

Contractor Tort Claims: Why Litigate When You Don't Have To?

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All too often companies are sued by a contractor's employees for an accident that should be covered by workers' compensation. Why are so many of these employees successful? The answer is usually quite simple: the company failed to insist that the written contract include Louisiana statutory employment language. The inclusion of a short paragraph in each of your master-service agreements (or individual contracts for services that are part of your trade business or occupation) will go along way toward avoiding litigation. (Contractors – rest assured, you too can be protected from the injuries suffered by your sub-contractor's employees!).

Here is how it works: In Louisiana, when a principal undertakes to execute any work, which is part of his trade, business, or occupation, and contracts with a contractor for any part of the work, the principal, as statutory employer, shall be granted tort immunity under Louisiana workers' compensation laws. The statutory employment relationship can only exist if there is a written contract between the principal and the contractor which recognizes the principal as a statutory employer. Such a contract raises a presumption of a statutory employer relationship between the parties that can only be overcome by showing that the work performed was not an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.

It gets even better: When the statutory employer relationship is established, the principal becomes liable only to pay compensation under Louisiana's workers' compensation laws. The statutory employer law entitles principals to indemnity from the contractor who would have been liable for workers' compensation in the first place.

What about Contractors? Contractors can take advantage of statutory employer relationships for work performed by employees of its subcontractors, but only if the "two-contract" theory applies. Generally, a statutory employer relationship will exist whenever the services or work provided by the immediate employer is contemplated by or included in a contract between the principal and any person other than the employee's immediate employer. This description means there must be three parties and two contracts: a general contractor who has been hired by a third party to perform a specific task; a subcontractor hired by that general contractor; and an employee of the contractor. An important difference with a "two-contract" theory is no written contract is required.

What to do? That's the easy part: just ensure that all of your master service agreements and other contracts with general contractors include proper language agreeing to the statutory employer relationship. Once the proper language is included, make sure your attorney knows about it if a suit is filed. When we are advising

clients, we always review the relevant agreements to look for this language. This is particularly important because tort immunity is an affirmative defense and must be pled or asserted in the proper exception. That is, if you worded your agreements correctly, you and your lawyer can work together to ensure that you benefit from your foresight if you are sued.