

Fiedler Industries

COVERAGE AND EXCLUSIONS

Sole proprietors (RCW 51.12.020(5))

INDEPENDENT CONTRACTORS

Sole proprietors

Whether an independent contractor is exempt from coverage under the sole proprietor exclusion of RCW 51.12.020(5) depends upon factors such as whether the person (1) has a principal place of business eligible for a business deduction for IRS purposes, (2) maintains a separate set of books or records reflecting income and expenses, (3) has done everything legally necessary to establish a business in the state of Washington, (4) has obtained necessary licenses and tax identification numbers, (5) provides services to more than one person or entity, and (6) holds him or herself out to the general public as an independent business person. An additional consideration is "which way does the money flow?" ...*In re Fiedler Industries*, BIIA Dec., **89 0822 (1990)** [Editor's Note: See later statutory amendments, Laws of 1991, ch. 246, § 1 (effective January 1, 1992).]

Scroll down for order.

1 That does not necessarily mean, however, that the dealers are subject to mandatory coverage
2 under the Act. Even though they meet the statutory definition of "worker" contained in RCW
3 51.08.180, they may still be excluded from mandatory coverage as sole proprietors under RCW
4 51.12.020(5). There are any number of independent businesses owned and operated by a single
5 individual, which do no more than provide personal labor. The difficulty, of course, lies in
6 distinguishing "sole proprietors" under RCW 51.12.020(5) from "workers" under RCW 51.08.180.
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10 Unfortunately, there is little guidance either from the Legislature or from the courts on how a
11 person qualifies for the sole proprietor exclusion under RCW 51.12.020(5). However, RCW
12 51.08.180(2), while not specifically applicable here, suggests some factors which, by analogy, might
13 be considered. That section defines those building and electrical contractors who are excluded from
14 the general definition of "worker" under RCW 51.08.180. For our purposes, the following factors which
15 distinguish building and electrical contractors from covered workers are significant:
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19 (b) The person, firm, or corporation has a principal place of business
20 which would be eligible for a business deduction for internal revenue
21 service tax purposes other than that furnished by the contractor for which
22 the business has contracted to furnish services;
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24 (c) The person, firm, or corporation maintains a separate set of books or
25 records that reflect all items of income and expenses of the business;

26 In addition to those two factors, it makes sense to ask questions like:
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- 28 1. Has the person done everything legally necessary to establish a
29 business in the state of Washington?
- 30 2. Has the person obtained the necessary licenses and tax
31 identification numbers?
- 32 3. Does the person provide services to more than one person or entity?
- 33 4. Does the person hold him or herself out to the general public as an
34 independent business person?
- 35 5. Which way does the money flow?
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38 The last question - Which way does the money flow? - is not very easy to answer in this case.
39 In Traditions Unlimited, cited in the Proposed Decision and Order, either the manufacturer or the
40 manufacturer's representative paid the outside salespeople commissions. Here, the situation was not
41 so clear-cut.
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44 Sometimes, the wholesaler/dealers purchased the Rainbow System from Fiedler and then sold
45 it to a customer, retaining the profit. Sometimes, they received the product on consignment, sold it to
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1 the customer, and then reimbursed Fiedler, retaining any profit. Many times, a credit transaction was
2 involved. Then financing would be provided by Beneficial Finance, which was set up through Fiedler
3 Industries.
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6 Only two of the wholesaler/dealers testified in this appeal. Ann Butler started working for
7 Fiedler Industries as a wholesaler/dealer in about August 1985. Initially she worked under the
8 guarantee agreement (Exhibit No. 6) and was guaranteed \$1,000.00 per month if she demonstrated
9 the Rainbow System 60 times in that month. She opted out of the guarantee agreement after about a
10 month because she could make more money on her own.
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13 As noted in the Proposed Decision and Order, Ann Butler testified that:

14 she (1) obtained a Rainbow System on consignment, and sold a machine
15 on her own time at a price she set; (2) supplied her own automobile,
16 insurance, clothes, and telephone; (3) was never reimbursed for travel,
17 mileage, automobile insurance, or other business expenses; (4) was free
18 to sell competing products; (5) was not required to attend seminars/clinics;
19 (6) was not required to go on appointments; (7) was not required to use
20 the telephone bank for referrals (although she did on occasion); (8) was
21 not required to Call to Start/Call to Finish; (9) never received an override;
22 (10) accomplished repairs of the Rainbow System by herself or by
23 returning them to Rexair, the manufacturer; (11) was free to hire
24 employees and delegate responsibility; (12) never sold a Rainbow
25 System at Fiedler Industries; (13) had a tax identification number with the
26 Department of Revenue, and paid quarterly business and occupation tax;
27 (14) conducted cash sales transactions on her own printed forms and then
28 paid Fiedler the machine's wholesale cost; (15) on credit transactions
29 used Beneficial Finance, which was set up through Mr. Fiedler; (16) was
30 not subject to control by Mr. Fiedler of the manner, method or means of
31 the performance of her contract with Fiedler Industries; and (17) the
32 agreement was terminable upon five days notice by either party.
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34 PDO at 8-9.
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36 Ms. Butler described the flow of money in a cash transaction as follows:

37 Basically the customer would write out a check to Ann Butler, or A.B.
38 Industries, I had my office opened at that time, and I'd deposit the check
39 and write Jack a personal check.
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41 2/20/90 Tr. at 78. She paid the required sales tax herself.
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43 The other wholesaler to testify, William Kromer, described his relationship with Fiedler in
44 somewhat different terms. Like Ms. Butler, he worked under the guarantee agreement for a short
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1 time--about two weeks, beginning on August 19, 1985. He also opted out of that agreement because
2 he could make more money on his own.
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4 He testified several times that he, not Fiedler Industries, was responsible for applicable taxes.
5 However, when he actually described the cash sales transactions he testified as follows:
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7 There was a cash sales ticket that we still have, it states the prices of each
8 individual piece and you fill the sales ticket out and mark down how much
9 it is, what the tax is and all this. You collect the money and then what I did
10 was I just turned all the money in to Fiedler Industries because they had
11 all of the paper for me and then they gave me back my share, and they
12 paid the taxes and kept the rest.
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14 2/20/90 Tr. at 114.

15 When asked, "In your case, did Fiedler Industries pay the sales taxes?" 2/20/90 Tr. at 119. He
16 responded, "They handled that for me, because I didn't apply for a sales tax card or number or
17 anything, because since I was allowing Fiedler's to handle all the paperwork, I didn't have any need for
18 it, so I didn't have to worry about paying sales tax, I let Fiedler Industries do that." 2/20/90 Tr. at 119.
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20 Unlike Ms. Butler, Mr. Kromer did not put the money he received from a customer in his bank
21 account and then write a check to Fiedler Industries. Instead, he handed all receipts over to Fiedler
22 and let them give him back his share. Fiedler also kept his books for him.
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24 In addition, a Fiedler employee assisted him in setting up appointments with customers. In
25 1985 and 1986 he received a 1099 miscellaneous form from Fiedler for IRS purposes. Unlike Ms.
26 Butler, he received commissions or overrides from Fiedler Industries on sales made by salespeople he
27 was training. He never hired anyone to work for him.
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29 There was general testimony from Ms. Butler, Mr. Kromer, and Mr. Fiedler that the other ten
30 wholesaler/dealers had substantially similar working relationships with Fiedler Industries. The difficulty
31 with those general statements is that they are not in fact borne out by the specific testimony of Ms.
32 Butler and Mr. Kromer. Comparing Ms. Butler's testimony with Mr. Kromer's testimony, it is
33 immediately apparent that they did not have the same type of working relationship with Fiedler
34 Industries. We therefore have no way of knowing whether the other ten wholesaler/dealers operated
35 like Ann Butler or like William Kromer. This is critical since Ann Butler appears to have been an
36 independent business person--a true sole proprietor within the meaning of RCW 51.12.020(5). On the
37 other hand, Mr. Kromer does not appear to have satisfied the requisite criteria.
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1 As we have said on numerous occasions, there is a presumption in favor of mandatory
2 coverage under our Act. If an individual wishes to take advantage of the sole proprietor exemption
3 from mandatory coverage, there must be evidence establishing that that person truly is a sole
4 proprietor. RCW 82.04, governing business and occupation taxes, sets forth a number of legal
5 requirements for dealers such as Ms. Butler and Mr. Kromer. Ms. Butler testified that she fulfilled
6 those requirements. Mr. Kromer never quite said that he did and, from his description of how sales
7 were actually handled, it seems likely that he did not. As to the other ten dealers who did not testify, it
8 is not clear from this record how they operated vis-a-vis Fiedler Industries. In the absence of either
9 documentary evidence (such as signed contracts, tax identification numbers, etc.) or clear testimony,
10 we cannot tell whether these other ten dealers were covered or not. Fiedler Industries has therefore
11 failed to meet its burden of proof.

12 Finally, even as to Ann Butler, during the one month period she worked under the guarantee
13 agreement (Exhibit No. 6) in 1985, she met the definition of a "worker" under RCW 51.08.180 and was
14 not a sole proprietor under RCW 51.12.020(5). Therefore, premiums can properly be assessed for her
15 work during that period.

16 The Order and Notice Reconsidering Notice and Order of Assessment issued on June 17, 1987
17 is incorrect only insofar as it assesses premiums based on the work performed by Ann Butler after she
18 stopped working under the guarantee agreement (Exhibit No. 6). In all other respects, the assessment
19 is correct.

20 **FINDINGS OF FACT**

- 21 1. On October 24, 1986 the Department of Labor and Industries issued to
22 John William Fiedler and his wife, d.b.a. Fiedler Industries, a Notice and
23 Order of Assessment of Industrial Insurance Taxes, No. 49974 signed by
24 Ray A. Brown, Collection Auditor, which ordered that taxes were due and
25 owing to the state fund which had accrued between April 1, 1984 through
26 March 31, 1986 in the sum of \$15,814.18, and made demand for
27 payment. On October 30, 1986 the Notice and Order of Assessment was
28 communicated to Mr. Fiedler.

29 On November 24, 1986 Mr. Fiedler mailed a properly stamped and
30 addressed letter of protest and request for reconsideration of the
31 Department's Notice and Order of Assessment dated October 24, 1986.
32 On December 1, 1986 the Department received from Mr. Fiedler the letter
33 of protest and request for reconsideration of its Notice and Order of
34 Assessment dated October 24, 1986. On December 8, 1986 the
35 Department issued an order holding in abeyance the order dated October
36 24, 1986. On June 17, 1987 the Department issued an Order
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1 Reconsidering Notice and Order of Assessment dated October 24, 1986,
2 affirming the assessment made thereby.

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4 On June 19, 1987 the Notice and Order of Assessment dated June 17,
5 1987 which affirmed the Notice and Order of Assessment dated October
6 24, 1986 was communicated to Mr. Fiedler.

7 On July 14, 1987 Mr. Fiedler, on behalf of Fiedler Industries, sent, by
8 Federal Express (Airbill No. 3794779461), a notice of appeal of the
9 Department's Notice and Order of Assessment dated June 17, 1987 to Mr.
10 Lan Nguyen, State of Washington, 410 W. 5th, Olympia, Washington,
11 98504. On July 17, 1987 the Department of Labor and Industries stamped
12 "received" Mr. Fiedler's federally expressed notice of appeal.

13 On March 16, 1989 an employee of the Department of Labor and
14 Industries named "Trudy" forwarded through campus mail Fiedler
15 Industries' notice of appeal from the Notice and Order of Assessment
16 dated June 17, 1987 with a memo to the effect that "this one fell through
17 the cracks." The Board received the employer's notice of appeal, as
18 forwarded through campus mail, on March 16, 1989, and assigned the
19 appeal Docket No. 89 0822. On March 29, 1989 the Board issued an
20 order granting the appeal subject to proof of timeliness.

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22 2. During the period of April 1, 1984 through March 31, 1986 John Fiedler
23 and wife, d.b.a., Fiedler Industries, contracted with 12 dealer/wholesalers
24 (salespersons) to demonstrate and sell the Rainbow System (vacuum
25 cleaning system). The dealers who contracted with Fiedler Industries at
26 various times between April 1, 1984 through March 31, 1986 included Ann
27 Butler, William Kromer, Richard Losh, Chuck Bykard, Kevin Manning, Karl
28 Reese, Randy Kenworthy, Roben Rohr, Scott Cann, Kathy Cook, Cindy
29 Schwab, and Tony Beck.

30 3. During the period of April 1, 1984 through March 31, 1986, each of the 12
31 dealer/wholesalers was required to provide his or her own automobile,
32 gas, insurance, telephone, and clothes. Each dealer was allowed to sell
33 competing products, to set their own sales price for the Rainbow System,
34 and to hire their own sales force. The dealers were not required to keep
35 time cards, appear at mandatory appointments, or attend seminars. The
36 dealers were allowed to use support services provided by Fiedler
37 Industries in the form of a telephone bank, credit card transaction forms,
38 financing through Beneficial Finance, cash transaction forms, and the
39 payment of taxes. Between April 1, 1984 and March 31, 1986 none of the
40 dealers signed Exhibit No. 7, the "Rainbow Terms of Agreement,
41 Distributor and Sub-Distributor" contract.

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43 4. For the period of April 1, 1984 through March 31, 1986, the dealers did not
44 in fact hire employees or delegate any of their duties. Few, if any, of the
45 dealers sold competing products, had tax resale numbers, paid industrial
46 insurance premiums on themselves, had office locations, or business
47 licenses.

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5. For the period of April 1, 1984 through March 31, 1986 the dealers provided their personal labor in the form of promoting, demonstrating, and selling the Rainbow System.
 6. Dealer Ann Butler conducted business in the following manner: (1) she obtained a Rainbow System on consignment, and sold a machine on her own time at a price she set; (2) she supplied her own automobile, insurance, clothes, and telephone; (3) she was never reimbursed for travel, mileage, automobile insurance, or other business expenses; (4) she was free to sell competing products; (5) she was not required to attend seminars/clinics; (6) she was not required to go on appointments; (7) she was not required to use the telephone bank for referrals (although she did on occasion); (8) she was not required to Call to Start/Call to Finish; (9) she never received an override; (10) she accomplished repairs of the Rainbow System by herself or by returning them to Rexair, the manufacturer; (11) she was free to hire employees and delegate responsibility; (12) she never sold a Rainbow System at Fiedler Industries; (13) she had a tax identification number with the Department of Revenue, and paid quarterly business and occupation tax; (14) she conducted cash sales transactions on her own printed forms and then paid Fiedler the machine's wholesale cost; (15) on credit transactions she used Beneficial Finance, which was set up through Mr. Fiedler; (16) she was not subject to control by Mr. Fiedler of the manner, method or means of the performance of her contract with Fiedler Industries; (17) she paid her own sales tax; and (18) her relationship with Fiedler Industries was terminable upon five days notice by either party. For about one month in 1985 she worked under the guarantee agreement (Exhibit 6).
 7. For the period of April 1, 1984 through March 31, 1986, except for one month in 1985 when she worked under the guarantee agreement, Ann Butler was an independent business person or sole proprietor. During that same period, the other 11 wholesaler/dealers were not independent business people or sole proprietors.

CONCLUSIONS OF LAW

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1. This appeal was timely filed pursuant to RCW 51.48.131, and the Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
 2. Ann Butler, Bill Kromer, Richard Losh, Chuck Bykard, Kevin Manning, Karl Reese, Randy Kenworthy, Roben Rohr, Scott Cann, Kathy Cook, Cindy Schwab, and Tony Beck were independent contractors with Fiedler Industries from April 1, 1984 through March 31, 1986. Personal labor was the essence of their contract within the meaning of RCW 51.08.180.
 3. Except for one month in 1985, Ann Butler was a sole proprietor within the meaning of RCW 51.12.020(5) and exempt from mandatory coverage under the Industrial Insurance Act. The other 11 wholesaler/dealers were

1 not sole proprietors within the meaning of RCW 51.12.020(5). Therefore,
2 they were covered workers within the meaning of RCW 51.08.180.

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4 4. The order reconsidering Notice and Order of Assessment dated June 17,
5 1987, which affirmed Notice and Order of Assessment No. 49974 dated
6 October 24, 1986, which assessed industrial insurance taxes pursuant to
7 RCW 51.48.120 in the amount of \$15,814.18 for the period of April 1,
8 1984 through March 31, 1986, is incorrect and is reversed and this matter
9 is remanded to the Department with directions to issue an order assessing
10 industrial insurance premiums for the period of April 1, 1984 through
11 March 31, 1986 for Bill Kromer, Richard Losh, Chuck Bykard, Kevin
12 Manning, Karl Reese, Randy Kenworthy, Roben Rohr, Scott Cann, Kathy
13 Cook, Cindy Schwab, and Tony Beck, and for one month only of Ann
14 Butler's work, and to assess premiums for class 0301 lawn care, 0601
15 vacuum repairmen, 4904 telephone solicitors, and 6602 janitors in the
16 amount of \$1,132.76.

17 It is so ORDERED.

18 Dated this 13th day of December, 1990.

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20 /s/
21 SARA T. HARMON Chairperson

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24 /s/
25 PHILLIP T. BORK Member