



A Litigator's View of the Special Employer Doctrine

By: Richard M. Williams, Esq.

Published By: *Employee Benefit Plan Review*

July 2013

INTRODUCTION

It is a well-established principle of common law that when a general employer lends an employee to another employer, and the employee assents to the change of employment, a "special" relationship may arise between the borrowing employer and the employee, such that the employee becomes the employee of the employer to whom he is lent.

In each case, the determination of the existence of the special employer relationship is based on the particular facts of the case. No two cases are alike, and a case-by-case analysis is required. It is important to note that it is the reality of the situation, not the parties' characterization of the relationship that controls the outcome of the analysis of the particular employment situation.

The Employer/Employee

California Labor Code Section 6304 describes the "employer" as any person having direction, management, control, or custody of any employment, place of employment, or any employee. The statute defining the term "employer", dealing with workmen's safety expands the definition of this section to include supervisory employees.

The "general employer" is an employer who hires out its employees, and includes employment agencies, and businesses that provide services.

The term "employee" is defined broadly. Ordinarily, a person who renders service to another is presumed to be an employee. The term "employee" includes every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.

Special Employer Doctrine

The two principle factors in determining whether there is a special employment relationship in a situation where a general employer lends an employee to another employer are the right to

control or exercise of control by the special employer, and the employee's assent to the right to control or exercise of control by the special employer.

In the absence of an express contract between the special employer and the special employee, various elements, taken as a whole, are determinative of whether there is a special employment relationship. Such elements include:

- Control by the alleged special employer over the details of the employee's work, i.e., the special employer lays out the work to be done and supervises the details and quality of the tasks performed.
- The alleged special employer paid wages to the employee, including withholding taxes and social security contributions.
- The alleged special employer had the power to discharge the employee. It is important to remember that it is the right to terminate the special employment relationship and not the right to discharge the employee outright that is determinative.
- The work performed by the employee was relatively unskilled, which would make the employee readily subject to control by the special employer.
- The work tools, including such things as hard hats, were provided by the alleged special employer.
- The employee expressed or implied consent to the special employment relationship.
- The parties believed they were creating a special employment relationship.
- The duration of the alleged special employment was lengthy.

If the special employer has the right to exercise control over the employee, it is immaterial whether he actually exercises that control. The fact that the general employer has residuary control, i.e., he can recall the employee at will, discharge the employee, or give him other orders, is not the test. The test is whether the special employer has the right to control the details of the work for which the employee was the "lent" or "loaned" employee.

Case authority has established that the payment of wages or salary, or workers' compensation insurance premiums, of itself and with nothing more, is insufficient to establish that the recipient thereof is the employee of the one paying the same. In other words, as earlier noted, it is the reality of the situation, not the parties' characterization of the relationship that controls the outcome and the determination of special employment status.

A hypothetical situation may be illustrative: In a personal injury action against an oil company by a worker whose general employer was a maintenance company, the trial court properly concluded that the workman was a special employee of the oil company at the time of his

alleged injury. Despite the terms of the contract between the maintenance company and the oil company, designed to prevent the oil company from being considered a special employer, the relationship displayed the following elements:

- The workman had worked for the oil company without interruption for at least a year, and possibly two.
- He was engaged in relatively unskilled work.
- The maintenance company kept a foreman on the premises who had nothing to do with the details or quality of the work.
- The oil company had no right to fire a maintenance company employee, but it could terminate his employment at the refinery.
- The record was replete with testimony that controls the supervision of the actual work which was done by the oil company's foreman.

Special employment is found in the above hypothetical.

In a contrary hypothetical situation, where both equipment and skilled operators are leased by one company to another, the operators remain the employees of the lessor and do not become the special employees of the lessee, in the absence of an express agreement to the contrary or in the absence of the surrender of the right to terminate the employment. A continuation of the general employment is indicated by the facts that the general employer may at any time substitute another servant, that the time of employment is short, and that the lent employee has the skill of a specialist.

Likewise, no special employment relationship is created where no control is exercised by the special employer over the employee in the performance of his duties or where the special employer does not instruct the employee in the operation of his equipment, such as where the special employer does not nothing more than assign the work and designate the job to be done, leaving the details of that work to the judgment of the employee.

In this regard, California law provides that the following circumstances which tend to negate the finding of special employment, if the employee is:

- Not paid by and cannot be discharged by the borrower.
- A skilled worker with substantial control over operational details.
- Not engaged in the borrower's usual business.
- Employed for only a brief period of time.
- Uses tools and equipment furnished by the lending employer.

Although the Special Employer Doctrine does not apply to independent contractors, there may be situations where a dual general and special employment relationship is present, if there exists in both the general employer and the special employer some power, not necessarily complete, of direction and control.

The “full control” relinquished by the general employer to the special employer includes authoritative direction and control; there has been no such relinquishment where there is necessary cooperation between general and special employers, such as where the work furnished is part of a larger operation.

Effect of the Special Employer Doctrine: Liability in Tort

The special employer doctrine absolves the general employer of respondeat superior liability during the period of transferred control for the employee’s job-related torts.

Thus, the special employer is solely liable for injuries caused by the negligent or wrongful acts of the employee while engaged in the performance of duties pertaining to the special employment, and while carrying out the bidding of the special employer.

Generally, for the special employer to be held liable, the direction and control must have been exercised at the time of the subject accident and with respect to the specific task being performed, during the performance of which the employee is injured. It is immaterial that at some other time and in connection with some other task, such detailed control may have been exercised.

Conversely, where general and special employers share control of an employee’s work, a “dual employment” arises, and the general employer remains concurrently and simultaneously, jointly and severally liable in respondeat superior for the employee’s tort.

Thus, where the negligence of a special employee injures another of the special employer’s workers, the victim is not barred by workers’ compensation law from suing the general employer of the tortfeasor in negligence on respondeat superior principles. The general employer is liable in tort if, at the time of the injury, it retained total or partial concurrent control over the tortfeasor’s work and the injured had no employment relationship with the general employer of the tortfeasor.

Liability for Workers’ Compensation

The Workmen’s Compensation Act provides an exclusive and complete system of compensation for injuries to employees arising out of and in the course of their employment and liability is imposed under the Act incident to the status of employment, whether caused by another employee acting within the scope of his employment, or the employer.

The definition of “employer” in the Workmen’s Compensation Act is broad enough to include both the general and special employer. In a dual employment situation, the worker is barred from maintaining an action for damages against either employer that is properly insured for

workers' compensation. As a result, the injured employee may look to either or both employers for compensation for injuries due to occupational hazards.

California Insurance Code Section 11663 provides that as between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his payroll at the time of the injury, in which case the insurer of the special employer is solely liable. Thus, both the general and special employer may be jointly and severally liable to the special employee for workers' compensation benefits.

In a special employment situation, such as described above, the special employer becomes liable for workmen's compensation if:

- The employee has an employment contract, express or implied, with the special employer.
- The work being done is essentially that of the special employer.
- The special employer has right of control of details of the work.

Furthermore, an employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees.

Recovery by the General Employer

An interesting question that arises in a special employment situation involves efforts by a general employer to recover workers' compensation benefits paid to an injured employee. It is well-settled law that an employer who has paid or become obligated to pay compensation to an injured employee can bring a civil action solely against a third party whose tort caused the injury. The employer may also intervene in an employee's action against a third party.

The employer may also bring an action against the special employer where the special employer paid insurance premiums for a workers' compensation coverage. In a situation where there is general and special employment with an agreement that the injured employee should be carried on the payroll of the general employer for purposes of computing compensation insurance premiums, a general employer is properly reimbursed by the special employer for wages and premiums paid on account of those working for the special employer. In that scenario, California courts have held that notwithstanding the admitted joint employment, workers' compensation benefits were properly awarded only against the insurer who received the insurance premiums. The rationale for this ruling is that the parties intended the general employer to be liable for compensation to those hired under the agreement and the general employer recognized its liability and insured against it. Despite any agreement between the two employers as to which of them shall bear the burden of liability, the employers are jointly and severally liable to the employee and an award is properly made against both.

Likewise, an agreement between two employers concerning which employer will obtain workers' compensation coverage and be responsible for benefits to injured employees, will be held valid and enforceable by California courts. This is in line with the rationale of Insurance Code Section 11663, discussed above, regarding the liability of a special employer for workers' compensation benefits if it had the special employee on its payroll at the time of the injury.

Conclusion

It is clear from the above discussion that where the facts of employment are not disputed, the existence of a special employment relationship between the borrowing employer and the special employee can be determined as a question of law. However, every employment situation is different and the various factors which courts analyze to determine whether a special employment situation exists and the precise nature and extent of the employment relationship, be it dual or singular, must be evaluated carefully to determine the applicability of the special employment doctrine in any given situation.

Especially where injuries sustained or monetary damages, including payment of workers' compensation benefits are large, the existence and provability of a special employment relationship may affect the payment or collection of substantial amounts of money. This not only includes injury situations but also the ever more common situation where a general employer or even a medical provider, such as Medicare, decides to subrogate to recoup losses or payments made, by way of filing a civil lawsuit or a lien claim. In such situations, the special employer doctrine and its various iterations and applications can be a very useful tool in either shifting liability or effectuating a recovery.

NOTE:

For an excellent discussion of both sides of the special employment issue, please see Santa Cruz Poultry, Inc. v. Superior Court, 194 Cal. App. 3d 575, 578-579 (August 1987).

###

Richard M. Williams is a partner with the business litigation and insurance defense law firm of Gray•Duffy, LLP. He has more than 38 years' experience handling complex litigation involving business, personal injury, professional liability and employment cases, including class actions, and has successfully tried over 40 cases to verdict. He can be reached at rwilliams@grayduffylaw.com.