

Workers' Compensation Insurance for the Temporary Worker

by Rick Reed

Borrowing employees from another private employer can be a great way to staff your project. Can you borrow employees from a company who already has a workers' compensation insurance policy, and arrange for that policy to cover both of your companies?

The Texas Workers' Compensation Act protects an employer who provides workers' compensation insurance against ordinary negligence claims arising out of a worker's work related injury or death. The Texas Supreme Court has said the Act allows employees to have more than one employer for workers' compensation purposes, and that a temporary employee injured while working under direct supervision of a borrowing employer "is conducting the business of both."

But, the Court recently ruled that an employer who relied on a temporary employment agency's workers' compensation insurance policy could still be exposed to the negligence claims of a temporary worker injured on the job. The temporary employment agency had bought a policy for itself, but the agreement was unclear on whether the temporary employment agency was obligated to place workers' compensation insurance for the borrowing employer, and whether its policy was endorsed to cover the borrowing employer. The Court said:

> "The Act does not permit a temporary employment agency . . . to obtain coverage for a client simply by obtaining coverage for itself. There must be explicit coverage for the client."

The Staff Leasing Services Act allows a "one policy" approach, but this applies only to agencies who lease long term employees. The Court found that parties in other circumstances, by private agreement, cannot decide to have a single policy cover one company's employees while they work under the direct control of another, since the insurer determines premiums on the basis of the claims experience rating of the policy owner, not the company who borrows its employees. The Texas Labor Code also allows a "one policy" approach only for certain types of employers. These include general contractors and motor carriers who provide coverage for subcontractor employees and owner-operators. The Court found these special situations showed the Legislature didn't intend to allow a "one policy" approach for other situations.

You may think the workers' compensation insurance policy of the employer of the workers you want to borrow will cover your company, but it won't protect your company against negligence claims of the injured temporary workers unless you clearly require the loaning employer to provide, and furnish evidence of, a policy of workers' compensation insurance issued for your

company's protection. The loaning employer may be able to accomplish this by specially endorsing its policy to specifically cover your company as an "alternate employer." Also consider whether the temporary workers might become eligible to receive benefits through your qualified plans under the Employee Retirement Income and Security Act ("ERISA").

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