

North America

## Co-Employment and Workplace Injuries: What Happens When A Contingent Worker Gets Hurt

Moderator: Barry Asin, President, Staffing Industry Analysts

Guest Speaker: Eric Rumbaugh, Partner, Michael Best & Friedrich



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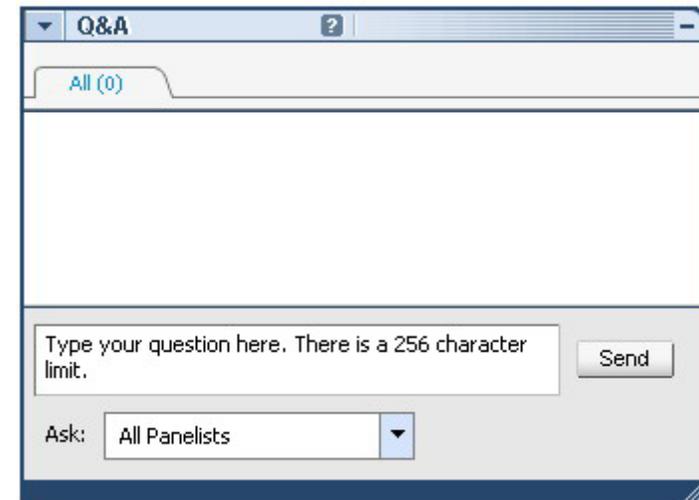
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## Our Speakers Today



**Speaker: Eric Rumbaugh, Partner,  
Labor and Employment Law Practice  
Group, Michael Best & Friedrich**



**Moderator: Barry Asin, President,  
Staffing Industry Analysts**

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## Co-employment and Workplace Injuries: What Happens When a Contingent Worker Gets Hurt?

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## Elements of Negligence Claim

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- § 281. Statement of the Elements of a Cause of Action for Negligence
  - The Actor is liable for an invasion of an interest of another, if:
    - a) The interest invaded is protected against unintentional invasion, and
    - b) The conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
    - c) The actor's conduct is a legal cause of the invasion, and
    - d) The other has not so conducted himself as to disable himself from bringing an action for such invasion.

RESTATEMENT (SECOND) OF TORTS § 281



## Exclusive Remedy

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- Employees (in most cases) cannot sue an employer for negligence after suffering a work injury. Their exclusive remedy is to file a worker's compensation claim.

- Majority position – the contingent worker is an employee of **both** the general employer (the staffing agency) and the special employer (the client company where the work is performed).
- Minority position – it is a question of fact (for the jury) whether the contingent employee is under a contract of hire with a special employer. The jury is to address whether the contingent worker consented to enter into an employment relationship with the special employer.

## Professor Larson's Test

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- To address whether the special employer is liable for worker's compensation benefits (and thus immunized from a negligence/tort suit):
  1. Did the contingent worker make a contract of hire, express or implied, with the employer?
  2. Was the work performed essentially the work of the special employer?
  3. Did the special employer have the right to control the details of the work?
- If all three elements are satisfied, both the general and special employers are liable for worker's compensation.

## Illustrations

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- Anderson v. Tuboscope Vetco, Inc. and Olsten Staffing Services
  - Plaintiff sustains a work injury and is paid worker's compensation benefits by staffing company's worker's compensation carrier.
  - He then sues the special employer, Tuboscope, claiming he was not their employee and thus able to sue them in a tort claim.
  - The court found that the exclusive remedy precluded the pursuit of a tort claim against Tuboscope.

## Black v. Labor Ready

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- Contingent worker sustains an injury, after which the staffing company pays worker's compensation benefits.
- Worker filed a petition to review compensation benefits and claimed that the special employer was her employer.
- Special employer maintained it was not the employer of the contingent worker, after which the employee withdrew the claim petition, and special employer did not pay worker's compensation benefits.

## Continued

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- Contingent worker then sued special employer for negligence, and special employer claimed employer status including exclusive remedy rule.
- Court held that special employer was bound by their earlier position that it was not the contingent worker's employer, a costly miscalculation.



## Wingfoot Enterprises v. Alvarado

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- Contingent worker sustains injury and sues staffing company, the general employer, in tort.
- Worker obtains worker's compensation benefits through staffing company's worker's compensation insurance carrier, then sues the staffing company in a negligence action.
- Staffing company prevails under exclusive remedy rule.

## State ex rel. Newman, et al. v. Ind'l Comm. of OH

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- Contingent workers sustained injuries and pursued safety violation claims against their special employer.
- Safety violation claims were not covered by worker's compensation carrier, and thus employers are responsible for payment of any safety violation awards.
- Court found in favor of employees, and awarded safety violation claims against special employer.



## Pryce V.D. Jackson & Associates, Inc. v. Universal Forest Products, Inc.

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- Contingent employee, a minor, suffers injury and claims that based upon his age he was prohibited by law from performing dangerous work, resulting in injury, also claiming strict liability against special employer.
- Court still finds in favor of special employer under exclusive remedy rule.

## Port Electric Brownsville v. Casados

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- Contingent worker was killed in an accident at work, after which his family sued the special employer in tort and was awarded \$2 million at the trial court and appellate level. The Texas Supreme Court reversed.
  - Texas law allows employers to “opt out” of worker’s compensation, but they then lose the exclusive remedy protection.
  - Here, both the general and special employers had coverage, but the special employer’s policy did not specify that it covered contingent workers.

## Continued

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- While the worker's family received worker's compensation benefits through the staffing company's worker's compensation carrier, the special employer was not named as an additional insured under the staffing company's carrier's policy.
- Worker's family claimed based upon the above that the special employer opted out of worker's compensation coverage, and thus the exclusive remedy rule should not apply.
- The Texas Supreme Court reversed, holding that special employer's purchase of worker's compensation insurance covered all worker's compensation liability.



## Indemnification

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- When a staffing agency places a contingent worker with a company, the two parties sometimes enter into an indemnification agreement in their staffing contract.
- Staffing company is sometimes required to indemnify its client company, or special employer, against claims by a contingent worker.

## Sanchez v. Harbor Construction

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- Contingent worker files a tort suit against special employer after work injury.
- Special employer successfully argues exclusive remedy rule.
- Worker then pursues worker's compensation claim against staffing agency, and agency asserts that special employer is liable for contingent worker's benefits, including those already paid by staffing company.
- Court held that special employer had to reimburse staffing company, due to a lack of an indemnification agreement.

## Dinh v. Louisiana Commerce and Trade Association Self Insurers Fund

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- Contingent worker injured and filed a worker's compensation claim against special employer's worker's compensation carrier.
- Both employers had worker's compensation insurance, and staffing agency had agreed to indemnify special employer's carrier.
- Worker then sued staffing agency's carrier for an additional claim.
- Court held that staffing agency's carrier was not liable because the policy did not cover indemnification claims.



## Continued

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- Texas Supreme Court held that the insurance policy, not the indemnity agreement, governs whether an insurer is obligated to make a claim.

## Double Recovery

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- **Safeco Ins. Co. v. Broadnax**
  - Contingent worker obtained a worker's compensation settlement from staffing agency's carrier and then pursued a second claim against the special employer's carrier.
  - Court held that employee was not entitled to double recovery.



## Pursuit of Claims Against Either Employer

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- Henderson v. Manpower of Guilford County, Inc.
  - Injured contingent worker pursued a claim against staffing company and special employer
  - Court held both employers equally liable for compensation, as both were joint employers of the contingent worker.



## When is Someone an Independent Contractor? It Depends.

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- Internal Revenue Service
- Wage and Hour Laws
- Title VII/ADA/ADEA
- Wage and Hour
- Worker's Compensation
- Unemployment Insurance
- Benefit Plans
- Immigration



## Independent Contractor or Employee? A Sampling of “Factors”

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- Who gives direction concerning where, when and how work is done?
- Who trains the worker?
- Does the worker hire, supervise and pay anyone else?
- Where is the work performed?
- Who sets the worker’s hours of work?
- Who supplies the tools and materials?
- Who pays the worker’s business and travel expenses?
- Can the worker realize a profit or loss?
- Does the worker have other clients?

## Internal Revenue Service “Tests”

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- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker’s job controlled by the payer (e.g., how worker is paid, whether expenses are reimbursed, who provides tools/supplies)?
- Type of Relationship: Are there written contracts or employee type benefits (e.g., pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

- Classification rules vary from state to state and are not necessarily consistent with federal tax rules.  
For example:
  - Under Wisconsin law, a “multi-factor” test is used for Worker’s Compensation cases (all nine criteria must be met).
  - Under California law, tests for independent contractor status are supplemented by consideration of the remedial purpose of the statute, the class of persons intended to be protected, and the relative bargaining positions of the parties.

## Occupational Safety and Health

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- Courts will look to the employer at whose business location the work is assigned first for liability when it comes to workplace-related injuries, since this is likely the employer who created the hazard and supervised the injured worker(s) exposed to the hazard.
- Generally, the party in direct control of the workplace and actions of the employees is cited for OSHA safety or health violations.
- Co-employment liability is more limited under OSHA, as staffing agencies will generally be cited only if necessary to correct a violation, or if the agency knew or should have known of the unsafe or hazardous condition.

*Loomis Cabinet Co.*, OSHRC Docket No. 88-2012, 15 O.S.H. Cas. (BNA) 1635, 1992 OSAHRC LEXIS 65



## Wisconsin Safe Place Statute

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101.11 Employer's duty to furnish safe employment and place.

(1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.



## Continued

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(2)

(a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

## Continued

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- (b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.
- (3) This section applies to community-based residential facilities as defined in s. 50.01 (1g).

# Time for Your Questions



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May 9, 2012

Take Your Program to the Next Level:  
Build a Plan for Continuous Improvement

May 24, 2012 VMS and Beyond

May 30, 2012 MSP and RPO Contracts in Europe:  
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June 6, 2012 Services Procurement

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# THANK YOU!

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