



Unlicensed contractors: Find the positives, not the negatives

The hirer of an unlicensed contractor may face civil liabilities if the contractor — or his employee — is injured on the job



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Plaintiffs' attorneys may encounter work injury cases where the client was an unlicensed contractor — a person who did not have the proper California State contractor's licensing to perform the work. Alternatively, the client may be the employee of the unlicensed contractor. Owners and general contractors hire unlicensed contractors in order to save money, because they can pay these workers less than licensed contractors. However, the lack of expertise of these workers, and the hirer's indifference to worker safety, can lead to errors, unsafe practices and conditions, and serious worksite injuries.

When an attorney hears that the injured client was working as an unlicensed independent contractor or working for an unlicensed independent contractor, the attorney might think: "No civil case, no insurance, no assets, comparative fault and perhaps no viable defendant if the person was hired as an independent contractor."

These conclusions are often wrong. In fact, the attorney should think: "Civil case, likely insurance or assets, presumption of negligence, no comparative fault, and your defendant will be either an owner or general contractor who hired the unlicensed contractor."

Take a second look

In general, complex issues arise when bringing suit on behalf of a worker injured on a construction jobsite. Particularly, where an independent contractor or her employee is injured, it is often difficult to establish the liability of the owner or the general contractor. The owner and the general contractor who hired the contractor will typically deny they have any legal duty. These defendants usually assert they are not liable for the acts of an independent contractor or for injuries to an independent contractor's workers. (See, *Privette v. Superior Court* (1993) 5 Cal.4th 689; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253.)

If these defendants are successful in asserting such defenses, the injured worker is left few options for compensation. Where the injured worker is the employee of the negligent subcontractor, he may be limited to making a workers' compensation claim pursuant to the exclusive remedy doctrine — if any workers' compensation insurance exists. The hallmark of an unlicensed contractor is that they have no insurance and are often working without permits and under unsafe conditions.

These cases deserve a second look. Where an owner or general contractor hires an unlicensed contractor, there are several presumptions available that are highly beneficial to the plaintiff. Under Labor Code section 2750.5, an unlicensed contractor and



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their employees are presumed to be the employee of the hirer; this will eliminate the owner's defense that he is not liable for the conduct of the independent contractor. Moreover, if the owner and/or general contractor did not provide workers' compensation insurance for the injured subcontractor, the injured worker can bring a civil suit against the employer. (Lab. Code, §3706) The employer is presumed negligent; the defenses of contributory negligence and assumption of the risk are not available; and a judgment includes attorney's fees. (Lab. Code, §§ 3708, 3709.)

An "unlicensed contractor" is an "employee" of the hirer

Under California law, an "unlicensed contractor" – one who lacks the proper contractor's license for the work – cannot be an independent contractor. The hirer of the unlicensed contractor is presumed to be his "employer."

Labor Code section 2750.5 states in part:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

The penultimate paragraph of the statute states:

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractor's license as a condition of having independent contractor status.

The presumption of employee status can be rebutted only as to persons who hold a valid contractor's license; the presumption cannot be rebutted as to persons who do not hold a valid contractor's

\$1.395 million settlement for electrocution of unlicensed contractor

Papazyan v. Chia et al.

Case number: CGC-469161, San Francisco County

Date: 1/26/2010

Plaintiff's Attorney: Eustace de Saint Phalle, The Veen Firm, San Francisco, California

Facts: Decedent was a 59-year-old former general contractor whose license had lapsed. The building owner hired decedent to perform an electrical upgrade on the building while the building was being renovated by the master lease tenant. (Decedent never had an electrical contractor's license.) While trying to wire the transformer, meters and new fuse boxes, decedent was electrocuted and subsequently died onsite in the presence of his son.

Per Pltf: Decedent's widow and two sons sued the building owner, the master lessor, the general contractor, and an electrical contractor for wrongful death. Plaintiffs presented evidence that in order to keep the elevator working for investors scheduled to visit the building that day, the owner directed Papazyan to rush the electrical work, despite the fact that the day before a city inspector determined that the electrical supply was not properly grounded.

Per Deft: Defendants claimed that plaintiff misrepresented his status as a licensed contractor and could not be an employee of the hirer per the *Chin* case; and that his death was caused solely by his own negligence and not the negligence of anyone else. Defendants also disputed the amount of damages claimed.

Plaintiffs countered that the defendants knew plaintiff was attempting to renew his license prior to his death and was unable to obtain permits for the work on his own. Plaintiffs also alleged that defendants knew and/or required decedent to work on a live electrical system on the day of his death.

Specials: Plaintiffs claimed general wrongful death damage claims, including \$600,000 in future lost earnings.

license. (*Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72, 77-79 [overturning summary judgment for defendant homeowner who hired an unlicensed roofer: "[B]ecause plaintiff is concededly unlicensed, section 2750.5 kicks in and creates an employment relationship. And that relationship allows plaintiff to maintain an action in tort."].)

An injured employee of an unlicensed contractor is also covered under section 2750.5. The employee of an unlicensed contractor is considered the direct employee of the hirer.

Labor Code section 2750.5 attaches responsibility to employers who try to "cut corners" and save money by hiring unlicensed contractors. "The legislative history of Labor Code section 2750.5 indicates that it was intended to "help end the 'subterranean economy' where contractors hire unlicensed subcontractors and pay them in cash, resulting in the 'loss of large sums in taxes, employee social insurance contributions, and employee pension funds.'" (*Smith v. Workers' Compensation Appeals Bd.* (2002) 96 Cal.App.4th 117, 127)



Hirer's lack of workers' compensation insurance = favorable presumptions

In these cases, the "hirer" is the owner and/or the general contractor. Generally, the hirer fails to provide workers' compensation insurance. This results in presumptions benefitting the unlicensed contractor plaintiff, who is deemed an employee of the hirer. The workers' compensation laws are designed to corral delinquent employers who do not provide workers' compensation coverage and force them to take full financial responsibility for injuries to their workers.

For that reason, the following presumptions come into play to assist plaintiff's recovery against an employer who fails to secure workers' compensation insurance:

- An injured employee or his dependents may bring a civil action at law against such employer for damages. (Lab. Code, § 3706.)
- The injured employee or his dependents may attach the property of the employer, at any time upon or after the institution of the action, to secure the payment of any judgment that is ultimately obtained. (Lab. Code, § 3707.)
- It is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. (Lab. Code, § 3708.)
- It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard. (Lab. Code, § 3708.)
- Such judgment shall include a reasonable attorney's fee fixed by the court. (Lab. Code, § 3709.)

The hirer of an unlicensed independent contractor, who will probably fail to provide workers' compensation insurance, is exposed to considerable risk. If the unlicensed independent contractor or its employees are injured, the hirer essentially acts as the workers' compensation provider for the injured worker. The hirer

can be sued directly; his or her negligence is assumed; and there is no defense of assumption of the risk or contributory negligence. Further, the hirer is 100 percent at fault; must pay the plaintiff's attorney's fees; and can have his personal property attached to pay a judgment.

For these reasons, an injured unlicensed contractor – even if she is largely responsible for her own injury – can have a strong liability case for full compensation with sufficient insurance or assets to pay a judgment.

Caveat: Where unlicensed contractor represents he is licensed

Recently, the courts have created an exception to Labor Code section 2750.5. Before 2008, the burden was on the hirer to ensure the independent contractor was properly licensed for the work. Recent case law holds that, where the independent contractor holds himself out to be licensed, he is estopped from asserting he was an unlicensed contractor and therefore an employee under section 2750.5.

In *Chin v. Namvar* (2008) 166 Cal.App.4th 994, the Court of Appeal affirmed a trial court's ruling following a bench trial against an unlicensed contractor who suffered a broken leg in a fall from a ladder at a shopping center. *Chin* was formerly licensed as a painting contractor. *Chin*, who had done work for *Namvar* for a number of years, never divulged his license had lapsed. (*Id.* at 999.)

"Notwithstanding the conclusive presumption established by the second to last paragraph of section 2750.5, one who misrepresents himself as a licensed contractor is estopped from asserting that his unlicensed status makes him an employee under the statute." (*Id.* at 999.) Under *Chin*, a "contractor by estoppel" defense can be proved by showing that "the party who hired the unlicensed contractor believed that the unlicensed contractor had a valid license and would not have hired him had he known that the license was not valid." (*Ibid.*)

In evaluating these cases, it is important to determine as soon as possible whether the client represented to the hirer that she was licensed. Pursuant to the *Chin* case, these representations may limit or invalidate her claim.

Counteracting *Chin*: Obtain discovery regarding the hirer's knowledge and investigation of the contractor's license

There are limits to the hirer's "I thought he was licensed" defense. First, note that this defense does not apply to employees of the unlicensed subcontractor. Even where the subcontractor falsely represented she had a contractor's license, this representation cannot be imputed to the employee of the subcontractor.

Second, to assert this defense, the hirer has the burden to prove the elements of estoppel (*Chin, supra*, 166 Cal.App.4th at 1007), which include an affirmative statement by the unlicensed contractor, and reliance by the hirer. "The existence of an estoppel is generally a question of fact, and the party relying on the estoppel must prove all of the elements." (*Chin, supra*, at 1006) Therefore, the plaintiff is usually able to get to a jury on this question.

The *Chin* Court discussed several possible fact patterns. In a case where the "worker affirmatively lies when asked if he is licensed, commences work, and shortly thereafter is injured . . . the unlicensed worker in this setting is estopped from claiming employee status." (*Chin, supra*, 166 Cal.App.4th at 1006) "On the other end of the spectrum: the hirer does not inquire and the worker makes no representation about his licensing status. In this situation, . . . the unlicensed worker cannot be estopped, and is deemed an employee." (*Ibid.*)

The hirer may have a duty to investigate to determine whether the contractor was in fact properly licensed. As noted above, the *Chin* court was skeptical that an estoppel can occur where the hirer



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makes no inquiry about the contractor's license. Also, it may be unreasonable for the hirer to rely on the contractor's oral representation that he was licensed, without demanding to see the license itself.

Since this issue turns on a number of factual details, it is important to conduct thorough discovery. Some critical questions to investigate include:

- Whether the contractor made any affirmative representations that he had a valid license for the type of work;
- Whether it was reasonable for the hirer to rely on the contractor's verbal assurance alone;
- Whether the hirer requested to see the contractor's license, and examined it;
- Whether a valid license was presented, but later expired;
- Whether it was industry practice to demand to see the contractor's license, and how often;
- Whether the hirer had other information that should have aroused suspicion

that the contractor did not have a valid license;

- Whether the hirer knew in fact that the contractor did not have a valid license.

These questions should be part of the attorney's investigation of the case, and should be included in the deposition questions to persons who witnessed the hiring of the unlicensed contractor.

When next presented with a potential case where the injured worker is either an unlicensed contractor or working for an unlicensed contractor, do not assume that there are no rights and remedies available to the injured worker or her family. During current economic times, those in power will tend to take economic advantage of the "subterranean economy" and its workforce. These defendants use their economic power in the workplace to oppress their workers, directing them to perform unsafe activities for low compensation. With skillful practice, you can turn defendants' advantage

in the workplace into your clients' economic advantage in litigation.

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.

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