



Staffing agency employees injured on the job: A double-edged sword

Consider a two-part attack on the WC exclusive-remedy defense in a dual- or multiple-employer situation



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**BY WILLIAM VEEN
AND KIMBERLY WONG**

During the current recession, there appears to be an emerging trend of businesses trying to distance themselves from traditional employer responsibilities by taking advantage of services offered by staffing agencies and professional employer organizations such as Kelly Services, Inc., Manpower, Inc. and Barrett Business Services, Inc.

These employment services companies provide a range of services to businesses related to staffing, human resources, personnel management and other workforce solutions. Commonly under these arrangements, the business is responsible for the day-to-day supervision and control of the employees while the employment services company handles payroll, benefits administration, workers' compensation insurance, unemployment insurance, hiring, discipline and termination.

The U.S. Bureau of Labor Statistics predicts that between 2008 and 2018 the employment services industry will grow approximately 19 percent and will be one of the top ten industries in employment growth. (<<http://www.bls.gov/news.release/ecopro.t03.htm>> (as of June 2, 2010)). In fact, the employment services industry already appears to be big business. Manpower and Kelly Services recently reported revenue of \$22 billion and \$4.3 billion respectively. (<<http://us.manpower.com/us/en/about-manpower/default.jsp>> (as of June 2, 2010) (statistic for total revenue for fiscal 2008); <http://www.kellyservices.com/web/global/services/en/pages/about_us.html> (as of June 2, 2010) (statistic for total revenue in 2009).) Given the increasing complexity of employment-related laws and regulations, it makes sense for businesses to contract with employment services companies as a way to shift responsibilities, reduce risks and control costs associated with human resources and personnel management.

The growth of employment services companies is significant because it affects how plaintiffs' lawyers approach the prosecution of injured worker cases. When an employment services company is involved, the worker may be considered to have more than one statutory employer not only for purposes of workers' compensation coverage but also for immunity from a civil suit. Such immunity is known as "the exclusive remedy doctrine." Generally, workers' compensation is the sole and exclusive remedy a worker has against an employer for a workplace injury. (Lab. Code, § 3602, subd. (a).) It is therefore crucial that plaintiffs' lawyers carefully prepare and analyze their injured worker cases to determine the existence of an employment relationship; and to verify the existence of workers' compensation coverage for each defendant asserting the exclusive remedy defense. This article discusses some of the issues that plaintiffs' lawyers will need to examine as part of a two-part attack on the workers' compensation exclusive remedy defense in a dual- or multiple-employer context.

Threshold inquiry: Employee vs. independent contractor

In any case involving a workplace injury, the threshold inquiry is whether the injured worker is an employee, and thereby entitled to workers' compensation benefits, or an independent contractor precluded from receiving such benefits. Generally, a court must liberally construe the Workers' Compensation Act to extend benefits to persons injured in their employment. (Lab. Code, § 3202.) *Borello* is the seminal case that discusses the test and relevant factors for distinguishing an employee from an independent contractor. (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) "[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired..." (citations)." (*Id.* at 350.) The right to discharge at will is also



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strong evidence that supports an employment relationship. (*Ibid.*) Other *Borello* factors to consider include:

- Whether the worker is engaged in a distinct occupation or business
- Whether the kind of work is usually done under the direction of the principal
- The skill required in the particular occupation
- Who supplies the instrumentalities and tools used in the work
- The length of time for which the services are to be performed
- Whether payment is by the time or by the job
- Whether the work is part of the regular business of the principal
- Whether the parties believe they are creating an employment relationship

Recently, the Second District Appellate Court reaffirmed that the right to control is still the paramount factor to be weighed in determining employment status, followed by the other *Borello* criteria. (*Lara v. Workers' Compensation Appeals Bd.* (2010) 182 Cal.App.4th 393, 399.) Because this inquiry is fact specific and cannot be mechanically applied, it is important to investigate and conduct discovery on each factor, especially the right to control. However, the above-cited factors typically weigh in favor of finding an employment relationship for persons hired by employment services companies, including staffing agencies.

Plan A: Negate a special employment relationship

When an employer, such as a staffing agency, lends one of its employees to another entity and both have the right to exercise control over the employee and the employee's work, a "special employment relationship" arises. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174; *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 888.) The lending employer is known as the "general" or "regular" employer and the borrowing employer is referred to as the "special" employer. The employee is considered to

be a "borrowed servant" of the general employer engaged in "dual employment."

A client company of a staffing agency will typically assert the exclusive remedy defense as a special employer to try to shield itself from civil liability for workplace injuries. However, this defendant asserts the defense at its peril. If the defendant is wrong about its status as employer, the exclusive remedy defense fails and the plaintiff will be able to proceed with a civil suit against the defendant as if the exclusive remedy provision did not apply. (Lab. Code, § 3706.) Moreover, all of the defendant's admissions and efforts to establish itself as an employer can serve as powerful evidence to support a claim of negligence based on retained control. Therefore, the first plan of attack on the exclusive remedy defense should be to gather evidence negating the existence of a special employment relationship.

The primary consideration in finding a special employment relationship is the alleged special employer's right to control and direct the manner and method of the employee's work followed by the other *Borello* factors. (*Caso, supra*, 163 Cal.App.4th at 888-889.) The terminology used in a contract to describe the responsibilities or relationships of the parties is not conclusive of an alleged special employer's right to control, but its exercise of control strongly supports a special employment relationship. (*Kowalski, supra*, 23 Cal.3d at p. 176.)

When dealing with a dual-employment case, thorough discovery is required. Depositions and written discovery should be tailored to all factors bearing on the employment relationship with particular emphasis on eliciting facts related to the control of the employee and the manner, method and means of the employee's work. For example, discovery requests should seek information and documents related to the identities of the people WHO:

- Had authority to and who actually directed and controlled the employee's work

- Evaluated the employee's performance
- Had the authority to discipline the employee
- Had the authority to terminate the employee
- Provided the necessary tools and equipment to perform the work
- Provided safety and personal protective equipment

Plan B: Prove the employer was uninsured for workers' compensation

If the facts support a special employment relationship, the plaintiff still has an opportunity to attack the exclusive remedy defense by showing that the employer is uninsured for purposes of the Workers' Compensation Act. Under the Act, every employer must secure workers' compensation coverage in one or more of the enumerated ways. (Lab. Code, § 3700.) An employer's failure to secure compensation is significant because it permits the injured employee to apply for compensation through the Workers' Compensation Appeals Board and file a civil suit against that employer for damages. (Lab. Code, § 3715.) The fact that an injured employee has received workers' compensation benefits from another source does not bar a civil action against the uninsured employer. (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987.)

The Act also provides other favorable presumptions and rules that the plaintiff may use against the uninsured employer, including: a presumption of the employer's negligence (Lab. Code, § 3708); the abolition of the defenses that the employee was contributorily negligent, assumed the risk, or was injured by a co-employee's negligence (*Ibid.*); a presumption of negligence per se based on an OSHA citation issued to the employer (Lab. Code, § 6304.5); the attachment of the employer's property upon or after the filing of the action to secure the payment of any judgment ultimately obtained (Lab. Code, § 3707); and the allowance of reasonable attorney's fee fixed by the



court as part of a judgment (Lab. Code, § 3709).

There are two main ways under the Act in which an employer may secure workers' compensation coverage: the employer may either obtain a policy from an authorized insurer or satisfy the requirements for self-insurance. (Lab. Code, § 3700.) There is a third option available in dual- or multiple-employment situations. Where an employer borrows employees from another employer pursuant to an agreement, the borrowing employer may enter into an agreement with the other employer in which the other employer agrees to obtain, and actually obtains workers' compensation for the shared employees. (Lab. Code, § 3602, subd. (d).) If the insurance is in effect for the duration of the borrowed employees' employment, both employers are considered to have satisfied the Act's requirements for obtaining workers' compensation insurance and will receive the protection of the exclusive remedy defense. (*Ibid.*) Even if the insurance policy does not name the borrowing employer as an insured, it is nonetheless covered under the policy as a third-party intended beneficiary as a matter of law because the policy was obtained pursuant to the employers' agreement to satisfy the requirements of the Act. (*Diamond Woodworks, Inc. v. Argonaut Insurance Co.* (2003) 109 Cal.App.4th 1020, 1040-41.)

During discovery, it is important to request from the special employer, copies of any declarations of self-insurance and workers' compensation insurance policies that were in effect at the time of the accident to insure the plaintiff. However, an employer that primarily relies on a staffing agency for its employees will likely also rely on the staffing agency to secure workers' compensation coverage. Therefore, it is crucial to carefully examine the staffing contract for any agreement regarding the security of workers' compensation insurance to determine whether it satisfies all of the requirements under Labor Code section 3602, subdivision (d).

First, verify that the agreement was in effect at the time of the injury and that the plaintiff was one of the employees covered by the agreement. Second, confirm that the contract is in fact a "valid and enforceable agreement" as required by Labor Code section 3602, subdivision (d). For example, if the staffing agency failed to sign the contract, any agreement it made to secure workers' compensation for the benefit of the special employer could be invalid under the Statute of Frauds. Third, keep in mind other contract principles while reviewing the staffing contract. Are the terms of the agreement so vague and ambiguous that it cannot reasonably be determined from the language what type of insurance the staffing agency agreed to provide (e.g. general liability, excess liability, workers' compensation, etc.)? If so, additional discovery will be necessary to ascertain the parties' intent when entering the contract.

Third-party beneficiaries

Although a less common occurrence, it is not difficult to conceive of a situation involving an injured worker with more than two employers. For example, imagine a staffing agency sends an employee to a client company that is under contract with an automaker to provide logistics services at its manufacturing plant. Further suppose that the staffing agency procured a workers' compensation policy for the employee pursuant to its agreement with the logistics company and that the logistics company agreed to secure workers' compensation for the employee on behalf of the automaker, but instead relied only on the policy obtained by the staffing agency. Assuming for the purposes of this example that all three entities are found to be employers of the employee, would the automaker receive the benefit of coverage under the policy that the staffing agency procured? A recent case out of the Fourth District Appellate Court may help shed some light on this novel question.

In *InfiNet Marketing Services, Inc. v. American Motorist Ins. Co.* (2007) 150 Cal.App.4th 168, the Court faced the issue of whether InfiNet, a party claiming to be a third co-employer of injured employees, was entitled to coverage under a workers' compensation policy obtained by another employer. The case involved several injured employees of an employment services company that had sent the employees to work for three different client companies. After denial of the employees' workers' compensation claims, the client companies sued InfiNet, the marketing company that had introduced the employment services company to the client companies. InfiNet cross-complained when the insurer for the employment services company rejected its request for defense.

The insurer filed a motion for summary judgment on the ground that there was no triable issue as to whether InfiNet was an insured under the policy. The Court found that the insurer met its burden of showing that there was no coverage for InfiNet under the policy, as it was not a named insured. The burden then shifted to InfiNet to demonstrate that it was a third-party beneficiary under the policy, and not just an incidental beneficiary, by showing that the policy was procured expressly for its benefit or that it was a member of the class of persons for whose benefit the policy was procured. (*InfiNet, supra*, 150 Cal.App.4th at p. 177.) The Court stated that InfiNet could not enforce the contract just because it would receive some benefit from it. (*Ibid.*)

InfiNet argued that it was a co-general employer of the injured workers and that under Labor Code section 3602, subdivision (d), if any of the employers had workers' compensation insurance for the injured workers, then all of the employers were third-party beneficiaries of the policy as a matter of law. The Court rejected this argument, finding that even if InfiNet were a co-employer, it was not automatically protected under Labor Code section 3602, subdivision (d), because it was required to satisfy the statute's



express requirements. This included the requirement that the employer who agrees to secure workers' compensation coverage does in fact obtain coverage by either purchasing a policy from an authorized insurer or satisfying the requirements for self-insurance. (*Infinet, supra*, 150 Cal.App.4th at 179-180.)

The Court found that InfiNet failed to satisfy any of the statute's requirements. InfiNet had no contract with the employment services company for either the provision of employees or for workers' compensation insurance for the injured workers. Additionally, there was neither evidence of any other agreement that the employment services company had made to obtain workers' compensation insurance on InfiNet's behalf, nor any evidence that InfiNet had paid fees to the employment services company representing premiums for insurance. The Court concluded based on these findings that there was no evidence that InfiNet was of a class of persons for whose benefit the policy was purchased. Consequently, InfiNet was not entitled to coverage by the insurer.

Returning to the hypothetical posed earlier, the analysis in *InfiNet* suggests that the automaker would probably not be covered under the staffing agency's workers' compensation policy. Although the automaker had an agreement with the logistics provider, the logistics provider failed to secure workers' compensation coverage through self-insurance or purchase of a policy, which according to the *InfiNet* case are the only two ways the insurance could be secured for purposes of Labor Code section 3602, subdivision (d). Additionally, it is unlikely that the automaker, the third entity in the chain of employers, would have had any sort of agreement with the staffing agency, let alone an awareness that the staffing agency had any relationship with the employee. Therefore, establishing the intent to benefit that is necessary to prove third party beneficiary status would be difficult in this situation.

Conclusion

The exclusive remedy defense should not be considered an automatic bar to an injured employee's civil suit without a thorough investigation into the facts to

confirm that the defendant has satisfied each element of the defense. The defense is often worth a fight and plaintiffs' lawyers should prepare for a two-part attack. If successful, the plaintiff will obtain favorable presumptions and advantages during litigation that would have been otherwise unavailable.

William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.

Kimberly Wong is an associate on the Lancaster Trial Team at The Veen Firm, P.C. She litigates complex catastrophic injury cases involving negligence, wrongful death, products liability, industrial accident, and exceptions to workers' compensation exclusive remedy doctrine. For more information on this article or a copy of Lancaster's helpful checklist of exceptions to the exclusive remedy rule and third-party causes of action, please e-mail k.wong@veenfirm.com or visit www.veenfirm.com.