

When Workers Aren't Employees

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Chez Richard, Inc., is a successful, established restaurant in the downtown area. It is incorporated, with all shares owned by its president and head chef, Richard Alain. While Chez Richard is marginally affected by a few holidays, for the most part, the restaurant is known for its steady repeat clientele. Except for the occasional day or two of bad weather, there is virtually no seasonal aspect to Chez Richard's operation.

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One problem that Richard (don't call me Richie) Alain constantly battles is the turnover in his wait staff. Most of the personnel are part-time students who too often fail to appear for work on time (if they appear at all), leaving him shorthanded, and his customers annoyed. At wits' end, Richard decides to use a temporary employment-staffing agency (Wait With Us, Inc.) to supply him with his wait staff. Although this approach is decidedly more expensive—the temporary staffing business, which specializes in restaurant staffing, guarantees a reliable supply of personnel. This guarantee is an invaluable benefit to Richard.

After a month of using the wait staff supplied to him by Wait With Us, Richard is very pleased. Customer satisfaction has never been higher, business is up, and profits are actually increasing—all without the headache of continually finding, hiring, and training new wait staff.

Chez Richard's Insurance

Chez Richard is insured under an Insurance Services Office, Inc. (ISO), commercial general liability (CGL) policy (December 2004 edition) with a solid regional insurance company with the highest financial ratings. While Wait With Us, the staffing agency, does provide workers compensation benefits for the wait staff personnel they supply, Chez Richard has kept its workers compensation and employers liability coverage, as the restaurant does have a full-time assistant chef and full-time restaurant manager who are not furnished by the staffing agency. The workers compensation and employers liability policies for both Wait With Us and Chez Richard are written on the latest National Council on Compensation Insurance (NCCI) forms with no additional coverage endorsements, although both policies include increased limits for Part Two—Employers' Liability Insurance.

The Accident

In his haste to make the perfect entree for a VIP, Richard leaves a large pot of boiled water precariously balanced on the counter where the wait staff picks up their orders. Unfortunately, while reaching to pick up a dish for a customer, a member of the wait staff, Lisa, who is a single mother, brushes against the pot, causing it to tip, splashing and seriously burning her hands and face.

The staffing agency pays for the statutory workers compensation benefits now due Lisa. She does not file a claim for workers compensation benefits against Chez Richard.

The Litigation

Because of the severity of her injuries and the need for others to care for her child, Lisa feels compelled to bring a tort action against Chez Richard, Inc., asserting that Chez Richard was negligent in causing her injuries. In her lawsuit, she has demanded \$500,000 damages for her pain and suffering and, separately, \$500,000 of damages on behalf of her child, because of loss of consortium. Initial motions by Chez Richard to dismiss Lisa's lawsuits fail as the judge rules the exclusive remedy of the state's workers compensation statute does not apply between Chez Richard and Lisa.

The CGL Insurer

Chez Richard sends the lawsuit to the CGL insurer right away, but is stunned when the insurer flatly denies the claim—and asserts no coverage exists because of Exclusion e: employers liability. The insurer goes on to explain that this exclusion applies to bodily injury to an employee of the insured. Once Richard receives the insurer's letter of denial, he is beside himself. How could his broker have failed to provide him the right insurance?

Temporary Worker

After a review of the CGL policy in effect for Chez Richard, his broker finds the answer and writes to the insurer to refute its claim denial: Lisa is a "temporary worker" under the CGL policy and thus not an "employee." As the employers liability exclusion applies only to an "employee" of the insured, the broker succinctly points out the exclusion the insurer is relying on simply does not apply to this claim. Along with the letter of refutation, the broker provides the insurer the contract between Chez Richard and Wait With Us that clearly shows that Lisa was furnished to Chez Richard and is thus a "temporary worker."

In response, the insurer first points to the definition of "employee" in the CGL policy which states:

"Employee" includes a "leased worker." "Employee" does not include a "temporary worker."

The insurer's letter goes on to assert that Lisa does not fit the definition of "temporary worker" and the facts show Lisa's status with Chez Richard fits more closely with that of a "leased worker," but in any case, an "employee." What is the difference between a leased and temporary worker?

"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include "temporary worker."

Contrast the above to "temporary worker":

"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

The insurer argues that although Lisa may have been furnished to Chez Richard by Wait With Us, she was not:

- a substitute for a permanent employee who was on leave;
- or supplied to meet a seasonal need or short-term workload condition.

The insurer then concludes that since Lisa did not meet all aspects of the definition of "temporary worker," she cannot be considered a "temporary worker." A "temporary worker," in the opinion of the insurer, is a person who is furnished for a finite period of time to support or supplement the insured's workforce—not one who is to perform indefinitely as part of the insured's main workforce.

In the view of the insurer, Lisa can only be a "leased worker" and thus an "employee." While the insurer's contention that Lisa can only be a "leased worker" is far from a settled matter, the insurer is likely correct that Lisa is not a "temporary worker."

Possible Solutions

While Chez Richard is obviously in a bind, there are ways to close this coverage gap. These are discussed below.

Alternate Employer Endorsement (WC 00 03 01 A)

Arguably the most effective way to close the coverage gap described above is the Alternate Employer Endorsement. Chez Richard could have required Wait With Us to include the Alternate Employer Endorsement on the workers compensation and employers liability policy of Wait With Us, specifically scheduling Chez Richard, Inc., as the alternate employer. While not a CGL solution, the Alternate Employer Endorsement would have provided coverage to Chez Richard as an alternate employer for Lisa's tort suit. Specifically, the endorsement states:

Part One (Workers Compensation Insurance) and *Part Two (Employers Liability Insurance)* will apply as though the alternate employer is insured. [Emphasis added.] Based on the facts as described, the employers' liability portion of Wait With Us workers compensation policy would defend and pay on behalf of Chez Richard for its liability for Lisa's damages. However, as the employers liability limits on the Wait With Us policy may have been inadequate for the \$1 million of total damages being demanded, Chez Richard may wish to consider amending its own insurance to fill this coverage gap.

Coverage for Injury to Leased Workers (CG 04 24)

Chez Richard should also consider adding to its own CGL policy the Coverage for Injury to Leased Workers (CG 04 24) endorsement. This endorsement simply states that the term "employee" does not include a "leased worker" or "temporary worker." The effect of this is that the employers' liability exclusion of the CGL no longer applies to the claims for injuries to a leased or temporary worker—neither is considered an employee of the insured for the purposes of applying this exclusion.

Leased Workers The above coverage endorsement is usually used in situations that are a bit different than described in the Chez Richard case. Typically, there is no dispute as to the status of the workers—everyone agrees the workers fit squarely in the definition of "leased worker." The coverage problem arises because the state's laws are such that the "leased workers" are considered solely the employees of the leasing company and not of the named insured client company. The result is that the "leased worker" is not barred by exclusive remedy from bringing an action in tort against the named insured. Coverage for the potential tort claims by such personnel is then provided through the CGL by this endorsement.

In the Chez Richard case, the coverage gap is not at all obvious. Richard's decision to use a temporary staffing agency would, on the surface, give the impression that he is using "temporary workers." However, it is only after examining the details of the arrangement and a careful review of the definition of "temporary worker" that it becomes apparent Lisa may not be considered a "temporary worker."

Even if the law of the state in which Chez Richard does business considers "leased workers" to be employees of the named insured client company, the issue here is whether Lisa (1) is a "leased worker" and thus considered to be an employee of Chez Richard or (2) a "temporary worker" and thus considered to be an employee of the temporary staffing firm.

It is the arrangement for providing the workforce itself that is the source of the uncertainty. Put another way, businesses may strike deals with staffing firms to furnish a workforce in such a manner that the workers provided do not fit neatly into either the "leased worker" or "temporary worker" category.

Not Available As a practical matter, the Coverage for Injury to Leased Workers (CG 04 24) endorsement may be difficult to obtain for Chez Richard. Insurers can and do refuse as they may perceive they are eliminating the CGL's employers liability exclusion—something they would rather avoid. While this concern has merit, it should be tempered by the recognition that if Lisa had instead sued Richard Alain personally, as it was his personal act of negligence that was the cause of Lisa's injuries, the CGL insurer would have been obligated to defend and pay on behalf of Richard Alain. This is because he is an executive officer (and thus an insured), and Lisa is not an employee of Richard Alain (she would be an employee of the corporation—Chez Richard, Inc.). In other words, the insurer is not really giving away that much coverage.

Chez Richard, Inc. Employers Liability Insurance

In the absence of either of the above solutions, one question that might be pursued is whether the tort claim by Lisa would be covered under Chez Richard's workers compensation and employers liability policy, specifically Part Two—Employers Liability.

Employee by WC Statute While Lisa may not fall within the workers compensation statute's definition of "employee," it is important to recognize that employers' liability insurance is a coverage part separate and distinct from Part One—Workers Compensation. Thus, the statutory definition of "employee" applicable under Part One—Workers Compensation should not be presumed to apply to Part Two—Employers Liability. In fact, the term "employee" is not defined in the employers' liability portion of the policy.

Common-Law Employment If common-law tests for employees, such as the right to control the details of Lisa's work, which Chez Richard has retained, indicate Lisa might be a common-law employee, should the employers' liability insurer have at least defended the tort action brought by Lisa against Chez Richard? While the general tendency seems to be to dismiss this notion out of hand, considering that undefined terms (such as employee) are generally understood to take their ordinary meaning, this position seems hasty and may be without sufficient basis. If the details of the arrangement between Chez Richard and Wait With Us raise questions as to Lisa's status, as they have in the above illustration, how can the employers' liability insurer reject with certainty *any possibility* of coverage for Chez Richard for the tort claim filed by Lisa?

While it is possible for the CGL insurer to consider a person an employee for the purposes of invoking an exclusion and the employers' liability insurer to consider the same person to not be an employee to avoid providing coverage, this approach may be perceived as an insurer wanting to have it both ways. A rejection of coverage by Chez Richard's employers' liability insurer should be done only after careful consideration is given to the uncertain employment status of the person bringing the tort suit.

Conclusion

When an organization uses a workforce that is furnished on a short-term basis, such as from a temporary staffing agency, or on a longer-term basis, such as from an employee leasing company, careful review of the details of the arrangement are necessary. The insured needs a solid understanding of the difference between the CGL definition of "temporary worker" and "leased worker," and the implications of each. The insured must obtain the proper documentation from the company providing the personnel, including documentation that the leasing/staffing company has the alternate employer endorsement, scheduling the organization as an insured. The insured should also consider the possibility of adding the coverage for injury to leased worker endorsement to the organization's own CGL policy.

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