

# PARTICIPATOR

October 2015

## CLOSE, BUT NO CIGAR: NO WRITTEN CONTRACT, NO INDEPENDENT CONTRACTOR

### Background on North Dakota Law

*Under state statute, individuals working in North Dakota for remuneration (compensation) are presumed to be employees. Overcoming that presumption is difficult. Typical disputes involve an analysis using the 20-factor common law test that focuses on the employer's right to direct or control the work performed. The presumption may also be overcome by one of a handful of exceptions carved out by the North Dakota Legislature.*

One such statutory exception involves services performed by an individual known as a "landman", a land professional whose primary duties include negotiating leases to acquire mineral rights, conducting research of public and private records to identify mineral interest ownership, and managing mineral rights or obligations, among other things. The exception was established by the legislature in 1995 with the enactment of Subsection 18(k), NDCC Section 52-01-01(18)(k), which reads:

18. "Employment" does not include:

...

k. Service performed for a private for-profit person or entity by an individual known as a landman if substantially all remuneration, including payment on the basis of a daily rate, paid in cash or otherwise for the performance of the service is directly related to the completion by the individual of the specific tasks contracted for rather than to the number of hours worked by the individual, and the services are performed under a written contract between the individual and the person for whom the services are performed which provides that the individual is to be treated as an independent contractor and not as an employee with respect to the services provided under the contract.

The landman exception is based on three specific (and relatively simple) requirements: (1) performance of specific tasks (2) under the terms of a written contract, with (3) compensation directly related to performing the specific tasks. A recent decision from the North Dakota Supreme Court offers the first judicial interpretation of the exception, with a clear message to businesses that work with landmen and others.

### Court Won't Accept Partial Proof

Baha Petroleum Consulting Corporation provides referrals to oil and gas exploration and production companies, including referrals of landmen. In April 2013, Job Service North Dakota (JSND) conducted a random audit of Baha and concluded its landmen were actually employees, not independent contractors. JSND imposed liability on Baha for unemployment insurance taxes based on compensation to the landmen.

Baha challenged the agency's determination in an administrative hearing, with no success. A second appeal to the state district court was also unsuccessful, and the company finally took its challenge to the North Dakota Supreme Court.

On appeal, Baha acknowledged it had no written contracts with the landmen but asserted JSND should have applied the statutory exception. Its argument focused on the strong evidence that the landmen jobs met two of the three factors: performance of specific tasks and

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### Closer Look at Loss Control Financial Insights From the CEO

NDIRF

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compensation based on completing those tasks. In essence, the company asked the court to find the exception applied despite the missing third factor.

The court's resounding response is found in one simple sentence: "We simply cannot ignore the clear terms of the statute." In other words, the requirements for the landman exception are not subject to negotiation. NDCC Section 52-01-01(18)(k) was enacted to make it easier for an employer to treat landmen as independent contractors. JSND correctly applied the statutory factors of the exception and determined that the workers didn't qualify as independent contractors based on the undisputed fact that no written contracts existed during the relevant time period. The absence of one factor defeated the exception.

Based on the remaining evidence presented by Baha, JSND's finding of employee status under the 20-factor common law test applied in North Dakota was affirmed. *Baha Petroleum Consulting Corp. v. Job Service*, 2015 ND 199 (August 2015).

### **Bottom Line**

Missteps and mistakes in classifying workers can result in costly litigation. Misclassification claims are an uphill battle, and the burden of proof often falls on the employer's shoulders. If the challenge results in a finding of employee status, the employer will wind up paying multiple types of damages: unpaid wages with interest, FICA and unemployment insurance taxes, and attorney's fees, among other things.

Education is key. Learn the rules and follow them. Don't take shortcuts or ignore the clear requirements of the law. The issue is difficult and complicated, so if you have questions or concerns about the classification of your employees or independent contractors, consult with attorneys who have employment law expertise.

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## **RISK SERVICES**

### **A CLOSER LOOK AT NDIRF LOSS CONTROL**

During a time of turbulent insurance markets in the 1980s, the NDIRF was formed with a goal of providing a stable source of risk services to North Dakota's political subdivisions with a central focus on offering service as only a North Dakota organization with North Dakota employees can. We all have a stake in the success of the NDIRF and through the hard work of our members, agents, staff, and board members we have proven our ability to meet that goal, year after year. The NDIRF staff works to quickly and fairly resolve claims, properly underwrite our members' exposures and last, but certainly not least, we assist our members with their loss control efforts on a daily basis. One of the most impactful ways a member of the NDIRF can contribute to our mutual success is through their loss control efforts. Naturally, reducing or eliminating claims activity will ultimately reduce NDIRF claim payments. Money saved is moved right back to our members through the conferment of benefits program. In this article, I would like to take a moment of your time to explain some of the most prominent loss control programs we have available to our members - these loss control services are included with your membership in the NDIRF. The below list is certainly not all-inclusive of the services we provide and to inquire about additional services or to utilize our services listed below, please do not hesitate to contact us at 1-800-421-1988 or at [LossControl@NDIRF.com](mailto:LossControl@NDIRF.com):

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# RISK SERVICES

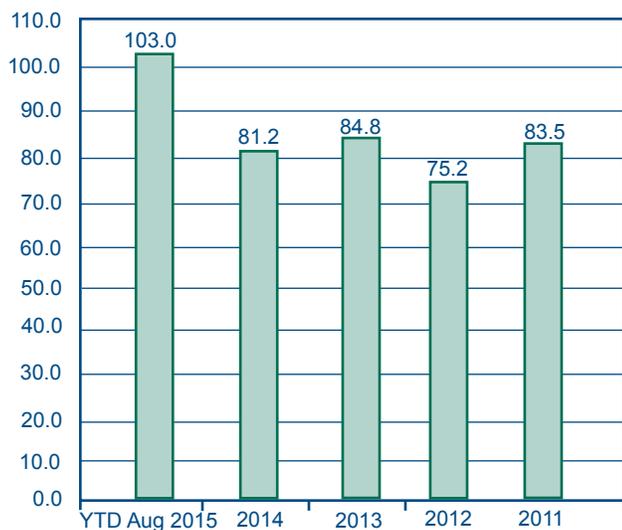
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- The most popular service we currently provide to our members is defensive driving courses. Our experienced loss control representatives, Mark Verke and Doug Griffin, performed defensive driving courses for over 1,100 class participants in 2014, free of charge to our members. The course was developed by the National Safety Council. Defensive driving courses offered by the NDIRF can meet the requirements of regulatory agencies, can help reduce auto accidents (which in turn helps lower your NDIRF contribution) and our courses can also assist participants with personal insurance rate reductions and even reduce driver's license points.
- Another valuable and unique service provided by our loss control representatives is the handling of special requests of our members. We receive requests from members for technical loss control assistance on a wide range of topics - from post-accident reviews to township road maintenance to aquatics safety. Given the experience and background of our loss control representatives, there are not many loss control scenarios we haven't seen or heard. Whatever the situation, if you would like assistance with a liability exposure, please reach out to us. We are happy to assist you in any way we can.
- One of the most important loss control activities an NDIRF member can perform is the identification of potential loss hazards and the planning for reduction or elimination of those hazards. Our liability hazard surveys are designed to do just that, identify hazards and assist with the reduction or removal of those hazards. NDIRF loss control representatives will periodically schedule a liability hazard survey with your

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## FINANCIAL INSIGHTS

### OPERATING RATIO



The operating ratio shown above is the sum of NDIRF's loss and expense ratio less the investment income ratio. The operating ratio is a measure of NDIRF's profitability and is the principal determinant of the Fund's financial solvency and stability. A ratio less than 100% means that a company is profitable and the lower the ratio the more profitable a company is. In 2015 so far losses incurred have been high and, combined with a down investment market, it has given us an operating ratio of over 100% through August. ■

## FROM THE CEO

The NDIRF routinely publishes articles in the *Participator* covering various aspects of employment-related litigation or potential liability and this issue continues that theme. There are reasons for all this attention. First, these types of claims are expensive to defend and successful claimants could receive significant damage awards, even beyond North Dakota's statutory "tort caps" and possibly including payment of a plaintiff's attorney fees. Second, such claims are preventable if due attention is given to development and application of appropriate policies and procedures. Lastly, new governing board members and officials are joining NDIRF member entities at a steady rate and we want to ensure awareness of their responsibilities in this area.

For the past several years, in furtherance of the activities of the North Dakota Human Resources Collaborative group, the NDIRF has made available an online resource that provides assistance to members in dealing with employment-related matters - the Human Resources Reference Guide for Local Governments in North Dakota. This web-based manual can be easily accessed by clicking on the "Online HR Guide" tab in the Shortcut Menu on NDIRF's website ([www.ndirf.com](http://www.ndirf.com)). It is periodically updated, as this is an area of law that is continually evolving - I encourage you to take advantage of it! ■



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### RISK SERVICES

#### ...NDIRF LOSS CONTROL

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entity and plan on working with you to achieve your loss control goals through team work and our loss control expertise. The goal of these surveys is not to catch members acting in a manner inconsistent with proper loss control methods. It is to act as a resource to reduce their potential for loss, creating a safer environment for

**Surveys.....to ultimately reduce the cost of risk services to the members of NDIRF.**

the citizens, students, employees and volunteers in our organizations and communities - and to ultimately reduce the cost of risk services to the members of the NDIRF. As mentioned, we will reach out to members to schedule a liability hazard survey periodically. However, we also take requests. Please feel free to contact us at any time to schedule a liability hazard survey of your entity.

At the end of the day, the NDIRF staff is here to serve our members. If you have an idea for a loss control service we are not providing or if you can provide feedback to help improve our current services, we want to hear from you! Please contact me, Brennan Quintus, directly at 701-751-9105 or through email at [Brennan.Quintus@NDIRF.com](mailto:Brennan.Quintus@NDIRF.com). ■

### Mark Your CALENDAR

Oct

- 25-27: ND Association of Counties  
Annual Conference & Expo  
Bismarck Events Center, Bismarck
- 30: ND School Board Association  
Annual Convention,  
Ramkota Inn, Bismarck

Dec

- 3: NDIRF Board of Directors Meeting  
NDIRF offices, Bismarck