

EMPLOYEE LEASING SUBROGATION LAWS IN ALL 50 STATES

It is not unusual for an employee to be subject to the direction and control of an entity other than his employer during the workday. 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 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”. 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 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 1982), *writ ref’d n.r.e.* 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 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 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.

The right to direct the result to be accomplished or the mere fact that the employee was carried on the payroll of one party and not the other is not alone sufficient to make the employee a borrowed servant. Likewise, the right of the general employer to fire or reassign the employee will 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 declare both the leasing company and leasing company's client joint employers of the employee, under certain circumstances. If things weren't complicated enough for the subrogation professional, virtually every state has enacted special legislation in construction settings involving contractors and subcontractors, 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.

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 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 who 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 service situations there is a contract between the employer and the client company which frequently references who is considered the employer. Generally, a contract between employers is conclusive as to who the employer is, 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 carrier will be given the benefit of the workers' compensation bar.

Some states, such as Texas, have enacted specific statutes to deal with this issue. Texas enacted the Texas Staff Leasing Services Act, which addresses the use of leased employees and their employers in Texas. Tex. Lab. Code § 91.001, *et seq.* This Act codified the dual employment theory in Texas and held that in staff leasing situations, both the leasing company the client company 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 that loan employees for a short period of time or even for a single day or task. Tex. Lab. 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 examined carefully to determine how borrowed servant scenarios are handled and what effect they have on the right of 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 can be successful. Equitable subrogation/equitable contribution actions between workers' compensation carriers for the leasing company and client company 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 states 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 for 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 be afforded protection under the Exclusive Remedy Rule. *Ruble v. Arctic Gen., 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 (PEO). It provides that both the employer organization and its client are considered 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 instructs the employees at 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 who 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, if 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's 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 Foundation*, 963 P.2d 349 (Haw. 1998).

Idaho: Like Georgia, if either the employee leasing company or its client provides workers' compensation coverage to the employee, both entities are protected under the Exclusive Remedy Rule. Idaho Code § 72-103.

Illinois: Illinois' statute provides that unless the employee leasing contract specifies otherwise, both the employee leasing company and the client employer are 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 employee 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, the client company is considered 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 Indus., Inc.*, 77 F.3d 223 (8th Cir. 1996).

Kansas: Neither statute nor case law has decided whether an employee leasing company and the client company are considered employers for purposes of the Exclusive Remedy Rule. However, if an employee becomes a borrowed servant, the special employer is immune to any third-party actions. *Hollingsworth v. Fehrs Equip. Co.*, 729 P.2d 1214 (Kan. 1986).

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

Louisiana: The employee leasing company and its client company are both considered employers and 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 that 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 services 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 Indem. Co. v. Ins. Co. of North Am.*, 519 A.2d 760 (Md. App. 1987). The employee is considered jointly employed by the temporary services agency 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 Mut. Fire Ins. Co.*, 830 N.E.2d 186 (Mass. 2005).

Michigan: The employee leasing company and its client company are both considered 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 against either the employer for benefits or the responsible third party for damages. M.S.A. § 176.061.

Mississippi: The temporary employment agency and the client company are both 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, and an injury occurs on or about the premises of the alleged statutory employer and the alleged statutory employee was doing work in the usual course of business of the alleged statutory employer, the worker is considered a statutory employee of the special employer and cannot be sued under the Exclusive Remedy Rule. *Wilson v. Altruk Freight Sys., 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. Mont. St. § 39-8-207.

Nebraska: An employee leasing company and its client company are both considered employers for purposes of the Exclusive Remedy Rule and are immune from third-party actions. *Schwartz 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's statute, an employee leasing company in compliance with the leasing provisions set forth in the Act is considered 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's considered the employer of the leased employee under the Employee Leasing Company Act. The employee leasing company and client company are both entitled to protection under 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, the employee leasing company and the client company are both considered 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 New York Workers' Compensation Act or case law directly addresses 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 company.

North Carolina: Neither North Carolina Workers' Compensation Act nor case law directly addresses 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 directly addresses 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 employees of the employee leasing company. An employee leasing company is referred to as a Professional Employer Organization (PEO) in Ohio. There does not appear to be any cases clearly delineating whether the client company is entitled to protection under the Exclusive Remedy Rule.

Oklahoma: Neither the Oklahoma Workers' Compensation Act nor case law directly addresses 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 Co-Op.*, 900 P.2d 1008 (Okla. App. 1995).

Oregon: The employee leasing company and the client company are both 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 sheds any light on the issue of whether 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 a leased employee as long as the employer remains on the general employer's payroll, but the employee leasing company and the client company are both 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 § 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 employer's trade or business of the employer; (2) are a necessary, essential, and integral part of the employer's business; or (3) have previously been performed by employer's employees. *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 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 the employer is, and who is the third-party subject to suit.

Tennessee: Tennessee has a specific statute dealing with professional employer organizations, also known as a "PEO," "staff leasing company", "registered staff leasing company", "employee leasing company", or "administrative employer." T.C.A. §§ 62-43-102 to 114. It is known as the "Tennessee Professional Employer Organization Act." This Act went into effect on May 21, 2012. Rules promulgated pursuant to the former "Tennessee Employee Leasing Act" that were in effect prior to May 21, 2012, remain in effect unless such rules are in conflict with the new Act. T.C.A. § 62-43-114.

The PEO and the client company are both entitled to the exclusive remedy protection based on the workers' compensation policy secured by either party. T.C.A. § 62-43-113. Section 62-43-108 is part of the Tennessee Professional Employer Organizational Act and provides as follows:

(3) A client shall not be liable for the acts, errors, or omissions of a professional employer organization, or of any covered employee of the client and a professional employer organization when such covered employee is acting under the express direction and control of the professional employer organization;

(4) A professional employer organization shall not be liable for the acts, errors, or omissions of a client or of any covered employee of the client when such covered employee is acting under the express direction and control of the client.

Texas: Texas enacted the Texas Staff Leasing Services Act, which addressed the use of leased employees and their employers in Texas. Tex. Lab. Code § 91.001, *et seq.* In particular, § 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 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 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). In *Rivera v. Alpine Insulation and West Bend Mutual Ins. Co.*, 2018 WL 334447 (Wis. App. 2018), the court held that where a temporary employee does not file a worker's compensation claim, the Exclusive Remedy Rule will not bar a tort suit against the special employer to whom he was temporarily loaned. By logical extension, the same would hold true for borrowed servant situations (Wis. Stat. § 102.29(7)), and employee leasing situations (Wis. Stat. § 102.29(6)(b)(1)).

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

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