



The Ever-Blurring Lines of 'Alternate Employment'

Paul Hughes

From an insurance perspective, our country is not “one nation under God,” but rather a loosely related confederation of states with unique laws and regulations. It has been a common complaint of foreign insurers that it is nearly impossible to stay current on each state’s unique business environment, at times affecting the amount of capital deployed in various insurance jurisdictions. A multi-state PEO is forced to employ or outsource a staff of legal counsel, accountants, brokers, and risk managers to stay current on issues impacting PEOs. As a result, there has been a wave of momentum to establish a federal bureaucracy to standardize all rules and regulations regarding the insurance industry and those impacted by it as a

whole (e.g., the proposed National Insurance Act). Until then, each and every broker, carrier, and business owner must have the ability to understand a variety of business climates and requirements, and more specifically, how they impact the PEO and temporary staffing industries.

It occurred to me when I began to participate in the procurement of reinsurance for our PEO workers’ compensation program some years back that many who supported both the temporary staffing and PEO industries with insurance capital did not know the difference between the two. So every year, I was asked to reconfirm the difference between the two and discuss the unique risk characteristics that

exist within each business model. In my opinion, then and now, a temporary staffing relationship is one in which there is a sole employer and the PEO is one in which co-employment exists. Simple enough? Apparently not.

Many business models appear to be operating as PEOs, yet use a client service agreement that would typically be used by temporary staffing firms. In essence, the client company fires all of its workers to then be rehired by the staffing company. The staffing company then places the employees back into the client company to finish the circle. The legality of this platform is impossible to ascertain because of the ambiguity in many state laws pertaining to PEOs, temporary staffing companies, and labor contractors. That said, most states are fairly consistent with their treatment of how each one of these entities should operate from an insurance standpoint.

All employers entering into a contractual relationship with a staffing company should know whether they are covered by the exclusive remedy provision of their state’s workers’ compensation act. This becomes even more of a challenge when another entity is also involved. There is currently a case in Florida (St. Lucie Falls Property Owners Association v. Morelli, 4D06-3689) about who is considered an employer, in which it is being debated

in a nutshell

- In recent years, I have been exposed to many business models that appear to be operating as PEOs, yet use a client service agreement that would typically be used by temporary staffing firms. My express concern is that all employers entering into a contractual relationship with a staffing company know whether they are covered by the exclusive remedy provision of their state’s workers’ compensation act.
- In some states, NAPEO has resolved the exclusive remedy issue by enacting a statute that grants both the PEO and its client the remedy. There is a question, however, about whether that provision would extend to a third party. If coverage does not exist as intended, the claim creates potential tort exposure to the client and certain litigation involving the broker, carrier, and anyone else involved in the transaction.
- This staffing platform has raised awareness amongst the regulators across the country, something not positive for the industry as a whole. Most regulators are far more accepting of the PEO platform in recent years, but there is still some inherent mistrust that exists between many departments of insurance and their PEO constituents. The industry has taken great strides in developing its relationships with the regulators, actuarial bureaus, and lawmakers that influence the manner in which a PEO conducts business.

whether a third employer is eligible for workers' compensation immunity, allowing it to be sued under the tort system for negligence. In the St. Lucie case, a condominium association employed a full-time maintenance worker, but paid him through their management company, which in turn leased the employee from a PEO. Because the condominium association was not a party to the staffing contract, the 4th District State Court of Appeals in Florida decided that there is a question of whether or not the condominium association was entitled to protection from a personal injury lawsuit filed by the maintenance worker when he was injured at the condo. It is a common practice for some plaintiff's attorneys to hone in on the ability to expose an employer to the tort system; this case could provide them with the ability to pierce the employer workers' compensation defense.

In some states, NAPEO has resolved the exclusive remedy issue by enacting a statute that grants both the PEO and its client the remedy. There is a question, however, about whether that provision would extend to a third party as in the case above. In many staffing arrangements, the workers' compensation policy is written in the name of the staffing company with no mention of the client company as a statutory employer. There is no co-employment provision in the client service agreement, which could typically provide exclusive remedy protection to both employers. Many argue one or both of the following points when asked how exclusive remedy is provided to the client company:

- "The client entity does not have employees and therefore does not require workers' compensation coverage." While it may or may not be required by law, every business should have workers' compensation coverage to protect the entity as well as owners

and officers who may or may not be deemed employees. In addition, any unpaid or court-defined employees (subs, volunteers) of the client company may not be covered in this scenario.

- "We have an alternate employer endorsement that extends coverage to the client company." While there is no question that the intent of this endorsement was not to provide exclusive remedy to the client companies of these staffing arrangements, the verbiage of the endorsement itself is vague enough to invite alternative interpretations.

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the transaction. Lynn Szymoniak, Risk Transfer's regulatory counsel and a former counsel for the National Council on Compensation Insurance (NCCI) during the time in which the alternative employer endorsement was originally drafted, sums the exposure up in the following manner: "Staffing companies acting as PEOs often assure their potential clients that they will have all of the protections of the exclusive remedy provision. Many times, however, PEOs rely on alternate employer endorsements, but this endorsement is not intended to replace coverage. As the filing memorandum to the alternate employer endorsement made clear, both the lending and borrowing employers must have coverage." (Source: Alternate Employer Endorsement, WC 00 03 , 01 A, National Council on

Sample Alternate Employer Endorsement

This endorsement applies only with respect to bodily injury to your employees while in the course of special or temporary employment by the alternate employer in the states named in Item 2 of the Schedule. Part One (Workers' Compensation Insurance) and Part Two of (Employers Liability Insurance) will apply as though the alternate employer is insured. If an entry is shown in Item 3 of the Schedule the insurance afforded by this endorsement applies only to work performed under the contract or at the project named in the Schedule. Under Part One (workers' compensation insurance) we will reimburse the alternate employer for the benefits required by the workers' compensation law if we are not permitted to pay the benefits directly to the persons entitled to them. The insurance afforded by this endorsement is not intended to satisfy the alternate employer's duty to secure its obligations under the workers' compensation law. We will not file evidence of this insurance on behalf of the alternate employer with any government agency. We will not ask any other insurer of the alternate employer to share with us a loss covered by this endorsement. Premium will be charged for your employees while in the course of special or temporary employment by the alternate employer. The policy may be cancelled according to its terms without sending notice to the alternate employer. Part Four (Your duties if injury occurs) applies to you and the alternate employer. The alternate employer will recognize our right to defend under Parts One and Two and our rights to inspect under Part Six.

Schedule

1. Alternate Employer Address
2. State of Special or Temporary Employment
3. Contract or Project

*Source: Alternate Employer Endorsement, WC 00 03 01 A, National Council on Compensation Insurance, Effective February 15, 1989
Alternate Employer Endorsement
Issued February 15, 1989 WC 00 03 01 A*

Compensation Insurance, Effective February 15, 1989.)

The filing memorandum Szymoniak refers to details the implicit situations and relationships in which the endorsement should be used and will provide coverage to an alternative employer (client company).

There are two paragraphs that define endorsement usage and responsibilities:

- “...applies only with respect to bodily injury to your employees while in the course of special or temporary employment by the alternate employer.”
- “The insurance afforded by this endorsement is not intended to satisfy the alternate employer’s duty to secure its obligations under the workers’ compensation law.”

As indicated above, most PEO licensing statutes provide that PEOs and their clients both have exclusive remedy protection. Not all staffing companies are PEOs, even though they may act like PEOs. It is likely that courts will look to whether the staffing company is a licensed PEO and thus entitled by statute to the exclusive remedy protection. Even licensed PEOs face the problem of “clients of the clients.” Many PEOs include temp companies, other PEOs, and real estate management companies as their clients—and the fate of these entities in personal injury lawsuits is now unknown, unless these entities have their own workers’ compensation policies. The new NAIC model guidelines specifically provide that a PEO may not cover another PEO, leasing company, temporary services entity, or any other entity in the business of employment sources outsourcing under its master or coordinated policy.

It is not my role to interpret whether “special employment” exists in these rela-

tionships or to define “temporary employment,” but I am sure there is enough uncertainty regarding how state courts interpret these arrangements to scare anyone contemplating this platform from a PEO or broker standpoint. To the carrier, it could provide a legal course to decline a claim or unknown exposures it had not underwritten. In any scenario for any party to these transactions, it is not black and white and therefore should be avoided from an insurance perspective. Simply put, if the client company retains a workers’ compensation policy when statutorily mandated, then it will be properly immune from tort litigation. Without one, unless the state law specifically provides to the contrary, all bets are off.

In another case that interprets the intent of an alternate employer endorsement, *Remedy Temp v. Miceli*, the California Insurance Guarantee Association (CIGA) recently lost its argument that an employee of a temporary staffing company was provided coverage under the alternate employer endorsement of the client company’s insurance policy. While the policy of the temporary staffing company was valid during the time of accident, the carrier, Reliance National, became insolvent and therefore financial liabilities transferred to CIGA. CIGA attempted to transfer the liabilities off its balance sheet to that of AIG, citing the availability of “other available insurance” triggered by an arrangement of “special employment.” The court originally affirmed CIGA’s position that the alternate employer endorsement triggered AIG coverage, but upon further information submitted to the court by both the department of insurance and the workers’ compensation rating bureau, the court’s ruling was as follows: “We further conclude that alternative insurance protection for special employees

like Miceli was not intended under the Assurance policy and section 3602, subdivision d which is incorporated into the policy as explained. Otherwise petitioners would have intended duplicate insurance protection that specifically insures Jacuzzi as an additional insured under the Alternate Employer Endorsement and as a named insured under the Assurance policy. Accordingly we hold the Assurance policy is not other available insurance under Ins. Code 1063.1(c) (9).”

This staffing platform has raised awareness amongst the regulators across the country, something not positive for the industry as a whole. They have received numerous certificates of insurance with coverage provided via the alternative employer endorsement, and some have commenced to investigate in many areas the intent behind the relationship shared by a PEO or temporary staffing company and its respective clients. Most regulators are far more accepting of the PEO platform in recent years, but there is still some inherent mistrust that exists between many departments of insurance and their PEO constituents. The industry has taken great strides in developing its relationships with the regulators, actuarial bureaus, and lawmakers that influence the manner in which a PEO conducts business. It always concerns me when the PEO community becomes justly or unjustly hit with negative publicity. It will be our purpose to make sure exclusive remedy is provided in an appropriate manner and appropriate premiums charged as a result. The provision of coverage via the alternate endorsement has become a flag to many whom regulate it, whether the usage is interpreted as proper or not.●

Paul Hughes is chief executive officer of Risk Transfer Holdings, Orlando, Florida.