

Insurance for Workers in the Entertainments Industry

This document has been prepared to help AIST members understand where and when different kinds of insurance are required in the course of their work and who would need to provide insurance cover. This document is the opinion of the AIST Insurance Working Group and does not constitute legal advice. The situation may be different for each individual. We hope that this information can help you assess your own situation.

The insurance types we will be dealing with are:

Employer's Liability Insurance which indemnifies against damages and costs awarded to an employee, where legal liability of the employer/company has been established for any injury, disease, sickness or fatality arising out of, or in the course of employment by the company.

Public Liability Insurance which indemnifies the Employer/Company against damages and costs where legal liability for injury to third parties or damage to their property has been established, arising out of the Company's activities.

Personal Accident Insurance covers the individual in the event of injury or death.

The following is the Financial Services Regulator's advice to companies:

"Employers Liability and Public Liability (EL and PL) insurances provide protection against claims by employees or members of the public where the firm may be at fault. EL and PL insurances are not compulsory. However depending on your type of work, you may be required by contract to have this type of cover in place. You could face financial ruin if a claim is made against you and you are uninsured." (see: www.ifsra.ie)

Although holding these insurances is not compulsory, Labour Law in Ireland is informed by the principal that Employers owe a **"duty of care"** to those whose services they engage and also to the public. (see: www.entemp.ie/employment/rights/about.htm)

Six specific duties are identified under common law in relation to employees (some of these duties overlap with Safety, Health and Welfare at Work obligations) -

1. Employer must provide a safe system of work
2. Employer must provide a safe place of work
3. Employer must provide safe equipment / plant and machinery
4. Employer will engage competent employees and a safe number thereof
5. Duty on the employer to have in place and enforce rules of conduct so that employees can work in a safe manner
6. Employer should inform employees of dangers which might reasonably be expected to be unknown to the employee

It is commonly accepted that one other element of exercising this "duty of care" is seeing to it that appropriate insurance cover is in place. Having insurance cover, however, does not in any way negate the requirement of all to adhere to legislation appropriate to the workplace, most particularly, Health & Safety legislation. (See: www.safework.ie)

The issue of who has the "duty of care" and therefore who should carry the insurance are matters which are dictated by **Employment Status**.

Where there is an employer/employee relationship, the employer's duty of care to the employee is clear.

In industries such as ours where most people work on a contract basis this issue is less defined.

To understand this we need to understand that there are two different types of contract.

A Contract **OF** service: Workers employed on a contract of service are generally considered employees and should be covered by their employer's **EL insurance** and **PL insurance**

A Contract **FOR** services: Workers employed on a contract for services are generally considered to be "contractors" and they carry their own independent "duty of care" to anyone they employ and to the public. They would therefore be advised to insure themselves against claims. (It is important to state that the company in charge of the undertaking still retains its Health and Safety obligations.)

If you are under a contract "of" service (employee) then you are not obliged to have Employer's (EL) or Public Liability (PL) insurance.

We have consulted PJT Insurance Services, who broker a large share of the insurance for the Entertainment Industry. Their advice is that the responsibility for the provision of insurance is a matter of **agreed employment status** between the employer and worker.

On negotiating a contract of employment the AIST advises its members to agree with the employer whether the contract is "of" service or "for" services. In simple terms, they should agree whether the worker is to be an employee or a contractor. Remember that contracts can be verbal although a written contract is always preferable. This understanding of status is the key issue.

As part of your job you may be asked to obtain the services of others. Firstly, you should be very sure whether you are hiring workers on behalf of your employer or whether you are employing them yourself. If you are employing them then you have the "duty of care" and therefore are in need of insurance to protect yourself. Secondly, we would advise you to agree with your employer and the workers, the status of these workers. That is, if you are employing workers on behalf of your employer are they, subsequently, employees or contractors. If it is agreed that they are contractors we would advise you to obtain written confirmation of their PL insurance cover. In all cases be sure to have the agreement of all concerned.

It is sometimes thought that those who issue an invoice for their services are "contractors". This is not necessarily the case. We would refer you to the **The Code of Practice for Determining Employment or Self-Employment Status of Individuals** issued by the Employment Status Group set up under the Programme for Prosperity and Fairness. (See: www.welfare.ie/publications/codeofpract.pdf You may also download it from the AIST website.)

It is important for the employer that the correct employment status is identified. It is the AIST's understanding that the "duty of care" that we discussed above cannot be signed away in a contract. What this means is that even if you have signed a contract stating that you are a contractor (ie a contract "for" services), it could be later found in court to be invalid if a judge decides that you should, in fact, have been an employee. This could leave the employer liable for you and uninsured. There are examples of this coming before the courts now with regard to the construction industry. (See www.labourcourt.ie/labour/labcourtweb.nsf). It is important for everyone that this issue is considered carefully and the correct employment status applied.

What follows is an analysis of the Code of Practice aimed at helping you and your employer with this decision.

The association has used the example of a freelance Lighting Designer (**LD**), Scenic Artist (**SA**) and Production Manager (**PM**) contracted for one show in the theatre industry. Our own interpretations are in **bold** beneath each of the criteria.

The Code of Practice for Determining Employment or Self-Employment Status of Individuals

While all of the following factors may not apply, an individual would normally be an employee if he or she:

- 1 "Is under the control of another person who directs as to how, when and where the work is to be carried out."
Only the Producer and possibly the director have the final say on how when and where the work is to be carried out
- 2 "Supplies labour only."
The term "Labour Only" originally defined unskilled manual work. In modern terms we understand it to mean "supplies no materials". We have contacted the Labour Court and the DSFA on this point and have found no clear, legal definition.
- 3 "Receives a fixed hourly/weekly/monthly wage."
All three are usually paid an agreed fee rather than an hourly wage but this fee is for a fixed time limit over their part of the production. It is often the case that PMs are paid with reference to weeks spent on the production and SAs will base a fee on hours required.
- 4 "Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on."
It is recommended that any deps are employed directly by the company.
- 5 "Does not supply materials for the job."
Most crew do not supply materials. They may book materials to avail of discounts but the supplier should invoice the company directly. Billing on for materials may suggest that the LD, PM or SA is a contractor.
- 6 "Does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case."
Most crew only supply "tools of the trade"
- 7 "Is not exposed to personal financial risk in carrying out the work."
Most crew would not unless they hold another position in the company separate from their crew position.
- 8 "Does not assume any responsibility for investment and management in the business."
See 7.
- 9 "Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements."
See 7.

- 10 “Works set hours or a given number of hours per week or month.”
They would all work as directed by the Producers Schedule. They may all take a greater or lesser part in writing the schedule but it would be agreed and approved by the producer.
- 11 “Works for one person or for one business.”
It is unlikely this would be the case.
- 12 “Receives expense payments to cover subsistence and/or travel expenses.”
Crew would expect this when on tour.
- 13 “Is entitled to extra pay or time off for overtime.”
Freelancers would not normally be paid overtime – they can however only work the number of hours that are set in law and must be given the appropriate breaks.

[This section has been taken directly from the Code of Practice]

Additional factors to be considered:

- An individual could have considerable freedom and independence in carrying out work and still remain an employee.
- An employee with specialist knowledge may not be directed as to how the work is carried out.
- An individual who is paid by commission, by share, or by piecework, or in some other atypical fashion may still be regarded as an employee.
- Some employees work for more than one employer at the same time. Some employees do not work on the employer’s premises.
- Statements in contracts considered by the Supreme Court in the ‘Denny’ case such as:
 - ..“You are deemed to be an independent contractor”,
 - ..“It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise”,
 - ..“It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply”,
 - ..“You will not be an employee of this company”,
 - ..“You will be responsible for your own tax affairs”
 are not contractual terms and have little or no contractual validity. While they may express an opinion of the contacting parties they are of minimal value in coming to a conclusion as to the work status of the person engaged.

It is the opinion of the AIST Insurance Working Group that, in the majority of cases, a crew member (stage manager, designer, production manager etc) would, regardless of the duration of the employment, be considered an employee (i.e. under a contract “of” service) based on the guidelines and definitions included in this document. It is important to say however that this has not been tried in court with relation to our industry and is an issue which will need careful attention in the coming months.

We hope this document has gone some way in addressing the concerns that have been brought to the attention of the Association. If you have other insurance issues the Association may be able to help. The best method of contacting us is to email the AIST at info@irishstagetechnicians.com or post a forum topic on the website www.irishstagetechnicians.com or contact a board member directly. If we can't help you we may be able to put you in touch with someone more qualified to advise you. Many of you may be members of Unions who would be very informed and helpful in dealing with insurance.

The important thing is to make sure that you and the people around you are all covered by 'Public Liability Insurance'. Also that you are adequately covered in the event of you having a work related accident or illness. (i.e. that you are covered by your employer's Employer's Liability insurance or your own personal accident insurance or both.) Do not be embarrassed to ask your employer for written proof of their insurance. Taking someone at their word may put you in an unfortunate situation later.

If you feel that you or the people around you are at risk you should come forward either to a Union, to your peers or to us.

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Below are listed documents that may help you:

- The Code of Practice for Determining Employment or Self-Employment Status of Individuals issued by the Employment Status Group set up under the Programme for Prosperity and Fairness. Available for download from the AIST website or www.welfare.ie/publications/codeofpract.pdf
- A case study "Kelly v Michael McNamara & Co Ltd" (Budd J) 1996 available for download from the AIST website.
- A case study "Henry Denny & Sons (Ireland) Limited v The Minister for Social Welfare" www.ucc.ie/law/irlil/cases/henrydenny_e.htm
- A small section of the HSE (UK) Event Safety Guide on definitions available for download from the AIST website.
- DSFA Scope - Insurability of Employment www.welfare.ie/foi/scope_insofemp.html
- DSFA Employment Status Group Report - PPF 18/04/01 www.welfare.ie/publications/esg_ppf.html
- Labour court ruling between Mythen Brothers and BATU www.labourcourt.ie/labour/labcourtweb.nsf/0/80256a770034a2ab802570cb004ce688?OpenDocument
- SIPTU Contract Of Service and Contract For Service www.siptu.ie/YourRights/TUFGuideToLabourLaw/ContractofEmployment/ContractOfServiceandContractForService

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