

## Casual labor issues

March 31, 2004:

A risk manager recently discussed with us Company A's use of individuals for occasional work and the resulting workers' compensation exposure. Company A needed ideas on how to address the exposure and asked us for input. This newsletter will discuss possible insurance treatment for Company A for injuries suffered by casual laborers and independent contractors.

*Our commentary is based on Company A's workers' compensation exposures, certain state statutes and our overall understanding of third party insurance including workers' compensation. The suggestions made in this newsletter should be considered a broad response to certain exposures and may not be applicable to all casual labor and independent contractor situations. We suggest you review similar exposures with legal counsel and a risk management professional.*

### Exposure

Company A uses local individuals as laborers for limited and defined work in certain US cities when it hosts an exhibition. Individuals may be hired by Company A out of a local labor hall to erect tents and similar structures. The work is of a short duration, lasts less than one day and may not be repeated in the future. The following definitions are from Black's Law Dictionary, Seventh Edition.

- *Casual employment*: work that is occasional, irregular, or for a limited, temporary purpose.
- *Employee*: A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.
- *Employment*: 1. The act of employing; the state of being employed. 2. Work for which one has been hired and is being paid by an employer.
- *Independent contractor*: One who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method of accomplishing it.
- *Statutory employee (Workers' compensation)*: An employee who is covered, or required to be covered, by the employer's workers' compensation insurance and who therefore has no independent tort claim against the employer for unintentional injuries suffered on the job.

The individuals hired by Company A may fall within classes considered casual labor or may be independent contractors. The deciding factor is often the amount of control and direction given by Company A. Casual labor employees are often excluded under workers' compensation statutes and, thus job related injuries are not subject to benefits payable by Company A's workers' compensation insurance. Independent contractors are not employees and therefore generally are not subject to coverage under worker compensation statutes or Company A's workers' compensation insurance. The workers' compensation statute in a given state must be reviewed by Company A to determine how it affects its use of casual labor and independent contractors.

Are these exposures insurable? Yes.

### Solutions

There are several ways that insurance can be used for job related injuries suffered by casual laborers or independent contractors.

Voluntary Compensation Endorsement: For purposes of this newsletter we refer to the Voluntary Compensation Endorsement, NCCI endorsement WC 000311. Company A must request this endorsement from its workers' compensation insurer. It is not normally issued as part of the standard policy. The endorsement pays an injured employee's claim for medical expenses and lost wages using the state of employment as the model statute for benefits even though the worker is not eligible under the statute for benefits due to an excluded class (i.e. casual labor). The endorsement will not provide benefits to an individual if that person is not an employee, such as an independent contractor. A requirement of benefits paid under Voluntary Compensation is the injured employee must transfer their rights of recovery from others to the Voluntary Compensation insurer. The employee can reject the insurer's voluntary offer of benefits and proceed instead with a tort action against the employer. The possibility of a tort action by the injured employee increases if they believe they have a right of action against third parties in addition to Company A as their employer.

There may be a premium cost associated with this endorsement.

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## *AN EMERGING RISK ISSUE*

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Insurers are allowed to audit the voluntary compensation exposure and charge premium for it. Company A should keep accurate payroll records for its use of casual labor and use NCCI workers' compensation classification codes for this exposure like it does for its other employee payroll.

Employers' Liability: A casual employee may bring a lawsuit against Company A when the injury is not compensable under the workers' compensation statute. Allegations of tort liability for damages may be well beyond those of a workers' compensation claim (i.e. medical expense and lost wages). Coverage for tort liability damages is within the employers' liability section of the workers' compensation policy. The limit for employers' liability is shown in the workers' compensation policy and can be supplemented by an umbrella or excess liability policy.

General Liability: Certain individuals hired by Company A may be independent contractors and not considered casual labor. A true independent contractor (\*) is not an employee and will not be subject to workers' compensation, Voluntary Compensation or employers' liability insurance. A tort action brought against Company A by such individual should be covered by the general liability policy in place for Company A. The coverage limit in this policy can be supplemented by an umbrella or excess liability policy.

*(\*) Employers sometimes try to create an independent contractor out of a true employee relationship in order to evade workers' compensation compliance and cost. Simply creating a document that states an individual is an independent contractor may not be sufficient to change an employee relationship to that of an independent contractor. Other tests to determine employee status are referenced in the last portion of the newsletter.*

Use of Accidental Death and Dismemberment policy ("AD&D"): Conceptually these types of insurance policies can be structured to provide benefits similar to that required by workers' compensation statute: medical expense, possibly some lost income, dismemberment and death benefits. This type of policy may be redundant to Voluntary Compensation coverage as outlined above. Further, if an employee rejects benefits available under Voluntary Compensation benefits they may accept those of the AD&D policy but still sue for pain and suffering and other damages such as loss of consortium. An AD&D policy may be a reasonable means to provide benefits to independent contractors. If AD&D benefits are similar to that required by workers' compensation statute then it is possible this policy may lessen the potential for a tort action by an injured individual. Lastly, the cost of the AD&D policy needs to

be viewed in relation to its value as a loss mitigation tool for the liability exposure.

In determining whether one acting for another is a servant (i.e. employee) or an independent contractor, the following matters of fact, among others, are considered (\*):

- The extent of control which, by agreement, the master (i.e. employer) may exercise over the details of the work;
- Whether or not the one employed is engaged in a distinct occupation or business;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relation of master and servant; and
- Whether the principal is or is not in business

(\*) From Restatement of the Law, second Agency 2d, Volume 2, S220, Subsection 2.

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