

**60 West Superior Street ★ Chicago, IL 60610 ★ {Fax (312) 944-7000 Fax} ★ Phone (312)642-1000**
*Employee Liability*

## Are Your Independent Contractors Really Independent?

As an employer, it seems cut and dried as to what determines an employee. If the person is on your payroll, they're an employee. Simple.

Of course, nothing is that easy when it comes to employees – or employment law. Illinois is one of the leading states in enacting standards to determine whether a contractor is considered an employee. Unfortunately, Illinois also is one of the leaders in auditing employers' payrolls. Often times, investigative leads are the result of complaints from disgruntled workers.

The Illinois Department of Employment Security (IDES) applies a 3-prong test to determine whether a worker is an employee or an independent contractor. Known as the ABC test (because of the organization of the law, 820 ILCS 405/212), a worker is considered an employee UNLESS:



**A.** The worker is free from control or direction over the performance of the services, both under contract and in fact; **AND**

**B.** Services provided are either outside the usual course of business for the employer or are performed outside the place of business; **AND**

**C.** The worker is engaged in an independently established trade, occupation, profession or business.

In practice, these seem clear, but the devil is in the details. As an example, a window washer for a company engaged in manufacturing easily meets the B & C tests. However, what if the window washer is told to clean the windows from 2-4 pm every other Tuesday, rain or shine? There is now a direction over the performance of services, which may be enough to place that worker under control.

Interestingly, and most tellingly, the method of compensation is not controlling, nor are the terms of any contract or agreement between the parties.

One consideration for avoiding these issues is (*over*)

*Personal Lines*

## Diminution of Value - What You Need to Know

What if, driving to work one morning, you were involved in a minor fender-bender. Nothing serious, just \$600 in body work.

When you go to trade in your car, would you be surprised to learn the true cost could be 5, 10 or even 20 times the damage? That is because very often damaged vehicles suffer a Diminution in Value...and it's your responsibility to claim this as part of your damage settlement.



Diminution in value, simply put, is the direct and actual loss of or reduction to a vehicle's market value due to an accident. Even if a vehicle is repaired properly, this loss can occur. Think about it. You would not pay the same amount for a vehicle after you learned it was damaged. Shouldn't you be compensated for the loss you suffer in the resale value of your vehicle – even if the vehicle isn't immediately sold?

There are 3 types of reduced value. Two are relatively easy to determine. Improper repair by the repair shop or failure by the insurance company to pay for needed parts or labor to restore the vehicle to pre-loss condition can each be determined by restoring the vehicle.

The third type, **loss in resale value**, is much more subjective and difficult to determine. With the proliferation of CarFax and other reports available to vehicle buyers, any reported accident is available to any buyer. But there are other losses associated with damage, including the voiding of any factory warranty on the damaged area, the increased likelihood of mechanical failure, and the potential for undiscovered damage to appear in the future.

In Illinois, the question of whether an insurance carrier is obligated to pay for diminution of value has not been determined by the courts. Most insurance policies promise to restore a vehicle to its "preloss condition" – but almost no policies define what "pre-loss condition" is. So, when we have been asked if a policy covers diminution in value, our answer (*over*)


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to utilize the services of staffing firms. We have not found any cases where workers working with staffing firms were considered employees. The extra expense of the staffing firm is a strong insulation against an employee audit, as the worker is now an employee of the staffing firm.

One more item of practical significance: Our Claim Director once handled a case in California where the employer told the Workers Compensation insurance carrier that his independent contractor was an employee. It was an inopportune comment, and one which was ultimately proven incorrect. However, the Workers Compensation insurance company declined the claim on the basis of this statement, which caused the General Liability carrier to become involved, and the question of whether this injured person was an employee or an independent contractor took over two years to resolve – and over \$200,000 in legal fees to prove

*(Diminution of Value - What You Need to Know  
continued from previous)*

is “it depends” – and unfortunately, we have been proven right. These claims have been difficult to collect, as most carriers simply do not consider diminution of value unless deliberately pressed to do so. It must also be remembered this works in your favor if you were the cause of the accident, as the diminution goes both ways.

To best protect yourself, keep records of your vehicle’s current condition. Keep all repair records for the life of your vehicle. In the event of an accident, we do not advise attempting to negotiate diminution yourself – this is both technical and subjective, and is best addressed by the experienced claim professionals at Alper Services. 

what should have been clear from the beginning. We urge you to examine your relationships with any independent contractors you have based upon these criteria, and discuss with your attorney. 

*Employee of the Quarter*

## DEBBIE WERST

Debbie has been an Alper Team Member for over a year, joining as our Employee Benefits Client Services Representative reporting to Herb Singer and Helen Clary. Debbie was recently promoted to a new role as an Employee Benefits Producer, while staying involved in the consultation and advisement to our clients. She previously was with Humana, Inc. as an Underwriter/Account Advisor in the benefits field. In addition, she has prior experience as a Medical Claims Adjuster.



Debbie is married, has three sons and a Poodle named Darla. She and her family reside in one of our northwest suburbs. Debbie's main claim to fame is that she was the first person to be married inside Wrigley Field.

Those of you who have come in contact with Debbie, have found her to be very courteous, knowledgeable, possessing a positive mental attitude, and happy to be of assistance to you. We are very fortunate to have Debbie as a member of our Alper team, and look forward to her being one of our Team Members for many, many years.

**The information in this newsletter is provided for general information only. Specific implementation and action should be undertaken only after individual consultation with your professional insurance and/or legal advisor.**

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Alper Services LLC  
60 West Superior St.  
Chicago, IL 60610