

Opinion No. 55-6332

December 7, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Guy Mayes, Office Manager, Contractors' License Board, P. O. Box 1179, Santa Fe, New Mexico

You have asked for the opinion of this office on the questions:

1. Must a well driller, contracting to drill wells in a declared underground basin and who has a license from the State Engineer under § 75-11-13, N.M.S.A., 1953, secure a contractor's license from your Board?
2. Must a well driller, who furnishes his equipment to drill wells but drills on an hourly rate basis, secure a contractor's license from your Board?

Section 75-11-13, N.M.S.A., 1953, provides that any person who drills in a declared or proclaimed underground source of water must, before undertaking to drill in such an area, secure a license from the State Engineer. This, however, in our opinion, does not obviate the necessity of securing a contractor's license from your Board under § 67-16-1 et seq., N.M.S.A., 1953, if such a person otherwise falls within the definition of "contractor" as that term is defined by § 67-16-3, N.M.S.A., 1953, and, of course, further provided that he does not fall within any of the exceptions to the Contractors' Licensing Act. Those exceptions, as you know, are contained in §§ 67-16-2 and 67-16-3, N.M.S.A., 1953.

We base this conclusion on the fact that the purpose of the two licensing statutes are different and that no necessary incompatibility exists between the two.

Thus, for your purpose, it is immaterial that a person engaged in such an occupation is otherwise required to have a license from the State Engineer. You have only to determine whether or not such a person comes within the provisions of the Contractors' Licensing Act.

In connection with the exceptions contained in § 67-16-2, your attention is called to *B & R Drilling Co. v. Gardner*, 55 N.M. 118, wherein our Supreme Court had the occasion to construe this section. This section was given a rather broad interpretation. In determining the applicability of the Contractors' Licensing Act to those people engaged in well drilling, you should give particular attention to this case.

As concerns your second question, we are unable to give you a categorical answer which would cover each and every situation. However, as a general guide, the following may be helpful.

Section 67-16-3, N.M.S.A., 1953, defines the term "contractor" and, in part, provides:

"A contractor within the meaning of this act is a person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, who for either a fixed sum, price, fee, percentage, or other compensation other than wages, undertakes or offers to undertake, or purports to have the capacity to undertake to construct, alter, repair, add to or improve any building, excavation, or other structure, project, development, or improvement, or any part thereof; . . ."

The fact, however, that a person undertakes to do work for another at an hourly rate does not necessarily by that fact alone exempt himself from the definition of "contractor" above. The key to the problem, as concerns your question, lies in ascertaining the legislative intent and meaning of the phrase "who for either a fixed sum, price, fee, percentage, or other compensation other than wages." It seems to us that "other than wages" points to the class of persons who occupy the legal status of servants or employees as distinguished from the legal status of a contractor. Thus, as we view it, "wages", as used in this statute, means the remuneration paid to a person who occupies the legal status of a servant or employee.

We then are directed to the traditional legal tests for determining whether an employee or a contractor's status exists.

One of these is whether or not the employer retains the right to direct the details of the manner in which his business or the undertaking will be done. *Mendoza v. Gallup Southwestern Coal Company*, 41 N.M. 161.

And observe the following:

"Whether plaintiff was a day laborer, or defendant's servant or employee, or whether he was a contractor, depends upon all the facts of the employment. The measure of his compensation is but one of these facts and not necessarily a controlling one. For the purposes of this case the following definitions are applicable: A servant is one whose employer has the order and control of the work done by him and who directs, or at any moment may direct, the means as well as the end. *Powers v. Mass. Hom. Hosp.* 109 Fed. 294, 47 C.C.A. 122, 65 L.R.A. 372. Where the work done involves the furnishing of capital, implements, shop facilities, and assistants, the person undertaking it is a contractor, not a laborer, servant, or employee. *Campfield et al v. Lang et al.* (C.C.) 25 Fed. 128. **One who contracts to do certain work for another, furnishing his own laborers, implements, and materials, is a contractor, not a laborer, even though paid by the day.** *Tod et al. v. Ky. Ry. Co. et al.*, 52 Fed. 241, 243, 3 C.C. A. 60, 18 L.R.A. 305." (Emphasis Supplied) *Arnold v. Lawrence*, 213 P. 129.

Thus, in determining whether or not a person is a contractor within the meaning of the act, it is permissible to take into consideration the factors cited above and should you determine that a person is actually a contractor, though paid on an hourly basis, you should require that he secure a license from your Board.

I trust the above is of help to you.

By Santiago E. Campos

Assistant Attorney General