Powell, 94 Ohio App. 80, 114 N.E.2d 593 (1952).

¹⁸ Phipps v. Redick, 98 Ohio App. 442, 129 N.E.2d 856 (1954).

¹⁹ State v. Gephart, 60 Ohio L. Abs. 463, 101 N.E.2d 787 (1950).

in the usual course of the trade, business, profession or occupation of the employer and the work involved is of the kind required in the business of the employer and in conformity with the established scheme or system of the business. The duration of the employment is not a test of its regularity.²⁰

Independent Contractors

It is, of course, obvious that in not all instances where one engages to perform services for another does that one become an employee. It is also inevitable that many difficult questions should arise in establishing the distinction between one who performs services for another as an employee, and one who performs such services as an independent contractor. The Ohio statutes, themselves, are silent as to the definition of the term "employee" as it is distinguished from one who occupies the relationship of an independent contractor. Here, again, each case must rest upon its own facts. Nevertheless, the courts have attempted to establish some broad principles of distinction. The primary test which has been applied to the relationship is that of the existence of the intent and power to control the manner and means of executing the work to be done.²¹ Numerous other indicia, persuasive in either direction, may also exist. For example, the following factors tend to be persuasive in establishing the relationship either of independent contractor or employee: materials to be used in performance of the work are to be furnished by the workman or the employer, the workman is carried on the books of the employer as an employee, deductions are made for withholding and social security taxes, discretion is vested in the workman as to the hours of work, and time within which the work is to be performed, the workman has discretion to or does employ help, the work is to be performed for a fixed price, or upon a time rate.

Thus, a mere lease of equipment for transportation of persons or goods, with no undertaking to perform work in any particular manner, does not establish the relationship of employer and employee.²² But if, in the contract of hire, or lease agreement, the element of control of the manner and means of using the equipment is added, the operative becomes an employee within the meaning of the Workmen's Compensation Act.²³

Where as many factors exist and go to make up the test in distinguishing one relationship from another, it is inevitable that there shall

²⁰ State *ex rel.* Bettman v. Christen, 128 Ohio St. 56, 190 N.E. 233 (1934).

²¹ Industrial Comm'n v. McAdow, 126 Ohio St. 198, 184 N.E. 759 (1932).
See also Bobik v. Industrial Comm'n, 146 Ohio St. 187, 64 N.E.2d 829 (1946).

²² Behner v. Industrial Comm'n, 154 Ohio St. 433, 97 N.E.2d 403 (1951);
Coviello v. Industrial Comm'n, 129 Ohio St. 589, 196 N.E. 661 (1935).

²³ Bobik v. Industrial Comm'n, 146 Ohio St. 187, 64 N.E.2d 829 (1946); Firestone v. Industrial Comm'n, 144 Ohio St. 398, 59 N.E.2d 147 (1945).

be inconsistencies between decisions of the courts. The development of the law with respect to the distinction between an independent contractor and an employee is by no means complete. With the increasing development of government controls over employers and employees, the indicia have multiplied and may reasonably be expected to continue to multiply, and any problem in this field can only be resolved with a regard to all the facts in the situation and all of the decisions which have gone before.

Members of Partnerships

Originally, members of partnerships were regarded as being themselves employers, and therefore not within the purview of the Workmen's Compensation Act as employees. In 1925, the Workmen's Compensation Act was amended²⁴ to provide that a member of a partnership, firm or association who has paid a fixed compensation for services should be considered as an employee and treated as such under the Workmen's Compensation Act. This provision, however, was held to be unconstitutional as in violation of the terms of section 35 of article 11 of the Ohio Constitution, and partners are, therefore, not in any situation to be considered as employees.²⁵

On the other hand, officers or shareholders of corporations who perform services for such corporations are not barred from consideration as employees.²⁶

CONCLUSION

In an ideal society, the legislative intent to cover all those defined as "employees" under the Workmen's Compensation Act should be recognized without question. A person, injured in the course of the performance of his work, would either be recognized immediately as an employee or as one occupying some other relationship. There would thus be no need for litigation to determine the status of the workman, and the legal practitioner would have no valid role in the administration of the Workmen's Compensation Act. However, it is seen that the law is not static; presumably reasonable minds do differ, social changes cause the development of new problems and the raising of new questions, all of which bear upon employer-employee relationship. The legal practitioner, therefore, may find that for a long time in the future he has a legitimate function to perform in the adversary system, seeking the ultimate abstract truth in this, as in other fields.

²⁴ OHIO GEN. CODE ANN. § 1465-68 (Page 1946).

²⁵ *Westenberger v. Industrial Comm'n*, 135 Ohio St. 211, 20 N.E.2d 252 (1939); *Goldberg v. Industrial Comm'n*, 131 Ohio St. 399 (1936).

²⁶ *Hillenbrand v. Industrial Comm'n*, 72 Ohio App. 427, 52 N.E.2d 547 (1943).