



PINPOINT WEBINAR

January 28, 2021

Thanks for joining us a few minutes early.

We will start promptly at Noon!

LEGAL UPDATE

*... a conversation with Trent
Cotney*



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Thank you!

Agenda

Noon | Start Program and Webinar Housekeeping Items

Debbie Hathorne, CRA Executive Director

12:02 | CRA Announcements & Speaker Intro

Debbie Hathorne, CRA Executive Director

12:05 | Legal Challenges when Using Subcontractors

Trent Cotney & Gabriel Pinilla, Cotney

12:55 | Q & A

Webinar Courtesies:

- ★ Thank you for being on-time.
- ★ All attendees are muted
- ★ **Use the Q&A at the bottom your screen to send your questions to Debbie.** She will relay them to the speaker(s).
- ★ We will not use the raise hand function, please use Q & A.
- ★ Links and other information will be sent in Chat box if applicable. Otherwise, the chat function is limited and we ask you to use Q&A.
- ★ Due to the number of participants, we may not get to all the questions, but we will try.
- ★ Please participate in our interactive polling through-out the presentation.
- ★ Final note, in order to earn CIU credit, you will be required to answer a final poll question at the end of today's presentation.

LEGAL CHALLENGES WHEN USING SUBCONTRACTORS ON PROJECTS

Trent Cotney & Gabriel Pinilla

January 2021



Introduction

- Lack of skilled labor leads to use of subcontractors
- Success depends on effective management of subcontractor labor
 - Quality Control
 - Production
 - Profitability
- Independent Contractor vs. W2 Employee
 - Misclassification has become a top priority for Biden administration
- Reducing Risk on a Multi-Employer Site
- Limiting Liability for Defect Claims
- Licensure of Subcontractors
- Injuries and Workers' Compensation



Independent Contractor vs. Employee

■ Benefits of “Independent Contractor” as Subcontractor

- Savings on payroll
- Withholding taxes
- Savings on benefit expenses
- Reduced liability for injury on the job
- Limit liability with government agencies

■ Problem – Must Actually Be An “Independent” Subcontractor

- Independent Contractor agreement: Not Enough
- 1099 v. W2: Not Enough
- Economic Realities Test vs. ABC Test

Independent Contractor vs. Employee

- **The Seven Factors of the Economic Realities Test (Current)**

1. the extent to which the services rendered are an integral part of the principal's business
2. the permanency of the relationship
3. the amount of the alleged contractor's investment in facilities and equipment
4. the nature and degree of control by the principal
5. the alleged contractor's opportunities for profit and loss
6. the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
7. the degree of independent business organization and operation



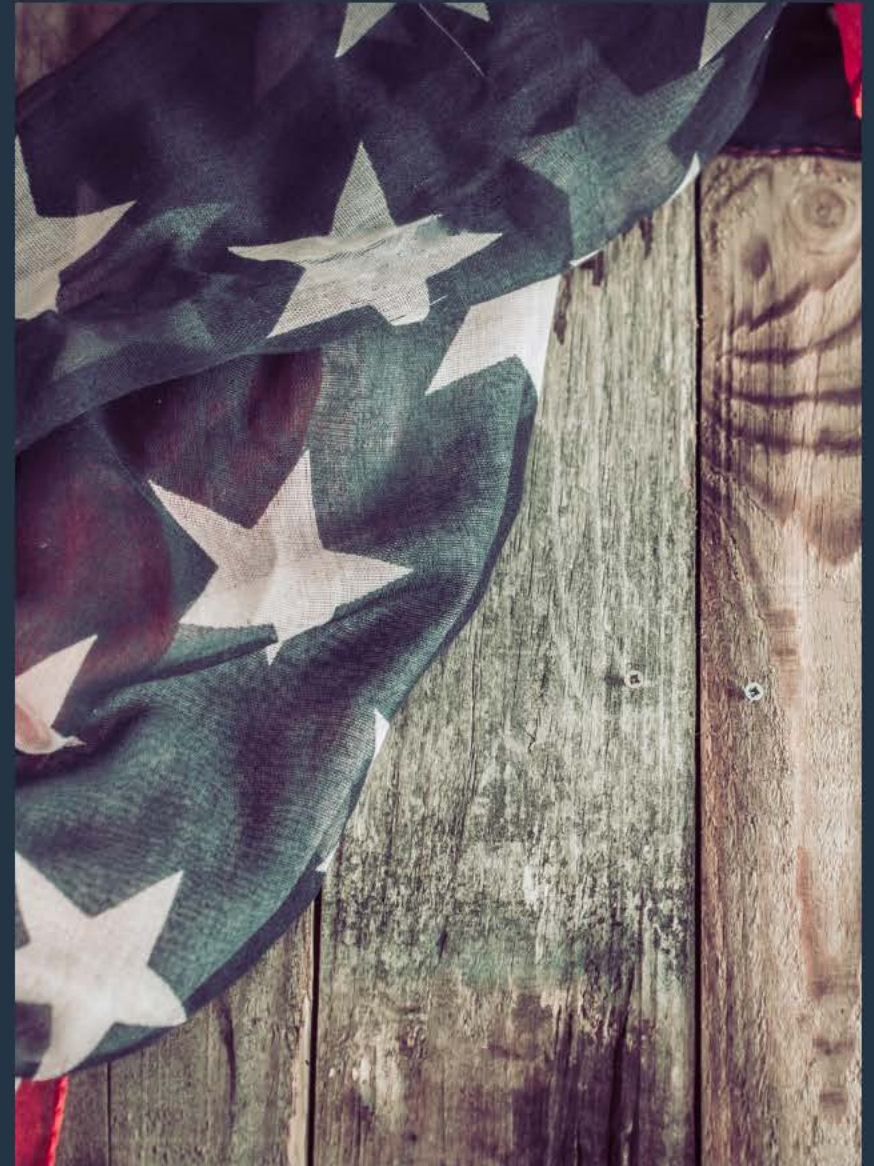
September 2020 Proposed Changes to Test

- Changed seven factors of Economic Realities Test to two core factors with three additional factors for consideration
- **Two Core Factors:**
 1. Nature and degree of a worker's control over the work that needs to be performed
 2. Opportunity for profit or loss by the worker on the job
- **Three Factors for Consideration:**
 1. Amount of specialized skill or training required to complete the work
 2. Degree of permanence in the relationship between the prime and the worker
 3. Whether the work the subcontractor is doing is an integrated unit of production



But...

- Biden administration has signaled that it will return to Obama administration levels of enforcement
- Either renewed focus on 7 factor test or move toward California ABC test
- CO DOL applies the three-factor ABC test that hinges on "right of control". The test is framed by statutory definitions set out in the Colorado Wage Act [C.R.S. 8-4-101(5)], CO's Worker's Compensation Statute [C.R.S. 8-40-202(2)] and the Federal Employment Tax section of the Colorado Employment Security Act, C.R.S. 8-70-115. These last two statutes lay out a test based on 9 listed factors.
- However, Courts apply a "totality of circumstances" test that can give weight to any individual or set of factors, including factors outside those listed in the statute.



Independent Contractor vs. Employee

- **The Three Factors of the ABC Test**
 1. Worker is free from the control and direction of the hiring entity in performing the work, both under the contract and in fact
 2. Worker performs work that is outside the usual course of the hiring entity's business
 3. Worker is customarily engaged in an independently established trade, occupation, or business
- Again, in CO, these three factors are determined by examining the totality of circumstances of the dynamic between the worker and hiring entity.



Wage Theft and Subcontractors

- In Virginia, two laborers filed a federal-class action suit on 12-1-20 accusing Capital Labor Interior Contractors Inc. of using two labor brokers (subcontractors) on jobs.
- Lawsuit alleges that Capital violated overtime requirements per the FLSA and the state law against worker misclassification.
- The suit is seeking damages, unpaid wages and denied benefits.
- The basis of the suit is misclassification.

The Multi-Employer Worksite and OSHA

- What is the Multi-Employer Worksite Doctrine?
 - In projects involving multiple employers, OSHA makes a determination as to whether one employer may be responsible for the actions of another employer on that site
 - Whether one is responsible for the actions of the other depends on OSHA's classification of the employment relationship



What are the Classifications?

- **Creating Employer** – one that has caused a hazardous condition that violates an OSHA standard
- **Exposing Employer** – one whose own employees are exposed to the hazard
- **Correcting Employer** – one who is engaged in a common undertaking, on the same worksite as the exposing employer, and is responsible for correcting the hazard
- **Controlling Employer** – one who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them

Defenses to Multi-Employer Worksite

- Demonstrate inability to correct safety and health hazards
- General supervision is not enough... or is it?
- Contract Provisions



The Five “Must Have” Contract Safety Provisions

1. Anti-Controlling Contractor Provision
2. Reporting Injury, Illness, or Dangerous Conditions Provision
3. Indemnification Provision
4. Safety Training and Safety Inspection Responsibility Provision
5. Independent Contractor Provision



The Anti-Controlling Contractor Provision

Subcontractor as Controlling Contractor Provision:

“Subcontractor understands and acknowledges that Subcontractor shall control and implement all required safety procedures, and that Contractor shall only perform occasional inspections to determine conformance with the plans and specifications for the project. As a result, Contractor shall not be able to ensure Subcontractor (while working for Contractor) adherence to safety standards and the OSH Act or applicable state health and safety plans because Contractor cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited role on the project. Therefore, Subcontractor shall be solely responsible for controlling safety on the jobsite as it relates to Subcontractor.”

Reporting Injury, Illness, or Dangerous Conditions Provision

“Subcontractor is to complete the work in a safe and expeditious manner. Subcontractor shall take all reasonable safety precautions with respect to its work, shall comply with all safety measures and with all applicable laws, statutes, ordinances, codes, rules, regulations and orders of any public authority, for the safety of persons or property in accordance with the requirements of the Contract Documents. Subcontractor shall immediately notify the Contractor of any accident, illness, or injury experienced by any of the Subcontractor’s employees at the site and shall immediately notify the Contractor of any unsafe or dangerous conditions that may cause harm to an individual at the site. Subcontractor shall abide by all federal OSHA and state safety and health programs.”



Indemnification Provision

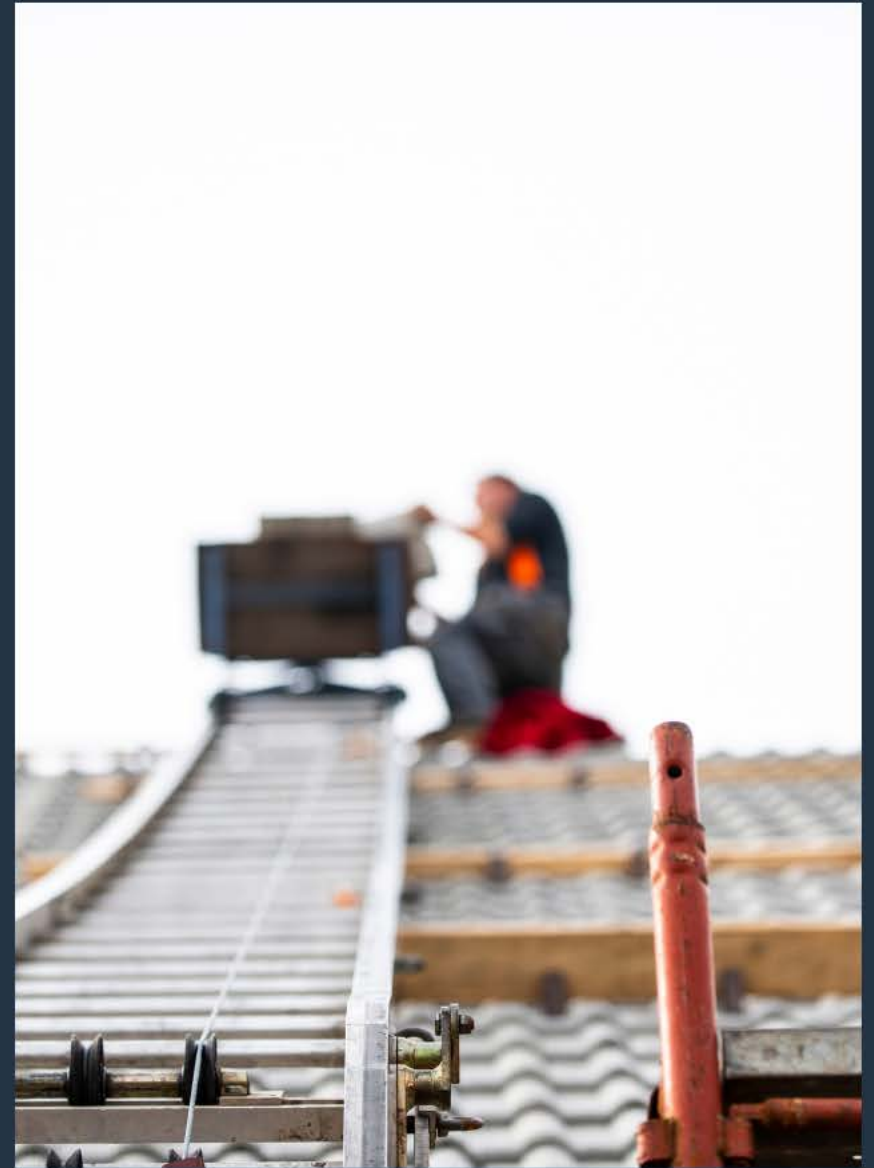
“To the fullest extent permitted by law, Subcontractor shall indemnify, hold harmless and defend Contractor for all costs, expenses and liability incurred as a result of the Subcontractor’s (including the Subcontractor’s employees’) failure to comply with applicable safety laws, rules, regulations and orders, including without limitation, any state or federal OSHA violation.”

Safety Training & Safety Inspection Responsibilities Provision

“At all times while under the control and supervision of the Subcontractor, the employees of Subcontractor shall be required to follow the safety rules, regulations and procedures instituted by Subcontractor, Contractor or any other contractor on the project and shall comply with all safety requirements identified in the Occupational Safety and Health Act of 1970, 28 U.S.C. Section 651 et seq., as amended (“OSH Act”) and applicable state health and safety plans. Subcontractor and not Contractor shall be solely responsible for all initial and subsequent safety training of Subcontractor’s employees, and Contractor is not responsible for any aspect of Subcontractor’s safety training. Subcontractor shall be solely responsible and liable for executing the work in a safe and prudent manner, for establishing safety procedures, for protecting all of the Subcontractor’s workers and the public from property damage and/or injury during the performance of work and shall be named as at fault party should any incident or violation extend from Subcontractor’s work or unsafe practice(s). Subcontractor shall be specifically responsible and liable for all aspects of its use of the workspace jointly used by different contractors and subcontractors, and Subcontractor acknowledges and agrees that Contractor does not retain supervisory control of such joint use areas for purposes of liability for unsafe conditions.”

Independent Contractor Provision

“The parties hereby expressly agree that Subcontractor shall perform under the terms of the Contract Documents as an independent contractor. The Contract Documents shall not render Subcontractor an employee, partner, agent of, or joint venture with Contractor for any purpose. Subcontractor agrees that it will be solely liable for all state and federal taxes and deductions relating to its performance under the terms of the Contract Documents including federal social security payments, state unemployment insurance payments and workers’ compensation payments.”



Limiting Liability for Construction Defects

- **Baseline Rule**

- The Prime Contractor is liable to the Owner for defects caused by its Subcontractor

- **Contract Provisions to Limit or Shift Liability**

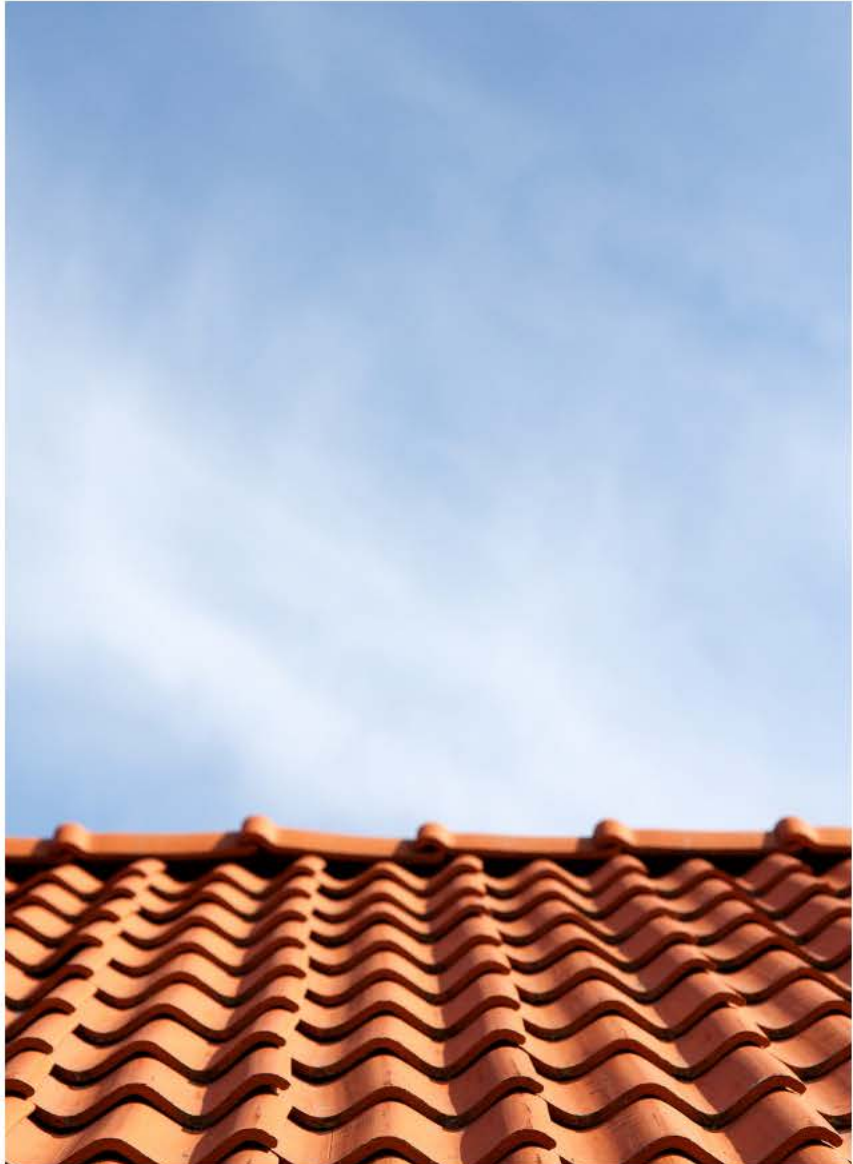
- Limiting Liability: Notice Provisions
- Shifting Liability: Indemnification Provisions
- Insuring Liability: Additional Insured Clause



Notice Provisions

- While some state statutes require an owner to give notice of any construction defects prior to filing suit for same, your contract should also provide a notice to cure period
 - When working with subcontractors, ensure that there is a notice provision requiring that the subcontractor remedy any defects within its scope of work within a reasonable time (less than the time period allotted to cure in your contract with the owner)
 - i.e., “Subcontractor shall remedy any defect within 72 hours of receipt of notice from Contractor”





Indemnification Provisions

- Types of Indemnification Provisions
 - Limited Indemnity
 - ❖ Requiring subcontractor to assume responsibility only for defects caused by the subcontractor's own negligence
 - Intermediate Indemnity
 - ❖ Requiring subcontractor to assume responsibility whenever subcontractor's own negligence contributes – even if only partially – to defective work
 - Broad Form Indemnity
 - ❖ Shifting the responsibility for defective work to the subcontractor regardless of which party is at fault for the defective work

Indemnification in Colorado

- Colorado's Anti-Indemnity Statute [C.R.S. 13-21-111.5(6)(b)] only permits limited indemnity provisions. Anything beyond that is void as against public policy;
- Some exceptions apply
 - Rental/Lease Agreements;
 - Agreements relating to property owned by Railroad, Sanitation or Water Districts;
 - Operations Agreement; and
 - Master Services Agreement.
- Limited to claims for personal injuries, death and property damage, but may not apply to claims for emotional distress.



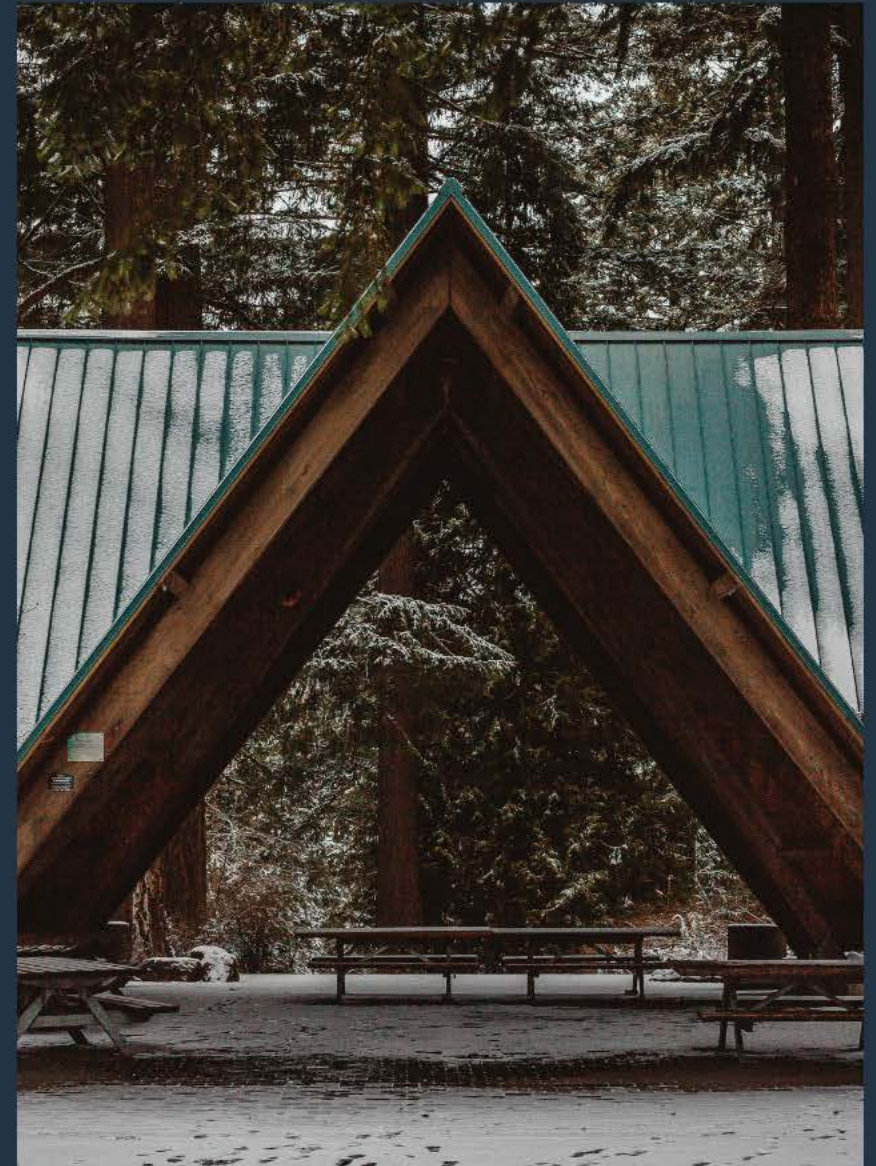


Additional Insured Provision

- Purpose
 - To “make good” on subcontractor’s indemnity obligations
- Limitations
 - Aligned with CO's limited indemnity restriction—additional insured requirements designed to cover anything beyond losses caused by the indemnifying party are void and unenforceable.[C.R.S. 13-21-111.5(6)(c)].
- Considerations
 - Make sure the requirements of both the insurance policy and the Contract Documents are followed to properly effectuate AI coverage

Licensure of Subcontractors

- Bottom-Line
 - Make sure you know the licensing requirements for your entire scope of work in the state, county, and city where you are performing work.
- Colorado has no state roofing license requirement, but a business license is required. There may be city and county licensing requirements for roofing and other trades for projects within city/county limits.



Injuries & Workers' Compensation

- Workers' Compensation Insurance Coverage
 - Benefits Employers by limiting liability.
 - Required by Colorado for all business with any employees, but coverage is not required for independent contractors.
 - Can reject coverage if a solo operator.
- Who is Responsible for Injuries to Subcontractor Employees?
 - Independent Contractor v. Employee: Workers' Compensation Statutes
 - ❖ "Statutory Employers" are responsible for providing workers' compensation coverage for all of its employees and ensure that coverage exists for all employees of any Subcontractor of risk being fined.
 - ❖ In Colorado, workers are **presumed** "employees" unless proven otherwise. The 9-factor "right of control/independent trade" test will apply to determine employee versus independent contractor status for purposes of WC coverage requirements. [C.R.S. 8-40-202(2)].

Injuries & Workers' Compensation

- How to Avoid Responsibility for Injuries to Subcontractor Employees
 - Require all subcontractors to have independent worker's compensation coverage
 - Ensure coverage is maintained throughout work on the project
- Failure to Provide Workers' Comp Coverage Penalties:
 - Civil Fines
 - Stop Work Orders
 - Loss of Licensure
 - Liability for Injuries



Conclusion

- Make sure you are treating subcontractors as independent contractors – both contractually and in reality on the jobsite
- Re-draft your subcontracts to include Multi-Employer Site defenses
- Review your subcontracts to ensure you have adequate notice provisions, your indemnification provisions abide by state law, and are accompanied by appropriate additional insured language
- Always make sure your subcontractors are appropriately licensed in the relevant state, county and city
- Require your subcontractors to maintain their own adequate workers' compensation coverage

Contact Us!



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Questions?

Final comments:



- ★ Thank you Trent & Gabe!
- ★ Presentation slides are available at:
<https://www.coloradoroofing.org/member/education>
- ★ A survey will be sent after the seminar, please take the time to respond. Your feedback helps us plan future webinars and seminars.
- ★ Thank you for staying on the webinar the full time. **Please answer this final poll question to earn your CIUs.** Then, you are free to hop off and end your session.

THANK YOU FOR ATTENDING

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