



Successfully Defending Against New York Workers' Compensation Claims as a Professional Employer Organization

Dustin W. Osborne, Esq.

CONFIDENTIAL – For Internal Use Only.
All Policies Effective April 1, 2016

www.goldbergsegalla.com

NEW YORK | ILLINOIS | FLORIDA | MARYLAND | MISSOURI | NORTH CAROLINA
PENNSYLVANIA | NEW JERSEY | CONNECTICUT | UNITED KINGDOM

©2019 Goldberg Segalla. All rights reserved.
Attorney advertising. For educational purposes only. Prior results do not guarantee similar outcomes.

Successfully Defending Against New York Workers' Compensation Claims as a Professional Employer Organization

In recent years, professional employer organizations (PEOs) have become a burgeoning means for small to medium-sized businesses to receive comprehensive HR services when they might be otherwise ill-suited to sustain a comprehensive HR department in-house. These PEOs typically offer a multitude of services, including employee recruitment and retention, payroll, tax administration, and — crucially for our purposes — workers' compensation insurance.

In essence, the PEO and underlying company become co-employers, with the PEO leasing employees to the company. As a result, issues begin to arise when employees inevitably suffer an injury arising out of the course of their employment — significantly, for instance, from which employer do they seek benefits?

In New York, once an injured employee files a workers' compensation claim, the Workers' Compensation Board typically performs a coverage search. Due to the current state of the board's coverage search capabilities and — perhaps more correctly — limitations, these searches typically produce the underlying company as the proper employer, along with the insurance carrier contracted by the PEOs.

When the injured worker is a leased employee pursuant to the PEO's insurance policy and the leasing agreement between the PEO and the underlying company, these claims are handled in a manner similar to any other run-of-the-mill workers' compensation claim.

Where things get murky, then, is in claims where the injured worker is *not* covered by the leasing agreement and, accordingly, *not* covered by the PEO's insurance policy. As seen in this article, a New York Optional Labor Contractor Endorsement in the policy typically provides the pertinent limiting language, establishing that the policy provides coverage solely for *leased* employees and does not satisfy an underlying company's duty to provide coverage for *non-leased* workers.

While the New York Workers' Compensation Board is still grasping the intricacies of how to differentiate between these two scenarios, this article examines the current law and, relying on practical experience, offers practical strategies to try and ease the burden of proving a lack of coverage on the part of PEOs.

Current Law in New York

Pursuant to the New York Workers' Compensation Board Coverage Situations web page, leased employees are those of the company that is paying to lease them, and that company must have a workers' compensation policy in its name.¹

¹ <http://www.wcb.ny.gov/content/main/onthejob/CoverageSituations/leasedEmployees.jsp>

Article 31 Section 922 of the New York Labor Law defines the relationship between the PEO and the client employer.² The employer generally recruits and hires its employees and contracts with the leasing firm to handle the payroll, taxes, and benefit packages for its employees. Leasing firms (PEOs) must be licensed by the New York State Department of Labor.

Currently, clients of PEOs may be covered by either of the following methods:

1. Each client of a leasing firm may procure its own workers' compensation insurance policy to cover its leased employees (as well as any non-leased employees); or
2. The leasing firm can procure a separate workers' compensation insurance policy to cover the leased employees of each of its client firms. Such a policy would identify the insured as: ABC Leasing Company Inc. L/C/F XYZ Machine Shop Inc. This policy only covers the leased employees of the client firm. If the client firm hires any non-leased employees (and/or wishes to protect itself from the claims of uninsured subcontractors working for it), the client firm must purchase a separate workers' compensation policy to provide coverage to individuals not specifically listed on their contract with the PEO.

As long as a professional employer agreement remains in force between a PEO and its client, the PEO shall pay wages and collect, report, and remit employment taxes of its worksite employees from its own accounts, and secure and provide required workers' compensation coverage for its worksite employees either in its own name or its client's name. Labor Law Section 922(3)(a), (c).

Application of Law

Breaking this law down, there are some key concepts to take away in actually putting its rules into practice. There are two standard scenarios that typically arise when a PEO is involved in a workers' compensation claim: first, the PEO contracts a workers' compensation policy to cover employees, whether leased or non-leased; second, and most likely, the PEO procures a workers' compensation policy to cover solely *leased* employees of each of its underlying companies.

Typically, the difference between the leased and non-leased employees is determined pursuant to terms of a client leasing agreement between the PEO and underlying company. In theory, this agreement should clearly establish what steps the underlying company needs to take to have the employee leased by the PEO and covered under its policy.

² <https://law.justia.com/codes/new-york/2015/lab/article-31/922>

Similarly, the policy should contain a New York Optional Labor Contractor Endorsement — or something along similar lines — wherein the policy dictates that coverage is provided *solely* for the workers leased to the underlying company. This endorsement should further note that the policy does not satisfy the underlying company's duty to provide workers' compensation coverage for non-leased employees or uninsured subcontractors.

As a result, the PEO is then responsible for proving not only that its insurance policy covers only leased employees, but also that the specific injured worker in question was in fact a non-leased employee. In theory, should the PEO prove both of these successfully, the judge should discharge and remove the PEO from the claim and shift the burden onto the underlying company to produce its own workers' compensation policy. This, of course, means that the interests of the PEO and underlying employer are in conflict.

First Hearing Overview

In this adverse scenario, the leased vs. non-leased debate effectively pits the underlying company and the PEO against each other in terms of coverage for the injured worker at hand.

In a practical sense, the timeline of events in this situation is as follows:

- The injured worker files a claim with supporting medical evidence and names the underlying employer;
- The Workers' Compensation Board performs a coverage search and deems the underlying company responsible along with the PEO's insurance policy;
- The PEO's insurance carrier or third-party administrator files a denial of the claim; and
- The Workers' Compensation Board schedules the first hearing.

At this first hearing, the PEO's counsel should utilize the insurance policy and client leasing agreement, along with a list of covered employees on the date of the accident, and explain the relationship to the judge. From there, a few scenarios could play out. The administrative law judge could:

- Direct the board's compliance bureau to conduct an independent coverage search in an effort to locate alternate insurance for the underlying employer. In the event that the underlying employer has no other coverage, it will be incumbent upon the board to place the Uninsured Employer's Fund (UEF) on notice of the claim. The case should be adjourned for the UEF to be present and state its position.

- Deem the policy and leasing agreement sufficient to discharge the PEO insurance carrier immediately;
- Adjourn the case for testimony of representatives from both the underlying company and the PEO to explain the relationship in further detail; or,
- In the worst-case scenario, evince a misunderstanding of the entirety of PEOs and establish the claim, resulting in an immediate appeal.

Practice Tips

With adverse claims involving PEOs increasing exponentially, it will take some time for the New York Workers' Compensation system to fully gain a clear understanding of this convoluted coverage issue.

To help ensure the PEO is doing everything possible to avoid unnecessary litigation, we would advise following these standard practice tips when these situations arise:

- Provide your attorney with the pertinent insurance policy, client leasing agreement, and list of covered employees on the date of accident as early as possible.
 - Not only will this help your attorney have a full picture of what argument to craft, these documents will also need to be filed along with the PH-16.2 at least 10 days prior to the pre-hearing conference to avoid potential preclusion.
- If the judge adjourns for testimony prior to making a decision on coverage, have your attorney take the claimant's testimony to establish who controlled his or her employment.
 - In practice, claimants typically do not argue control by the PEO, so his or her testimony can further establish the underlying company's responsibility to provide coverage.
- In some claims, there may be other defenses to raise in the denial, such as cancelation of coverage, independent contractor, and more.
 - While these should still be raised protectively and any evidence should be produced accordingly, these arguments are essentially moot if the claimant is not a covered employee in the first place.

Ultimately, once a PEO realizes that a non-leased employee has filed a workers' compensation claim, the PEO is advised to promptly contact counsel. A delay could result in the waiver of certain critical defenses.