MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670
(800) 637-9176 (262) 673-7850 Fax (262) 673-3766
http://www.mwl-law.com

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER DECEMBER 2006

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

WORKERS' COMPENSATION SUBROGATION

SOMETHING OLD, SOMETHING NEW; SOMEONE BORROWED, SOMEONE TO SUE

Workers' Compensation Subrogation and Employee Leasing Companies

By Gary L. Wickert

It is not unusual for an employee to be subject to the direction and control of an entity other than his employer during the work day. This is especially common in construction situations. In such cases, many states employ the borrowed servant doctrine which states that an employee can become a "borrowed servant" of an entity other than his employer, for a limited period of time, while that employee is subject to the "special employer's" right to control the details of the employee's work. Just as each state has its own criteria for determining whether an employee is subject to the right of another to control the details of his work, some states provide that a borrowed servant becomes the employee of the "special employer", which allows him to then sue his previous employer (general employer) as a "third party." Still other states employ something known as the "dual employment doctrine," which states that the employee can be employed by two employers at the same time, both of which are protected by the workers' compensation bar.

Most claims handlers are familiar with the borrowed servant doctrine because of its application to the everyday adjusting and handling of workers' compensation claims. In determining whether or not a carrier is responsible for workers' compensation benefits, the claims handler must look at whose employee the injured claimant was at the time of the injury. However, the borrowed servant doctrine can also be used as a *defense* to third party lawsuits. Where the injured worker and the carrier sue a third party based on negligence, they will not be able to recover anything where the third party shows that the claimant was, in fact, their borrowed servant. Carr v. Carroll Co., 646 S.W.2d 561 (Tex. Civ. App. - Dallas 1992), *writ ref'd n.r.e.* In essence, they can then take advantage of the workers' compensation bar.

Where an employee of one employer (general employer) is placed under the control of another company (special employer) for performing certain services, the employee may become the special employer's "borrowed servant." The central inquiry is whether the special employer had the right to control both the details of the employee's work and the manner in which the employee performed this work. When there is no written agreement between the employers regarding the right of control, it is determined from the facts surrounding the employee's work at the time of his injury. These facts include:

(1) the nature of the project;
(2) the nature of the work to be performed by the machinery and the employees furnished;
(3) the length of special employment;
(4) the type of machinery furnished;
(5) the acts representing an exercise of actual control;
(6) the right to substitute another employee; and
(7) whether the employee is doing something within the normal scope of the general or special employer's business.

Neither the right to direct the end result to be accomplished, nor the mere fact that the employee was carried on the payroll of one party and not the other is sufficient alone to make the employee a borrowed servant. Likewise, the right of the general employer to fire or reassign the employee does not preclude a finding that the employee was the borrowed servant of the special employer, if it also had the right to fire the employee. The employee of an employer in the business of supplying temporary workers to other companies will almost always (with a few exceptions) be the borrowed servant of the other company.

To make matters more complicated, the advent of employee leasing companies, temporary employment agencies, and staff leasing services, have complicated the borrowed servant issue. Special legislation has been enacted in many states that declares both the leasing company and the leasing company's customer to be joint employers of the employee, under certain circumstances. And if things weren't complicated enough for the subrogation professional, virtually every state has enacted special legislation in construction settings involving contractors and subcontractor, requiring general contractors to pick up the provision of workers' compensation coverage where subcontractors fail to do so – thereby making "statutory employers" of the general contractors or other parties in the contractual food chain. While the subject of "statutory employers" and its application in all 50 states was discussed at length in the article *Workers' Compensation Subrogation In Construction Settings* (see "Published Articles" at www.mwl-law.com), this article focuses on the challenges workers' compensation subrogation professionals face when dealing with traditional borrowed servant/loaned employee issues involving employee leasing companies and professional temporary employment agencies, in all 50 states.

One of the golden maxims of workers' compensation subrogation is the exclusive remedy protection an employer is "gifted" by virtue of having to absorb limitless liability for injuries and disabilities, which, through no fault of its own, befall its employees in the course of a work day. Assume that an employee is working for Company A (general employer) and is "borrowed" by Company B (special employer) for a specific and limited task, during which Company B has the right to control the details of the employee's work. If the employee is injured while under the direction and control of Company B, Company B will be able to avail itself of the exclusive remedy protection, and cannot be sued as a third party by the employee. But does Company A then become "fair game"? Or, what about a situation where Company A is a professional employee leasing company or a temporary employment agency? Under the same scenario above, under what circumstances can the employee sue Company A – its general employer or both? Some states focus on whether the cost of workers' compensation insurance is picked up by the special employer in the hourly rate or fee they pay to the employee leasing company (general employer). Other states apply traditional borrowed servant criteria and factors to determine whether an entity has the right to exercise or has actually exercised enough control over the details of the employee's work in order to qualify as an employer for exclusive remedy purposes.

The last twenty years have witnessed the advent of staff leasing services and temporary employment agencies. When the company which borrows or leases employees is covered by a worker's compensation insurance policy and one of its borrowed or loaned employees are injured while on the job at the business location of the client, there are complex and confusing subrogation issues that raise their ugly heads involving the borrowed servant doctrine. In most staff leasing and temporary employment services' situations there is a contract between the employer and the client which frequently references who is to be considered the employer. Generally, a contract between employers is conclusive as to who is the employer, unless the contract is shown to be a sham. Marshall v. Toys-R-Us Nytex, Inc., 828 S.W.2d 193 (Tex. Civ. App. - Houston 1992), *writ denied*. In such situations, it is the borrowed servant principle which generally applies to determine which carrier is responsible for workers' compensation benefits, and which will be given the benefit of the workers' compensation bar.

Some states, such as Texas, have actually enacted specific statutes to deal with this. Texas enacted the Texas Staff Leasing Services Act, which addresses the use of leased employees and their employers in Texas. Texas Labor Code § 91.001, *et seq*. This Act codified the dual employment theory in Texas and held that for staff leasing situations, both the leasing company and the customer may be deemed employers, worthy of the workers' compensation bar. Texas also enacted the Temporary Common Worker Employer's Act in 1991, covering temporary employment services who loan employees for short periods of time or even for a single day or task. Texas Labor Code § 92.001, *et seq*. (1991). The Temporary Common Worker Employer's Act, unlike the Staff Leasing Services Act, does not specifically provide for dual employment in temporary employee leasing situations. Richard v. L.D. Brinkman & Co., 36 S.W.3d 903 (Tex. Civ. App. - Dallas 2001). Therefore, the law of each state should be looked at carefully to determine how borrowed servant scenarios are to be handled and what effect they will have on the right of the defendant to claim the benefit of the workers' compensation bar. In some states, subrogation against the client of a staff leasing service is all but neutered, while in other states, such efforts still can be successful. Equitable subrogation/equitable contribution actions between workers' compensation carriers for the leasing company and the customer are still possible, depending on the state involved.

Each state varies with its application of the exclusive remedy rule to situations involving employee leasing companies and temporary employees. Some states set forth the respective rights of a worker and/or potential third party tortfeasor in the workers' compensation subrogation statute or other statutes, while other cases make declarations in established case law. Thirty-three states have statutes or regulations which address employee leasing and its effect on which entity is the actual employer, while 17 states and the District of Columbia make such determinations via court decisions. Below is an exposition of the laws in all 50 states.

Alabama: An employee of a temporary services agency was also held to be an employee of the client company to which she was assigned to work for purposes of workers' compensation, where the client company supervised her work and paid a fee to the temporary services agency which included an amount to obtain workers' compensation insurance for the worker. Marlow v. Mid South Tool Co., Inc., 535 So.2d 120 (Ala. 1988).

Alaska: There is very little precedence and no statutory guidance given to us in Alaska. However, one case leads us to believe that both the general and special employers will both be afforded protection under the exclusive remedy rule. Ruble v. Arctic General, Inc., 598 P.2d 95 (Alaska 1979).

Arizona: Arizona's statute dictates that a professional leasing organization is given protection under the exclusive remedy rule as a co-employer of the worker. A.R.S. § 23-901.08. However, in order to be given immunity under the exclusive remedy rule, the parties must be in compliance with various regulations and rules regarding employee leasing.

Arkansas: In Arkansas, a specific statute governs "Professional Employer Organizations". It provides that both the employer organization and its client are considered to be co-employers, and both may avail themselves of the immunity provided under the exclusive remedy rule. A.C.A. § 23-92-409.

California: In California, both the employee leasing firm and its client are considered to have made workers' compensation insurance premium payments, and both are immune from a third party suit, provided an employee leasing agreement has been executed and insurance coverage for the worker remained in effect throughout the length of his employment. Ann. Cal. Labor Code § 3602(d).

Colorado: By statute, Colorado allows the leasing company to be considered a "co-employer" of a work site employer's employee, provided the leasing company actually instructs the employees to the work site, it sets and actually pays the employee's compensation, and retains the right to control the details of the employee's work. C.R.S. § 8-70-114(2).

Connecticut: The Connecticut statute provides that the employer who originates a contract where an employee is loaned to another employer is ultimately responsible to the worker for all benefits. C.G.S.A. § 31-292. Section 31-284 provides:

> *". . . all rights and claims between an employer who complies with the requirements of Subsection (b) of this section and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights in claims given by this chapter . . ."* C.G.S.A. § 31-284.

Delaware: While there are no statutes or cases which directly determine the respective subrogation rights against an employee leasing company or its client, most likely, both are going to be afforded protection under the exclusive remedy rule. Porter v. Pathfinder Services, Inc., 683 A.2d 40 (Del. 1996).

District of Columbia: The special employer is entitled to protection under the exclusive remedy provisions of the Workers' Compensation Act, just as is the actual employer. Thomas v. Hycon, Inc., 244 F. Supp. 151 (D.C. 1965).

Florida: Any employer who utilizes the services of an employee leasing service is entitled to immunity under the exclusive remedy rule. F.S.A. § 440.11(2). However, such immunity will only extend to an employer and to each employee of the employer which utilizes the services of the employees of a help supply services company as set forth in Standard Industry Code Industry Number 7363.

Georgia: Employers are immune from suit under the exclusive remedy rule when utilizing employee leasing companies or temporary help agencies, provided that workers' compensation benefits are provided to a worker by either the leasing employer or the employee leasing company. O.C.G.A. § 34-9-11(c).

Hawaii: Hawaii statutes do not address the issue. Although there are no cases directly interpreting employee leasing situations, the Hawaii Supreme Court has held that a temporary employer utilizing an employee from a temporary agency was entitled to the exclusive remedy protection because it had paid a fee to the temporary agency, which the court construed to include the cost of workers' compensation insurance premiums. Frank v. Hawaii Planing Mill Foundry, 963 P.2d 349 (Haw. 1998).

Idaho: Similar to Georgia, if either the employee leasing company or its client provides workers' compensation coverage to the employee in question, then both entities will be protected under the exclusive remedy rule. Idaho Code § 72-103.

Illinois: An Illinois statute provides that, unless the employee leasing contract specifies otherwise, both the employee leasing company and the client employer will be protected by the exclusive remedy rule. 215 I.L.C.S. 113/45.

Indiana: Indiana's statute dictates that the employee leasing company is considered the employer of any employees leased to the client company. I.C. § 27-16-9-1. The employee leasing company is known in Indiana as a Professional Employer Organization (PEO). A professional employer agreement must specify

the allocation of the responsibility of obtaining workers' compensation coverage to either the client or the PEO. I.C. § 27-16-7-2. If this duty is met, a client and a PEO are both considered the employer of a covered employee for purposes of the exclusive remedy rule. I.C. § 27-16-9-2.

Iowa: Unless there is a contract of hire between the temporary employee company and the client company, the client company will not be considered an employer and is subject to a third party action brought by the worker. However, when a contract of hire exists, then the client company is considered to be the worker's employer and is immune under the exclusive remedy rule. Fletcher v. Apache Hose & Belting Co., Inc., 519 N.W.2d 839 (Iowa App. 1994); Parsons v. Procter & Gamble Mfg. Co., 514 N.W.2d 891 (Iowa 1994); Swanson v. White Consolidated Industries, Inc., 77 F.3d 223 (8th Cir. 1996).

Kansas: Neither statute nor case law has decided whether or not an employee leasing company and client company are considered to be an employer for purposes of the exclusive remedy rule. However, if an employee becomes a borrowed servant, the special employer is immune to any third party action. Hollingsworth v. Fehrs Equipment Co., 729 P.2d 1214 (Kan. 1986).

Kentucky: Under Kentucky law, the employee leasing company is considered to be the statutory employer of any leased employee. K.R.S. § 342.615.

Louisiana: Both the employee leasing company and its client company are considered employers and both are protected by the exclusive remedy rule. La. R.S. § 22:1210.56(C).

Maine: Maine has a special statute dealing with employee leasing companies, located in Title 32, Chapter 125: Employee Leasing Companies. Provided either the employee leasing company or the client company secures workers' compensation coverage, both entities are considered employers and immune from third party suits under the exclusive remedy rule. Me. Rev. Stat. Ann. Tit. 32 § 14055(1).

Maryland: Maryland case law holds that where there is an implied contract of hire between an employee provided by a temporary employment agency and the client company, the client company is considered the employee's special employer and is afforded protection under the exclusive remedy rule. Travelers Indemnity Co. v. Insurance Co. of North America, 519 A.2d 760 (Md. App. 1987). The employee would be considered jointly employed by the temporary employment company and the client company.

Massachusetts: It appears that Massachusetts allows an employee to sue a client company. Margolis v. Charles Precourt & Sons, Inc., No. 97-4029 (May 6, 1999) (*unpublished*); Home Ins. Co. v. Liberty Mutual Fire Ins. Co., 830 N.E.2d 186 (Mass. 2005).

Michigan: Both the employee leasing company and its client company are considered to be employers and immune from third party actions under the exclusive remedy rule. Renfroe v. Higgins Rack Coating & Mfg. Co., 169 N.W.2d 326 (Mich. App. 1969).

Minnesota: Minnesota deals with employee leasing situations in its Workers' Compensation Statute. It provides that when an employee leasing company and a client company are engaged in a common enterprise, the injured worker may proceed only against either the employer for benefits or the responsible third party for damages. M.S.A. § 176.061.

Mississippi: Both the temporary employment agency and the client company are considered employers and immune from third party actions under the exclusive remedy rule. Northern Electric Co. v. Phillips, 660 So.2d 1278 (Miss. 1995).

Missouri: When work is performed under a contract involving leasing or borrowing of an employee, if the injury occurred on or about the premises of the alleged statutory employer, and the alleged statutory employee was doing work which was in the usual course of business of the alleged statutory employer,

then the worker is a statutory employee of the special employer and cannot be sued because of the exclusive remedy rule. Wilson v. Altruk Freight Systems, Inc., 820 S.W.2d 717 (Mo. App. 1991). Employee leasing companies are not specifically dealt with in the Workers' Compensation Act or in case law.

Montana: An employee leasing company and its client company are both considered employers and immune from third party actions under the exclusive remedy provision of the Workers' Compensation Act. MT. St. § 39-8-207.

Nebraska: An employee leasing company and its client company are considered to be employers for purposes of the exclusive remedy rule, and both are immune from third party actions. Scwartz v. Riekes & Sons, 240 N.W.2d 581 (Neb. 1976).

Nevada: Provided there is a written agreement between the employee leasing company and the client company, as well as meeting several other conditions set forth in the Nevada statutes, an employee leasing company in compliance with the leasing provisions set forth in the Act is considered to be the employer for purposes of the Act. N.R.S. § 616B.691.

New Hampshire: An employee leasing company must be certified by the insurance commissioner to meet certain criteria. If it does, it is considered to be the employer of the leased employee under the Employee Leasing Company Act. Both the employee leasing company and the client company are entitled to protection of the exclusive remedy rule. N.H. Rev. Stat. Ann. § 277-B:9 and 10.

New Jersey: An employee leasing company must register with the State under the State's statutes. If it does, both the employee leasing company and the client company are considered to be employers and immune from third party actions under the exclusive remedy rule. N.J.S.A. § 34:8-72.

New Mexico: If certain conditions are met, the employee leasing company and the client company are both considered to be employers and immune from third party actions under the exclusive remedy rule. N.M.S.A. § 60-13A-5 (1978).

New York: Neither the Workers' Compensation Act nor case law in New York address employee leasing. However, the issue is addressed by Rule 11G of the New York Workers' Compensation and Employers Liability Manual. New York refers to the employee leasing company as the "labor contractor", and refers to the client company as the "client". Although it does not apply to temporary workers, Rule 11G provides that both parties must provide workers' compensation coverage for the leased employee but does not specifically extend the exclusive remedy rule to the client.

North Carolina: Neither the North Carolina Workers' Compensation Act nor case law directly address the exclusive remedy rule as applied to employee leasing situations. However, a court has held that a temporary employee could not pursue a third party action against the employer to whom the worker was assigned. Brown v. Friday Services, Inc., 460 S.E.2d 356 (N.C. App. 1995).

North Dakota: Both the employee leasing company and the client company are considered employers and immune from third party actions when the two entities have secured the payment of compensation in accordance with North Dakota law. N.D.C.C. § 65-01-08.

Ohio: Neither the Ohio Workers' Compensation Act nor case law address the issue. However, employee leasing and temporary employee situations are dealt with in the Bureau of Workers' Compensation Rules. Ohio Adm. Code 4123-17-15. Workers provided by an employee leasing company are considered to be employees of the employee leasing company. An employee leasing company is referred to as a "Professional Employer Organization" or "PEO" in Ohio. There does not appear to be any cases clearly delineating whether or not the client company is entitled to the exclusive remedy protection.

Oklahoma: Neither the Oklahoma Workers' Compensation Statute nor case law deal directly with the exclusive remedy rule in connection with employee leasing situations. The Oklahoma Court of Appeals, however, has held that a worker assigned by a temporary agency to a client company is considered a loan servant, and that both employers are responsible for the provision of workers' compensation, and therefore cannot be sued in a third party action. Zant v. People Electric Cooperative, 900 P.2d 1008 (Okla. App. 1995).

Oregon: Both the employee leasing company and the client company are immune from third party actions under the exclusive remedy rule, provided they comply with all of the provisions required under the Act. O.R.S. § 656.020 and O.R.S. § 656.850.

Pennsylvania: Neither the Pennsylvania Workers' Compensation Statute nor Pennsylvania case law shed any light on the issue of whether or not an employee leasing company and the client company are entitled to protection under the exclusive remedy rule in Pennsylvania. The determination of who is the employer in leasing situations is addressed via common law factors involving which entity controls and directs the details of the work being performed by the employee. American Rock Mechanics, Inc. v. W.C.A.B. (Bik & Lehigh Concrete Technologies), 881 A.2d 54 (Pa. Commw. Ct. 2005).

Rhode Island: Rhode Island case law has held that an employee leasing company remains the employer of the leased employee as long as the employer remains on the general employer's payroll, but both the employee leasing company and the client company are considered employers for purposes of the exclusive remedy rule. Sorenson v. Colibri Corp., 650 A.2d 125 (R.I. 1994).

South Carolina: Employee leasing companies and staff leasing services are governed by Section 40-68-70 of the South Carolina Statutes. In order to be a statutory employee under the Workers' Compensation Act, a worker must be engaged in an activity that "is a part of the client company's trade, business, or occupation". S.C. St. § 42-1-400. This statutory requirement has been construed to include activities that: (1) are an important part of the trade or business of the employer; (2) are a necessary, essential, and integral part of the business of the employer; or (3) have previously been performed by employees of the employer. Glass v. Dow Chemical Co., 482 S.E.2d 49 (S.C. 1997). Only one of these tests must be met in order for a subcontractor's employee to be considered a statutory employee of the owner and immune from third party actions as a result of the exclusive remedy rule. Woodard v. Westvaco Corp., 433 S.E.2d 890 (S.C. App. 1993), *vacated on other grounds*, 460 S.E.2d 392 (1995).

South Dakota: Neither the South Dakota Workers' Compensation Act nor South Dakota case law shed any light on the issue involving the exclusive remedy rule and employee leasing companies. This issue, most likely, will be determined by applying common law factors to determine who is the employer, and who is the third party subject to suit.

Tennessee: Tennessee has a specific statute dealing with employee leasing. Both the employee leasing company and the client company are entitled to the exclusive remedy protection based on a worker's compensation policy secured by either entity. T.C.A. § 62-43-113.

Texas: Texas enacted the Texas Staff Leasing Services Act, which addressed the use of leased employees and their employers in Texas. Texas Labor Code § 91.001, *et seq*. In particular, Section 91.042 reads as follows:

> *(a) A license holder (person licensed to provide staff leasing services) may elect to obtain workers' compensation insurance coverage for the license holder's assigned employees through an insurance company as defined under § 401.011(28) or through self insurance as provided under Chapter 407.*

(b) If a license holder maintains workers' compensation insurance, the license holder shall pay workers' compensation insurance premiums based on the experience rating of the client company for the first two years the client company has a contract with the license holder and as further provided by the Texas Department of Insurance.

(c) For workers' compensation insurance purposes, a license holder and the license holder's client company shall be co-employers. If a license holder elects to obtain workers' compensation insurance, the client company and the license holder are subject to § 406.034 and § 408.001 (the workers' compensation statute provisions protecting employers from liability for tortuous acts).

(d) If a license holder does not elect to obtain workers' compensation insurance, both the license holder and the client company are subject to §§ 406.004 and 406.033.

(e) After the expiration of the two-year period under Subsection (b), if the client company obtains a new workers' compensation insurance policy in the company's own name or adds the company's former assigned workers to an existing policy, the premium for the workers' compensation insurance policy of the company shall be based on the lower of:

> (*1) the experience modifier of the company before entering into the staff leasing arrangement; or*
> *(2) the experience modifier of the license holder at the time the staff leasing arrangement terminated.*

(f) On request, the Texas Department of Insurance shall provide the necessary computations to the prospective workers' compensation insurer of the client company to comply with Subsection (e). Texas Labor Code § 91.042 (1995).

Therefore, the Texas Staff Leasing Services Act codified the dual employment theory in Texas and held that in staff leasing situations, both the leasing company and the customer are considered employers. Most, if not all, efforts by the general employee's workers' compensation carrier to equitably subrogate or seek equitable contribution against the workers' compensation carrier for the special employer ceased with this statute. Due to the theory of contribution being equitable in nature, the court considered the fact that it was contemplated by the parties that the leased staff would have their workers' compensation premiums paid for by the general employer (the staff leasing company). The Staff Leasing Services Act, however, does not cover providers of temporary workers. The term "staff leasing services" within the Act does not include temporary help or a temporary common worker employer. The Staff Leasing Services Act applies to arrangements in which the employee's assignment is intended to be long-term or continuing in nature, rather than temporary or seasonal in nature, and where a majority of the workforce at a client company work site is a specialized group within that workforce consisting of assigned employees of the license holder. Wingfoot Enter. v. Alvarado, 111 S.W.3d 134 (Tex. 2003).

Utah: The employee leasing company and the client company in an employee leasing situation are both entitled to protection under the exclusive remedy provisions of the Utah Workers' Compensation Act, provided the employee leasing arrangement meets the requirements of the Employee Leasing Company Licensing Act. U.C.A. § 34A-2-102(3)(a) and U.C.A. § 34A-103(7)(e).

Vermont: Both the leasing company and the client company are immune from third party actions based on the exclusive remedy rule. Vt. Stat. Ann. Tit. 21, § 12-1037.

Virginia: Both the employee leasing company and the client company are afforded protection by the exclusive remedy provisions of the Virginia Workers' Compensation Act. Va. St. § 65.2-803.1.6.

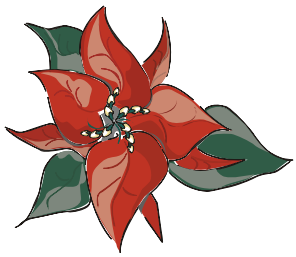
Washington: Neither the Washington Workers' Compensation Act nor case law directly give us guidance on employee leasing situations, and such questions will be answered by common law under Washington case decisions.

West Virginia: Neither the West Virginia Workers' Compensation Act nor case law give us direct answers to employee leasing situations. However, the 4th Circuit has indicated that a worker assigned by a temporary agency is a loan servant and therefore was not entitled to bring a third party action against the client company, who was considered to be a special employer. Maynard v. Keynard Chemical Co., 626 F.2d 359 (4th Cir. 1980).

Wisconsin: Section 102.29 provides that no employee of a temporary help agency who makes a claim for compensation may make a claim or maintain an action in tort against any employer who compensates the temporary agency for the employee's services. Wis. Stat. § 102.29(6). Furthermore, no employee who is loaned by his or her employer to another employer and who makes a claim for workers' compensation may make a claim or maintain an action in tort against the employer who accepted the loaned employee's services. Wis. Stat. § 102.29(7).

Wyoming: The Wyoming Workers' Compensation Act defines a temporary service contractor as an entity that employs individuals directly for the purpose of furnishing services of the employed individuals on a temporary basis to others. Wy. St. § 27-14-102(a). The Act also designates that the employer is considered to be the entity utilizing the services of a worker furnished by another, except in the instance of a temporary service contractor. Wy. St. § 27-14-102(a). The entity considered the employer is immune from third party actions by virtue of the exclusive remedy provisions of the Act.

It is important for subrogation professionals to familiarize themselves with the lay of the land when evaluating subrogation potential in employee leasing situations, regardless of which state you are subrogating in. Knowing who can be sued and when is extremely critical in evaluating your recovery chances and performing the necessary due diligence and investigation necessary to preserve your rights to bring a third party action and recoup your claim payments. For additional questions involving employee leasing or temporary employment scenarios, please contact Gary Wickert at gwickert@mwl-law.com.



The best part of the holiday season is remembering those who make the holidays meaningful. Matthiesen, Wickert & Lehrer, S.C. would like to wish you and your families all the happiness and prosperity this season can bring. May it follow you throughout the coming year!
