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## SCEANRIO: Who is an Employee?

Grub Hub is an online food ordering and delivery service. Customers can order meals from a local restaurant through the Grub Hub app or web site. The order is then picked up by the customer, delivered by the restaurant, or delivered by a Grub Hub driver. The restaurant delivers the majority of meals ordered through Grub Hub. More meals are delivered by Grub Hub drivers than are picked up by the customer.

Drivers apply to deliver for Grub Hub and are screened according to specific criteria which includes age, experience, iPhone or Android access, valid driver's license and auto insurance, and a background check. If accepted, drivers are provided an onboarding session consisting of training videos. Drivers may provide their own equipment or lease the equipment for the job through Grub Hub. For example, drivers may lease insulated delivery bags from Grub Hub in exchange for wearing Grub Hub t-shirts and hats. Drivers may also lease insulated delivery bags for \$5.00 per month or they may purchase insulated bags from Grub Hub. The driver is responsible for all costs and expenses arising from delivering food for Grub Hub.

The drivers are paid \$4.25 per delivery plus \$0.50 per mile for their vehicle. There is an agreed upon schedule for bonuses. Drivers are guaranteed \$15.00 per hour including tips if they fulfill 75% of orders during a shift.

Drivers set their own schedule on a weekly basis and once the schedule is submitted the driver is bound to perform all assigned services for that schedule. Drivers may assign someone else to perform the deliveries for that day but Grub Hub will only pay the driver with whom they have contracted. The drivers use a Grub Hub app to sign in and out and to record their progress for each delivery (e.g., when an order is picked up from a restaurant and when it is delivered to the customer.) All drivers sign a sixty (60) day "Delivery Service Provider Agreement" that states the driver is engaged in the "independent business of providing delivery services." Grub Hub does not have the right to restrict any driver from performing delivery services for other companies, including those that compete with Grub Hub. Both parties have the right to terminate the agreement at any time.

David Dennison has been driving for Grub Hub for the past two years. It is the main source of his income, although he did drive for another delivery service for a short time about six months ago. While making a delivery, Mr. Dennison was injured and has not been able to work for the past two months. His doctor says he may be unable to work for another six months, while he is in physical therapy for his injuries.

Mr. Dennison has applied for New York State Workers' Compensation as an employee of Grub Hub. Grub Hub claims he is not an employee of the company and therefore they were not obligated to pay workers compensation insurance for Mr. Dennison. Explain why Mr. Dennison is or is not an employee of Grub Hub.

# Who Is An Employee Under the Workers' Compensation Law?

## Employees in For-profit Businesses

Under the Workers' Compensation Law, most individuals providing services to a for-profit business will be deemed an employee of that business and therefore must be covered by the employer for workers' compensation insurance. This applies unless those services are specifically excluded as employment under the WCL.

For workers' compensation insurance purposes, the term *employee* generally includes day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) and most subcontractors.

Many factors are used to decide whether an individual is an employee under the Workers' Compensation Law. If a business meets any of the criteria listed below, and the individual hired does not meet the criteria listed under independent contractors, or the services rendered are not specifically exempted as employment under the WCL, then that business must obtain a workers' compensation insurance policy.

The factors that are considered to determine whether an individual is an employee within the meaning of the WCL and thus must be provided with workers' compensation insurance coverage by the employer include:

**Right to Control-** The degree of direction and control a person or organization exercises over someone they contract with to perform a task is always a central issue in determining an employer-employee relationship. A person or organization controlling the manner in which the work is to be performed indicates that the task is being performed by an employee. If the person doing the labor controls the time and manner in which the work is to be done this may indicate that the task is being done by an independent contractor. If an individual is truly independent, the individual generally works under his/her own operating permit, contract or authority.

**Character of Work Is the Same as Employer-** Work being done that is consistent with the primary work performed by the hiring business indicates that the labor is being done by an employee. Work done by a person that is different than the primary work of the hiring business may indicate the task is being performed by an independent contractor. (For example, someone installing shingles for a roofer is generally considered the employee of that roofer. Conversely, a plumber hired on a one time basis to fix a broken pipe for a retail store owner is generally considered an independent contractor,)

**Method of Payment-** Employees tend to be paid wages on an hourly, daily, weekly, or monthly basis. Naturally, employment is indicated if the hiring business withholds taxes and/or provides other employee benefits (Unemployment Insurance, health insurance, pensions, FICA, etc.) Whether the labor is paid using a W2 or 1099 Form for tax purposes does not matter in determining an employer/employee relationship for workers' compensation purposes. A business paying cash to an individual for services usually indicates that the individual is an employee. Payment made for performance of the task as a whole may indicate the task is being done by an independent contractor.

**Furnishing Equipment/Materials-** A business providing the equipment and/or materials used by people in performing the work tends to indicate an employer-employee relationship.

**Right to Hire/Fire-** A business retaining the authority to hire and fire the individuals performing the work indicates an employee is performing the work. An independent contractor retains a degree of control over the time when the work is to be accomplished and is not subject to be discharged by the hiring entity because of the method he chooses to use in performing the work. Naturally, an independent contractor's services may be terminated if the services rendered do not meet contractual requirements.)

All factors may be considered and no one factor alone determines whether a person will be considered an employee under the WCL.

**Note:** A workers' compensation law judge determines whether a person is considered an employee at a hearing following a work related accident or illness.

Advisory from the New York State Workers Compensation Board.



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