

Insurance Newsletter

Spring 2017

Insurance Issues with Labor Contractors

The past couple of decades have seen businesses turn increasingly to PEO's (professional employer organizations) and staffing agencies to fill both permanent and short term labor needs. From filling temporary staffing needs during busy times, temp to hire strategies or even long term solutions for more permanent needs, there can be many advantages to using these types of services. As convenient as these arrangements can be, they do create some additional liability risk for any business using them.

Labor and employment laws and regulations are still geared for the most part toward direct employment relationships, i.e., a direct, two party relationship between an employer and an employee. Bring a staffing agency into the mix and you still have a two party employment relationship, but it's between the staffing agency and the employee. Bring in a PEO and you now have a three party relationship, you and the PEO as co-employers, and the employee. Co-employment is a relationship between two or more companies, in which both have rights and obligations as an employer. In the co-employment relationship, a PEO assumes many of your employee related employer responsibilities, while you continue to manage and run your business. That additional complexity is the root of the insurance problems with this model.

It doesn't help that there is no uniformity in how PEO's are regulated. While there are numerous federal laws and regulations governing employment, regulation of PEO's resides principally at the state level. Some states regulate them through their insurance departments, others through their labor departments, and some have no regulation at all. While labor industry organizations have been advocating for a national regulatory model, no real national standards currently apply. Nor is there consistent uniformity in business models

among PEO's, staffing agencies or ASO (administrative service only) vendors.

As a result, although there may be good reasons for you to consider employing these services, there are some insurance pitfalls you need to understand and be prepared to deal with yourself. Two areas of increased risk, in particular, need to be addressed, worker's compensation and employment practices liability. In order:

Workers Compensation: Each state has worker's compensation statutes defining employer's obligations to their employees in the event of a work related injury. But what if they are not your employees, as with a staffing agency? Or what if you are a co-employer with a PEO in a long term employment arrangement? Both scenarios create unique problems.

The contract between the staffing company and the client business typically will have a provision for workers' compensation insurance coverage, and it's common to find the staffing company assuming the responsibility to provide this insurance. This creates another problem for you. Consider this scenario: you lease a temporary employee from a staffing company. They are in your building, working for you and with you directing their activities, but their employer is in fact the staffing company, not you.

That leased or temporary employee suffers a work injury. Workers compensation benefits are properly paid by the staffing company's workers compensation insurance policy. However, the injured worker turns around and files a liability suit against you, alleging it was your negligence that caused or contributed to their injury. Injured workers like to do this when they can, and it's a no lose situation for them; they get workers compensation benefits, but they also get a shot at a jackpot in the legal lottery.

Your general liability policy won't respond to this type of claim; it has a standard exclusion for claims arising out of an employment relationship. You will find coverage, though, in the Employers Liability section (coverage part

B) of your worker's compensation policy. As long as you have a worker's compensation policy you are covered for liability claims like these.

While it's good that coverage exists and you are protected, it's not good to have to deal with liability suits like these. And it should be avoidable; the whole point of the WC system is to eliminate litigation between employers and employees over workplace injuries. That doesn't happen in this type of scenario.

With a PEO and a long term employee, the situation is a little different. You are both co-employers, and are both obligated to provide WC benefits. You must have a worker's compensation policy. Again, the PEO will usually offer to provide this, with you as additional insured.

There is a problem with relying on WC coverage provided by either of these types of vendors. The policy needs to exist, of course, something which you may or may not be in a position to verify. It also needs to be properly written with the appropriate endorsement to assure you are protected. Even then, though, you still have problems.

Consider some common situations: you have officers or managers not employed through the PEO; you use the services of an uninsured (for WC) contractor; you hire a part time or temp worker separate from your labor contractor. In most cases it's doubtful the WC policy you buy through the labor contractor would respond to any of these situations. In order to be properly protected in these situations and others, you still need to buy your own WC policy. That will also need to be properly written, both to assure it properly meshes with the coverage provided in the labor contractor's policy, and to assure you only pay minimal premium for the residual exposure it covers.

Employment Practices Liability: Here's another potential problem area when using staffing companies. Again, workers on your premises are working for you, are under your direction and control, but are employed by the staffing

company or co-employed by you and the PEO. These employees are prone to all the same issues and allegations as if they were your own direct employees, including complaints of harassment, discrimination, wrongful termination and many others. Your own employment practices liability policy would respond, if you had one and if they were your own employees, but what if you don't have that type of insurance? And if you do, does it respond to complaints from non-employees or co-employees?

Again, back to your contract with the staffing company. Does it address employment practices liability? Does the staffing company carry that type of insurance? Are you protected under that policy? And what's the scope of that protection?

The easy solution, here, too, is to rely on the policy carried by the labor contractor, but that creates other problems. First, EPL policies, as we have pointed out in the past, are non-standard policies; each one is different. What does the offered policy actually cover? What limits does your PEO carry? You want to know what the occurrence limit is, but as important is the aggregate limit for all claims files against that policy; could claims from other PEO clients erode that aggregate and leave you uninsured? What is the deductible or retention? Larger employers (like PEO'S) usually have large retentions; can you handle that?

Next, remember that these are claims made policies, with all the issues and complexities policies of that type entail. What happens if you are hit with a claim for something that happened before you engaged with the PEO? What happens when you end your engagement with the PEO and a claim later comes in? What happens if a claim involves an employee outside your PEO engagement? What happens if the claim arises out of the actions of your co-employer PEO, but you are also sued? There may be real doubt that the PEO's policy will respond to situations like these, or others you could easily imagine. It's pretty certain, though, that there are some pretty significant coverage issues that will arise if you rely solely on your labor contractor for this type of coverage.

If you do not carry EPL insurance these are pretty important questions. Your only protection against EPL complaints will come from whatever coverage the staffing company has. If you do have EPL insurance (and you should), you'll need to read that policy to be sure you are protected for complaints from leased or temporary workers, and that it meshes with any coverage provided by the labor contractor.

These are all pretty complicated issues, and solutions will depend on the type of labor contractor you use and the nature of the services they provide. If you are currently using a labor contractor, or are contemplating doing so, we'll need to sit down with you so we can work through these issues and make sure you are properly protected.

Spring Flood Risk

It's Spring, and right on schedule many areas face renewed risk of flood from snow melt and spring precipitation.

The common perception of flooding risk is of massive flood events impacting large areas, with billions in damages and subsequent disaster zone declarations, but recent research points to a different picture. Opinions about climate change and rising sea levels might vary, but the reality of recent trends of more frequent, severe and unpredictable weather events can't be denied, and more, smaller, so-called "nuisance" flood events are occurring coast to coast.

While total damages from these localized events are considerably smaller than those from more widely publicized large scale events, they occur much more often and usually fly under the radar from a news standpoint (with only local news outlets typically reporting on them). Nevertheless, from the standpoint of individuals and businesses affected, the financial impact can still be enormous.

There were four major flood events in the U.S. in 2016 with damages reported in excess of \$1 billion each. In contrast, there were numerous much smaller localized flooding events across

the country. Cumulatively, the financial cost of these smaller events potentially exceed in any given year the impact of the more highly publicized major events. The top five metropolitan areas reported to be most at risk from these localized flood events were New York City, Washington, D.C., Miami, San Francisco and Seattle. No part of the country is immune to the possibility of such events.

What can you do? As we have mentioned in the past over a third of all floods take place in areas that are not in federally designated flood zones. Flood insurance is inexpensive in these areas, and widely available. For those located in flood zones, your options are more limited, but you still have some choices. Let's talk if you have any concerns.

Insurance Issues in Leases

Leases are always a potential source of insurance problems. Attorneys who draft them may be quite knowledgeable about real estate law but are often unsophisticated about insurance. It's not uncommon to find language addressing required insurance that uses terms that are obsolete or even antiquated, and indemnification provisions can often be written in ways that no insurance policy could cover. And for most tenants, insurance and indemnification provisions in leases are often an afterthought, even though they can contain unpleasant surprises.

Issues arising from damage to space you rent or lease are a fairly common problem. Landlords will commonly maintain a property insurance policy on the building, while tenants insure their own contents. When there is insured loss or damage, each party's insurance pays them for their respective loss. It's not uncommon, though, for there to be some allegation of responsibility or liability for such a loss, for instance, some suggestion that an act or omission by the tenant occupying the space that caused the loss. When that happens the landlord's insurance company can be relied on to pursue recovery for what they paid from the tenant who is allegedly responsible for the loss; this is called

subrogation, and insurance companies maintain large staffs for just this purpose.

Real estate attorneys and tenants might assume that such a claim would be covered by the tenant's general liability policy; after all, that policy covers both bodily injury and property damage. While the general liability policy does in fact cover property damage liability, there is an important standard exclusion in the policy for damage to "property you own, rent, or occupy".

Because of this standard exclusion the only coverage available for such claims comes by way of two exceptions to that exclusion built into the policy. Fire damage legal liability coverage is an exception to the exclusion with respect to fire damage to rented premises; if you are judged to be liable for causing a fire, this will cover you for claims by the landlord or their insurance company. There will always be a separate sublimit for this coverage; \$50,000 or \$100,000 is standard, although that can be increased. Of course, if the loss was from something other than a fire, you're out of luck. There is also an exception for short-term premises rentals, usually defined as seven days or less. Under either of these exceptions, coverage only attaches if the tenant is found liable for the damage, and only up to the sublimit.

A far better approach is to incorporate a waiver of subrogation into the lease. All that does is say that each insurance company will pay their policyholder for a loss, and won't pursue the other. This should go both ways; landlords don't want tenant's insurance companies chasing them, either.

If you already have a lease that lacks this important clause, we'll have to adjust your insurance policy to pick up the slack. We'll need to review your lease(s) to figure out the best way to do that.

Lessons from the Oroville Dam

You may have read or heard about the dangerous condition that cropped up in northern California in February at the Oroville Dam.

Weeks of heavy rainfall had filled the lake behind the dam to dangerous levels, forcing the release of water to reduce the risk of overflow. In that process a deep crevice opened up in the spillway, threatening to spread and undermine the spillway and dam itself, with potentially catastrophic consequences. Evacuation orders were issued for about 200,000 residents along the Feather River, although they were lifted a short time later.

This incident highlights a real issue for business owners and risk managers posed by the deteriorated condition of our nation's infrastructure. In their most recent report, which they issue every four years, the American Society of Civil Engineers gave America's infrastructure an overall rating of D+ (unchanged from their last report) for the condition of the nation's roads, bridges, dams, ports and other vital areas. Experts note that a lot of our national infrastructure is beyond its designed lifetime, meaning that it's brittle; even minor stressors could break important infrastructure, and with the load on it being higher than ever the consequences can be expected to be more severe. Factor in the increased incidence of catastrophic weather events (in 2016 alone there were six so-called 1,000-year rainfall events) and stressors could easily be more than minor.

What does that mean for business? You don't have to be located below a dam to have concerns. The condition of roads, tunnels and bridges is an obvious and visible issue in most parts of the country. Any business that relies on incoming or outgoing transportation of goods, stock, or labor is vulnerable. Think back to the collapse of the span on Interstate 35 over the Mississippi River in Minneapolis in 2010; that bridge was the third busiest in the area, a major artery carrying 140,000 vehicles over the river daily. The collapse of the bridge affected river, rail, road, bicycle and pedestrian, and air transit for over a year. Businesses throughout the region were affected, many drastically, some fatally.

One important purpose of a well written insurance program is to anticipate and mitigate,

to the extent possible, these types of exposures,
and to support any disaster planning you do.
We'll be happy to sit with you and discuss this.