

WEST VIRGINIA AMENDS WORKERS' COMPENSATION SUBROGATION STATUTE

State Limits Subrogation Opportunities in Construction Settings And Enters World of Statutory Employer Legislation



West Virginia has for years resisted limiting subrogation in workers' compensation settings by declaring general contractors, owners, and even subcontractors to be "statutory employers" protected by the exclusivity rule and immune from third-party lawsuits filed by employees. That all changed on May 7, 2009, when the West Virginia legislature passed a series of changes and amendments to West Virginia law that redefined the responsibility of prime contractors to injured employees of their subcontractors and clarified subrogation rights with respect to employees injured by third parties in construction settings. West Virginia's legislation leaves Iowa and Louisiana as the only two remaining states which have not passed specific legislation dealing with the liability of a general contractor or owner for the workers' compensation benefits of injured employees of subcontractors and the possible immunity as a "statutory employer" such legislation might grant to these long-time third-party liability targets.

American workers' compensation carriers are preoccupied with preventing occupational injuries and deaths - and for good reason and with palpable results. The National Institute for Occupational Safety and Health (NIOSH), the Center for Disease Controls' occupational arm which monitors occupational injuries and deaths in the American workplace, reports that over the last twenty years, occupational injuries and deaths are on the decline. However, accidents do happen. For more than ninety years, American insurers have depended, relied, and calculated premiums on the expectation that if a third party other than the worker's employer is responsible for the employee's injuries, the compensation carrier will be able to subrogate the loss and shift the ultimate responsibility for paying the loss onto the party responsible for causing the loss in the first place.

Employers rely on subrogation in occupational settings in order to keep the experience modification factors and retrospective ratings, and consequently their premiums, low. Employers with retrospective rating plans or retention plans literally depend on subrogation to help reflect their true loss history. Unfortunately, our industry has not done enough to sing the praises and designed social benefits of subrogation. Courts and legislatures across our country have begun whittling away at compensation carriers' subrogation rights. Sometimes this is done in the name of "reducing needless litigation" and sometimes it results literally from an ignorance of the philosophical and legal concept underlying subrogation. Perhaps the greatest irony, however, is the fact that states appear to be limiting third-party subrogation most severely in construction settings - the area of workers' compensation in which the average level of injury compensation payments is nearly double the level for all other industries combined. West Virginia has now joined the bandwagon of states limiting subrogation opportunities in construction settings.



West Virginia § 23-2-1(d) was passed on May 7, 2009, amending the term "employer" to include any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor's own contract, provided that the subcontractor does not provide goods rather than services. In short, if a subcontractor employer fails to make workers' compensation benefit payments to its employee, the primary contractor is now responsible for making those

payments. The new statute applies only to contracts which last longer than 60 days and were entered into or extended on or after January 1, 1994. In addition, a subcontractor can become a "primary contractor" if it subcontracts any or all of its responsibilities to another sub-subcontractor. The new statute reads as follows:

§ 23-2-1(d). Prime Contractors and Subcontractors Liability.

(a) For the exclusive purposes of this section, the term "employer" as defined in section 1 of this article includes any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor's own contract: Provided, that a subcontractor does not include one providing goods rather than services. For purposes of this subsection, extraction of natural resources is a provision of services. In the event that a subcontracting employer defaults on its obligations to make payments to the commission, then the primary contractor is liable for the payments. However, nothing contained in this section shall extend or except to a primary contractor or subcontractors the provisions of sections 6, 6(a) or 8 of this article. This section is applicable only with regard to subcontractors with whom the primary contractor has a contract for any work or services for a period longer than 60 days: Provided, however, that this section is also applicable to contracts for consecutive periods of work that total more than 60 days. It is not applicable to the primary contractor with regard to sub-subcontractors. However, a subcontractor for the purposes of a contract with the primary contractor can itself become a primary contractor with regard to other employers with whom it subcontracts. It is the intent of the Legislature that no contractor, whether a primary contractor, subcontractor or sub-subcontractor, escape or avoid liability for any workers' compensation premium, assessment or tax. The executive director shall propose for promulgation a rule to effect this purpose on or before December 31, 2003.

(b) A primary contractor may avoid initial liability under subsection (a) of this section if it obtains from the executive director, prior to the initial performance of any work by the subcontractor's employees, a certificate that the subcontractor is in good standing with the Workers' Compensation Fund.

(1) Failure to obtain the certificate of good standing prior to the initial performance of any work by the subcontractor results in the primary contractor being equally liable with the subcontractor for all delinquent and defaulted premium taxes, premium deposits, interest and other penalties arising during the life of the contract or due to work performed in furtherance of the contract: Provided, that the commission is entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor or on the subcontractor, or both.

(2) In order to continue avoiding liability under this section, the primary contractor shall request that the commission inform the primary contractor of any subsequent default by the subcontractor. In the event that the subcontractor does default, the commission shall notify the primary

contractor of the default by placing a notice in the certified United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the commission by the primary contractor. The mailing is good and sufficient notice to the primary contractor of the subcontractor's default. However, the primary contractor is not liable under this section until the first day of the calendar quarter following the calendar quarter in which notice is given and the liability is only for that following calendar quarter and thereafter and only if the subcontract has not been terminated: Provided, that the commission is entitled to collect only once for the premium amounts, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor or on the subcontractor, or both.

(c) In any situation where a subcontractor defaults with regard to its payment obligations under this chapter or fails to provide a certificate of good standing as provided in this section, the default or failure is good and sufficient cause for a primary contractor to hold the subcontractor responsible and to seek reimbursement or indemnification for any amounts paid on behalf of the subcontractor to avoid or cure a workers' compensation default, plus related costs, including reasonable attorneys' fees, and to terminate its subcontract with the subcontractor notwithstanding any provision to the contrary in the contract.

(d) The provisions of this section are applicable only to those contracts entered into or extended on or after January 1, 1994.

(e) The commission may take any action authorized by section 5(a) of this article in furtherance of its efforts to collect amounts due from the primary contractor under this section.

(f) Effective upon termination of the commission, subsections (a) through (e), inclusive, of this section shall be applicable only to unpaid premiums due the commission or the Old Fund as provided in article 2(c) of this chapter.

(g) The Legislature finds that every prime contractor should be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers' compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the prime contractor rather than the Uninsured Employer Fund should be responsible for the payment of statutory benefits. It is also the intent of the Legislature that this section not be used as the basis for expanding the liability of a prime contractor beyond the limited purpose of providing coverage in the limited circumstances and in the manner expressly addressed by this section: Provided, That receipt by the prime contractor of a certificate of coverage from a subcontractor shall be deemed to relieve the prime contractor of responsibility regarding the subcontractor's workers' compensation coverage.



(h) On after the effective date of the reenactment of this section in 2009, if an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers' compensation coverage or was not an approved self-insured employer, and the prime contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the prime contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the prime contractor: Provided, that a subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, is the prime contractor for the purposes of this section: Provided, however, that the provisions of this subsection do not relieve a subcontractor from any requirements of this chapter, including the duty to maintain coverage on its employees. The subcontractor shall provide proof of continuing coverage to the prime contractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the prime contractor and the subcontractor. The subcontractor shall provide notice to the prime contractor within two business days of cancellation or expiration of coverage.

(i) Notwithstanding that an injured employee of a subcontractor is eligible for workers' compensation benefits pursuant to this section from the prime contractor's carrier or the self-insured prime contractor, whichever is applicable, a subcontractor who has failed to maintain workers' compensation coverage on its employees:

(1) May not claim the exemption from liability provided by sections 6 and 6(a) of this article;

(2) May be held liable to an injured employee pursuant to the provisions of section 8 of this article; and

(3) Is the designated employer for the purposes of any "deliberate intention" action brought by the injured worker pursuant to the provisions of section 2, article 4 of this chapter.

(j) If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the Uninsured Employer Fund, both the prime contractor and subcontractor are jointly and severally liable for any payments made by the Fund, and the Insurance Commissioner may seek recovery of the payments, plus administrative costs and attorneys' fees, from the prime contractor, the subcontractor, or both: Provided, that a prime contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys' fee and costs: Provided, however, that if a prime contractor has performed due diligence in all matters requiring an verifying a subcontractor's maintenance of insurance coverage, than the prime contractor is not liable for any claim made hereunder against the subcontractor.



This is a clear departure from previous West Virginia law which did not provide that a prime contractor could be considered a statutory employer. While there is no case law to guide us at this time, it certainly appears that prime contractors, as well as any subcontractors who fit the new

definition of “employer” under § 23-2-1(d), are “employers” protected by the exclusive remedy rule under § 23-3-6. It is unclear whether such “statutory employers” will have the benefit of such immunity by virtue of being contingently liable for compensation benefits or only if and when they are actually called on to make benefit payments in lieu of the true employer.

Subrogating professionals should be familiar with the various states’ laws as they relate to subrogating in construction settings. Knowing when you can and when you can’t subrogate can mean the difference between recovering millions of dollars and recovering nothing at all. If you should have any questions regarding this article or subrogating in construction settings, please contact Gary Wickert at gwickert@mwl-law.com.

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