

Who's Who: Temporary Staffing Agencies and Subrogation Interests

In an ordinary workers' compensation matter one of the most straightforward issues is determining who is the employer and who is the claimant. This matter, and the interplay between the parties, becomes somewhat more complex when dealing with employers who are temporary staffing agencies.

In a temporary staffing agency situation from a defense perspective, not only do you have the employer and the insurer, but added to the mix is the company where the claimant was performing temporary work, i.e. the employer's client company. In many instances the client company is not considered the employer from a workers' compensation perspective when the temporary staffing agency handles the hiring, firing and paying of the employee and provides workers' compensation insurance coverage for its temporary employees. As defense counsel for a temporary staffing agency and its workers' compensation insurance carrier, this interplay between your clients and your client's clients must be recognized and handled with care.

One of the biggest quandaries the defense runs into when temporary staffing agencies are involved is determining the applicability of a workers' compensation employer's right to subrogation under Section 319 of the Pennsylvania Workers' Compensation Act ("Act"). When a compensable injury is caused by a third party, the employer can recover through the employee/claimant from the third party up to the extent of compensation payable under the Act. This most often is seen in the case of a motor vehicle accident caused by a third-party driver.

The complication with employer's right to third-party subrogation in the case of a temporary staffing agency is that the "third party" is also the employer's client company. While the insurer may have an interest in recovering through subrogation any additional amounts paid to the claimant, the employer has to consider not only the pending workers' compensation claim, but also its business relationships with the client company. In some instances this matter is taken even a step further as the employer (temporary staffing agency) will have a contract with its client company indemnifying the client company for exposure related to its temporary employees. Taken full circle, an employer would be attempting to seek third-party subrogation against its own client company whom it has indemnified per a separate contract for workers' compensation purposes. Clearly, this is a problem both from a workers' compensation perspective and from a business perspective.

Overall, a defense attorney must work to clarify its representation with employer, insurer and the employer's client company. All parties must work together to defend against the claim and to clarify who's who for the judge and opposing counsel.