



Day laborers and homeowner liability

What happens when the tree trimmer hired by the homeowner falls from the tree?



By CHRISTOPHER VIADRO

When a homeowner hires a day laborer to perform work at the home and the day laborer is injured, some unique workers' compensation and civil liability issues may arise. The term "day laborer" is often used to describe workers that gather at street corners, parking lots, store fronts and similar locations throughout the state, waiting to be hired by individuals/companies that need temporary labor. Per the Public Policy Institute of California and the National Day Labor Survey, these workers are employed in a variety of settings which include:

- Construction
- Moving/hauling
- Painting
- Gardening/landscaping
- Roofing
- Drywall
- House cleaning
- Carpentry
- Farm work
- Plumbing
- Dishwashing
- Car wash
- Electrical
- Cook

Oftentimes, the individual hirers are homeowners seeking help on residential projects. The duration of employment is often no more than a day to a few days.

Several questions are triggered regarding workers' compensation coverage and/or civil liability when day laborers are hurt while working for homeowners. Is the day laborer an employee of the homeowner or an independent contractor? Is the day laborer entitled to workers' compensation benefits? Or, are civil remedies available?

Who is an "employee"?

First, with regard to workers' compensation eligibility, Labor Code section 3151 defines who is an "employee." It provides, in pertinent part:

"Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(d) *Except as provided in subdivision (h) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.*

(Italics added.)

The exception referenced in section 3351(d) has a significant impact on day laborers. Pursuant to Labor Code section 3352(h), the following person is *not* an "employee" for purposes of workers' compensation coverage:

Any person defined in subdivision (d) of Section 3351 who was employed by the employer to be held liable *for less than 52 hours during the 90 calendar days immediately preceding the date of the injury for injuries, as defined in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury for injuries, as defined in Section 5412, or who earned less than one hundred dollars (\$100) in wages from the employer during the 90 calendar days immediately preceding the date of the injury for injuries, as defined in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury for injuries, as defined in Section 5412.*

(Emphasis added.)



Thus, where the worker works less than 52 hours or earns less than \$100 in the 90 days before the injury, the worker may be deemed an employee but will not be eligible for workers' compensation benefits under the homeowner's insurance policy. And, as indicated above, day laborers often work on short term residential projects (e.g., gardening, hauling, tree trimming, demolition, painting, etc.) where the work never reaches the 52 hours necessary to trigger workers' compensation eligibility.

In the foregoing situation, where the homeowner is not liable for workers' compensation benefits because either the 52 hour or \$100 threshold has not been reached, he/she may still be civilly liable even though the injured worker is technically the homeowner's employee if negligence or some other tortious conduct can be shown. (*Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72.)

The foregoing addressed whether a worker is a homeowner's employee for purposes of workers' compensation coverage; a homeowner may still argue that the day laborer was an independent contractor and not an employee. Generally, this distinction would benefit the homeowner given the legal protections afforded the hirer of an independent contractor as set forth in *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny (e.g., *Hooker v. Dept. of Trans.* (2002) 27 Cal.4th 198, *Kinsman v. Unocal* (2006) 37 Cal.4th 659 and *Mckown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219.)

Who is an independent contractor?

How does one determine whether an individual is an employee or an independent contractor? Labor Code section 2750.5 sets forth a rebuttable presumption that a worker is an employee and requires proof of independent contractor status. Specifically, that section provides:

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. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

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 [See below] shall hold a valid contractor's license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5. (Italics added.)

Who is a contractor?

Chapter 9 of the Business and Professions Code contains a number of sections that detail the types of work for which a license is required. For example, a license is required for carpet installers and landscape contractors (e.g., pool, spa, fire place installation). In addition, and perhaps more pertinent to day laborer issues, Business and Professions Code section 7026.1 provides several definitions for the term "contractor" among which are the following:

(a) Any person not exempt under Section 7053 who maintains or services air-conditioning, heating, or refrigeration equipment that is a fixed part of the structure to which it is attached.

(b) Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building or home improvement project, or part thereof.

* * *

(d) Any person not otherwise exempt by this chapter, who performs tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying. The term contractor does not include a person performing the activities of a nursery person who in the normal course of routine work performs incidental pruning of trees, or



guying of planted trees and their limbs. The term contractor *does not include a gardener who in the normal course of routine work performs incidental pruning of trees measuring less than 15 feet in height after planting.*

So, putting the pieces together, what is the consequence of a worker being deemed an employee under Labor Code section 3351 but excluded from coverage under 3352(h) and not being an independent contractor pursuant to Labor Code Section 2750.5? Simply stated, the homeowner can be held accountable for civil damages under ordinary negligence and premises liability theories.

The injured worker must still prove these theories against the homeowner employer. To assess the claim, one must ask a series of questions. For example, what was the involvement of the hirer? Did the hirer work alongside the day laborer? Did the hirer contribute to the injury/accident in any way? Did the hirer provide any equipment (e.g., table saw, ladder, etc.) and was that equipment involved in the incident? Did the hirer direct the manner of the work in any fashion? There are many other questions to ask, but the foregoing provides the gist of the inquiry.

In exploring these questions, it is often the case that the hirer was only minimally involved in the work. For example,

the homeowner asks the day laborer to trim a tree and that is the end of the homeowner's involvement. That is not, however, the end of the inquiry regarding liability. One must explore whether there were "co-employees" on site. In other words, did the homeowner hire more than one day laborer and/or hire an unlicensed contractor who in turn hired day laborers? (For all of the reasons set forth above, the unlicensed contractor and the other day laborers may similarly be deemed the employees of the homeowner.) If there were co-employees, then it is necessary to run through the negligence questions in the preceding paragraph to assess whether any of the co-employees were negligent. If the answer is "yes," then that negligence can be attributed to homeowner/hirer under the doctrine of respondeat superior.

The tree trimmer

By way of conclusion, reference is made to an example. Consider an individual working for an unlicensed and uninsured tree-trimming company. In the course of that work on a residential project, he falls 17 feet from a tree, sustaining a serious injury; he was not wearing fall protection. The injured worker's supervisor was on the ground watching the work and the incident occurred after five hours of work. The homeowner who hired the

company is sued in tort for negligence. Liability is premised on the following: (1) the tree trimmer may be deemed the homeowner's employee since the contractor had no license where one was required; (2) the IW was not eligible for the homeowner's WC coverage within the homeowner's policy because the IW had not worked more than 52 hours; (3) the supervisor on the ground was deemed negligent for allowing the day laborer to work at such a height without fall protection. That negligence was attributed to the homeowner under the doctrine of respondeat superior.



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