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Temp agency liability in the trucking industry

THE EXPERIENCE OF A RECENT CASE IN THE TRUCKING INDUSTRY CAN BE APPLIED TO TEMPORARY EMPLOYEES IN A WIDE VARIETY OF COMMERCIAL AND INDUSTRIAL SETTINGS

Staffing agencies market themselves as providing qualified temporary employees ("temps") while taking care of the administrative hassle of screening, hiring, payroll and paperwork. What many companies that contract with staffing agencies don't know is when a temp worker's negligence injures someone, the staffing agency will do everything possible to pass the buck.

Undercapitalized trucking companies often resort to hiring temp agencies when business picks up. Many of these transportation businesses carry the minimum insurance as a way to reduce overhead. As a result, when a catastrophic injury occurs due to a temp truck driver's negligence, a situation is created where there is limited insurance and the staffing agency attempts to avoid responsibility for their employee's conduct. This article explores staffing agency responsibility from the perspective of a recent case which can be applied in not only trucking accidents, but a wide variety of commercial and industrial settings.

Case beginnings

As I sat in the cafeteria of the Torrance Memorial hospital after meeting with the mother of a 33-year-old man who was undergoing his third brain surgery after he was crushed by an out-of-control tractor trailer, I could not bring myself to tell her the news that the trucking company had only $1million in insurance despite owning more than 20 commercial vehicles. With well over $1million in past medical expenses, the family was hopeful that there would be several layers of excess insurance to cover the losses in this clear liability case. My fear was that the client needed to net an eight-figure sum just to be able to have the medical care required for such a devastating traumatic brain injury. His outcome would depend on our team finding every avenue of possible recovery.

Early in discovery we learned that the truck driver ("TD") was originally hired by one of America's largest staffing agencies. After being hired, he was road tested and provided several multiple-choice tests about basic truck driving principles. He then was placed with various trucking companies making local deliveries throughout the greater Los Angeles Area. In the first month on the job, the temp caused a property damage collision and failed to report it. He was disciplined by the staffing agency and put on probation. He was reprimanded and no further action was taken.

The next week he was cited for speeding in a commercial vehicle. The staffing agency was made aware of the violation but no action was taken. He was placed with more trucking companies and was able to avoid a collision for over a year. Eventually, he was placed with a local company that started to use him on a weekly basis. For about six months leading up to the collision at issue, he had been working exclusively on behalf of the local trucking company, driving their trucks.

On the date of the collision, the defendant TD alleges he suffered an unanticipated medical emergency (a transient ischemic attack) which rendered him unable to negotiate a curve in a freeway onramp leading to the subject collision. We took many depositions of family members and prior doctors, and subpoenaed every record possible from his past to establish that TD had been a crack addict with intermittent relapses for nearly 20 years.

The jury was going to hear that even if TD did have a stroke it was his own fault because his long-term crack use likely pre-disposed him to have an ischemic attack. This is a subject for another article but if anyone needs a medical emergency briefing or experts in this area, please contact the author.

Negligent hiring theory of liability

Staffing agencies can be found liable in several respects depending on the evidence from vicarious liability, independent liability based on negligent hiring, and independent liability for negligent training and retention. The first theory of liability which should be vetted is whether the staffing agency negligently hired the employee in the first place.

CACI instruction 426 requires Plaintiff to prove: (1) that the employee was unfit or incompetent to perform the work for which he was hired; (2) that employer defendant knew or should have known that employee was unfit or incompetent and that this unfitness or incompetence created a particular risk to others; (3) that employee's unfitness or incompetence harmed plaintiff; and (4) that employer defendant's negligence in hiring employee was a substantial factor in causing the harm.

When taking the depositions of the Persons Most Knowledgeable, go through the key elements of the jury instruction. Find the actual person who interviewed the temp and hired them. In the case of a truck driver, it is usually a dispatcher or a part-time employee with little or no qualifications to be hiring commercial drivers.

Obtain and analyze the temp's job application. The standard of care in the trucking industry requires that a company attempt to contact prior employers going back at least seven years. If they make phone calls and are not able to contact someone, they are required to send a letter or fax requesting a call back. Failure to document this process likely means that it did not occur.

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Truck drivers are notorious for putting down false references for prior employers. In our recent case, I determined the most recent employer that formed the basis of his commercial driving experience was his sister. When I took her deposition, she said she had never been involved in any kind of trucking business. It became clear that the staffing agency did not contact this reference as they claimed.

Take the deposition of the temp agency's Person Most Qualified (PMQ) to discuss the policies and procedures for hiring, and the actual hiring of the truck driver at issue. The agency in our case required one full year of commercial truck driving experience. Our investigation revealed that besides the bogus claim of working for his sister, TD worked for an assisted living facility driving a 15-passenger van. The PMQ admitted in deposition that the required "commercial driving experience" is an 18-wheeler tractor-trailer and not 15-passenger vans.

Sending subpoenas to all prior employers is nothing short of a potential gold mine of evidence. You will get prior job applications which list former employers. Subpoena those places and get more records from other prior employers. In going down this rabbit hole in my case, I found evidence that TD had actually worked for the subject defendant staffing agency 10 years previously and they failed to disclose this to us.

We also received in response to a subpoena from a prior employer, evidence that he tested positive for cocaine in a random drug test shortly before being hired by the staffing agency 10 years ago. Armed with this information, I took the deposition of a policies and procedures/document retention PMQ who admitted the agency terminated him in the first employment for reckless driving. By digging into the full history of employment and obtaining the records, this helped establish the history of drug problems to counter the medical emergency defense but was also critical in establishing that the staffing agency knew or should have known that TD was a bad apple that never should have been re-hired.

In summary, our argument supporting negligent hiring was: (1) the agency hired him in 2004 and fired him because of reckless driving, (2) they should have known at that time about his failed drug test in 2003, (3) when they re-hired him in 2011 they had this prior info but failed to check their computer system which would have revealed his history with the company, (4) he did not meet the company criteria of experience and never should have been hired in the first place.

Negligent retention and training

The next step of the analysis turns to whether the staffing agency negligently retained and/or trained the driver. This can be a double-edged sword due to the agency argument that they are not responsible for training and supervising the driver. However, in most staffing agency agreements the agency is obligated to (1) provide an experienced and competent commercial driver, and (2) handle administrative issues such as the DMV pull notice program which puts the staffing agency on notice of every traffic violation.

It is important to hire a good trucking expert who will evaluate the particular relationship between the staffing agency and trucking company. The standard argument by the agency is that they are not a "motor carrier" for purposes of the Federal Motor Carrier Safety Regulations (FMCSR).

In our case, we learned that one week into the job in 2011, TD caused a collision and failed to report it, and shortly thereafter he had an on-the-job speeding violation. Pursuant to the contract, the staffing agency was charged with maintaining the driver qualification file and was administrator of the driver's DMV pull notice program. As a result, the staffing agency would get notification from the DMV for every violation.

For these "administrative services" the staffing agency charged a 150 percent markup on the driver's hourly rate. Our trucking expert testified in deposition that after the collision the first week, the agency should have gone back to the application at that point to take a second look at the driver qualifications. At that point they should have realized that he did not even meet the required commercial driving experience. Combined with the fact that the agency had previously terminated him for reckless driving, the staffing agency clearly should have taken this dangerous driver off the road.

After testing this theory in a focus group it became clear that the jurors were focused on the 150 percent markup. One juror noted "The agency has this big markup, and they argue they are not supposed to supervise their driver? What's all that money for then?" Our theme was further honed to focus on the amount of money that the agency was making that helped support our argument that they were in fact in control of the driver.

Vicarious responsibility – the borrowed servant defense

In conjunction with the direct negligence arguments, it is important to allege vicarious liability for the staffing agency as the employer of the driver. In staffing arrangements, the driver is typically the employee of the staffing agency. The staffing agency then argues that they have loaned out their employee to their customer trucking company which has exclusive control over this driver. This defense is also known as the "special employment" defense in which the staffing agency is the "general employer" and the trucking company is the "special employer." See CACI 3706 Special Employment.

The analysis begins with the question: did the special employer maintain exclusive control over the driver? As stated in CACI 3706 "In deciding whether [driver] was [trucking company's] temporary employee, you must first decide whether [trucking company] had the right to fully control the activities of [driver], rather than just the right to specify the result. This is a high burden to show the right to full control. An argument can be made that if the staffing agency retained any control at all, then they can be held accountable in vicarious responsibility.

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Courts "have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." Accordingly, Courts must consider a variety of additional factors in addition to control. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 300-01.) The additional factors include: (a) the right to control the manner and means of accomplishing the result desired; (b) whether the principal has right to terminate the workman's employment; (c) whether or not the one performing services is engaged in a distinct occupation or business; (d) whether the work is a part of the regular business of the principal; (e) whether the service rendered requires a special skill; (f) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (g) the method of payment, whether by the time or by the job; and (h) whether or not the parties believe they are creating the relationship of employer-employee; (i) whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status; (j) whether the hiree holds himself out to be in business with an independent business license; and (k) whether the hiree has employees. (*Borello & Sons, Inc. v. Dept. of Indust. Relation*s (1989) 48 Cal.3d 341 at 350-55.) These various factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations."' (*Azrate v. Bridge Terminal Transport, Inc*. (2011) 192 Cal.App.4th 419, 426-427.) In regards to control, exercise of the right of control is not necessary and the mere existence of the right is sufficient to support a finding of agency. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370.)

As discussed below, it is important to develop a game plan to establish favorable testimony for as many of these elements as possible.

What about the contract?

Modern staffing agency contracts typically place nearly all responsibility of control with the trucking company. However, the language of the contract is not the final determining factor – it is the conduct of the parties.

It is important to take the depositions of all signatories to the contract to get their understanding of the contract. Parol evidence aside, it is the conduct of the parties and their understanding of the obligations that matters. High turnover seems to be common in the staffing and trucking industries and, as a result, it is likely to get deponents who have an ax to grind with their former employer. Be mindful as these waters are navigated dealing with potentially hostile witnesses on all sides.

Drug and alcohol issues

As of December 2016, the Federal Motor Carriers Safety Administration (FMCSA) published a Notice of Enforcement Guidance. This guidance is intended to address issues that arise with the use of drivers CDL Holders from staffing companies and compliance with the drug and alcohol test requirements of 49 CFR Part 382. This enforcement guidance is effective immediately.

In summary, a driver-staffing agency may qualify as an employer in accordance with Federal Motor Carrier Safety Regulations (FMCSR). It should be noted that there are some qualifiers in place for a driver-staffing agency to be considered an employer along with guidance for trucking companies before using drivers supplied by the staffing agencies.

As noted, these staffing agencies supply the trucking industry with casual, intermittent or occasional drivers as needs for these drivers arise. These staffing agencies directly employ the driver, and pay the employment wages and assorted employment taxes. That makes them eligible to be subject to Part 382. It is also makes them required to produce records for inspection by a special agent or authorized representative of FMCSA.

A qualifier is as follows, as stated in the regulations. Section 382.103(a) applies to individuals or companies that that operate a Commercial Motor Vehicle (CMV) in compliance with Part 383. Using this as guidance, a staffing agency can choose to be responsible for ensuring compliance with Parts 382 and 383. This means that if they choose to, they must comply with all requirements of Parts 382 and 383 along with 49 CFR Part 40. A motor carrier is still responsible for ensuring compliance with Part 382 before allowing the drivers to perform any safety-sensitive functions.

The FMCSA interprets a casual, intermittent, or occasional driver as a driver who works for another employer for any time frame of less than 30 consecutive days. If a motor carrier uses a leased (borrowed) driver for more than 30 days or expects to use that driver for more than 30 days, the motor carrier is obligated to place that driver in their random testing pool.

The administration of the drug and alcohol enforcement over a truck driver can lead to other admissible discovery to support the issue of control.

Beating the MSJ: Depositions

Whether someone is an independent contractor, or an employee, is generally a question of fact. (*Brose v. Union-Tribune Pub. Co*. (1986) 183 Cal.App.3d 1079, 1081.) Where a conflict in the evidence exists from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. (*Dahl-Beck Electric Co., Inc. v. Rogge* (1969) 275 Cal.App.2d 893.

In Los Angeles, the defense will likely wait until just before discovery cutoff to attempt to schedule a hearing date for their motion for summary judgment. This will put your case in jeopardy and cause an undue delay in your expected trial date. To counter this, go on the offensive immediately in your case: work up a motion for summary adjudication and/or opposition to motion for summary judgment.

In our recent case, it was our position that the issue of vicarious liability was a question of fact for the jury and was not an issue which the court should consider on motion for summary judgment. For that reason we opted to simply oppose the MSJ rather than file our own MSA. As a strategy to avoid the last minute trial continuance which is becoming the norm, I alerted the judge to my fear at our first

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hearing and it was encouraged that any anticipated motions get filed timely as to avoid this problem down the line.

In our case we were able to successfully beat the MSJ by taking many depositions while being mindful of the criteria used to support a finding of vicarious liability.

In this regard we took the deposition of the Person Most Qualified from the local trucking company ("ABC" trucking) who testified to the following points which we used to defeat the summary judgment:

- ABC had their own drivers and used Staffing Agency on a limited basis as-needed.
- ABC would have to "buy-out" Staffing Agency if they wanted to directly employ a Staffing Agency driver.
- Staffing Agency had the right to come in and inspect ABC place of business and ABC paperwork.
- ABC never trained the driver.
- The driver was never given any ABC employee guide/paperwork.
- The driver was not under ABC drug policy.
- ABC did not monitor hours of service and rest breaks.
- ABC's role was limited to providing bills of lading.

We took many depositions of the various managers, dispatchers, and executives from the Staffing Agency and established the following helpful evidence:

- Staffing Agency paid the driver as a W2 employee.
- Staffing Agency provided the driver with health benefits, workers' comp benefits, dental, vision and 401k.
- Staffing Agency had the power to assign the driver to any of its customers at any time.
- Staffing Agency had the right to discipline and terminate the driver at any time.
- Staffing Agency assigned the driver to drive trucks for approx. 10 different companies from July 2012 to Oct. 2014.
- Staffing Agency provided the driver with the agency's Employee Guide, which includes its policies that he was required to follow.
- Staffing Agency determined the appropriate dress/attire for each employee assignment.
- The driver was required to call Staffing Agency to cancel an assignment or call in sick.
- Staffing Agency required drivers to take meal and rest breaks, and the agency was solely responsible for monitoring compliance.
- Staffing Agency provided its employees a phone number that provides 24 hr/day access to Staffing Agency staff.
- Staffing Agency provided ongoing safety training to drivers.
- Staffing Agency monitored DMV records of its drivers and maintained DMV driver files.
- Staffing Agency enrolled drivers in mandatory drug and alcohol testing, and monitored compliance.
- Staffing Agency has the right to "shut down" any driver for "reasonable suspicion" and pull them off the road.
- Staffing Agency supervised driver safety and provided driver counseling.
- Staffing Agency disciplined drivers for safety issues.
- Staffing Agency limited the kinds of trucks a specific driver could operate.
- Staffing Agency required their temps to call them immediately in case of an accident.

Documentary evidence

In terms of documentary evidence used to beat a summary judgment motion, it is often the staffing agency that provides its employees with manuals, and PowerPoint™ presentations regarding safe driving practices. In our case we obtained more than 20 PowerPoints™ showing the perspective of a recent case which can be applied in not only trucking accidents, but a wide variety of commercial and industrial settings from the "Safety Director" that were all about safe-driving practices.

We argued that this was evidence of controlling the details of the job; i.e., how to make a right turn, how to scan the roadway, how to enter a freeway safely. Even if the trucking company has their own policies and periodic training of the temp employee it does not matter for purposes of summary judgment because it is not exclusive in the sense that the staffing agency provides their own ongoing oversight and training.

Conclusion

The special employment defense is becoming ever more prevalent in the trucking industry given the rise of staffing agency employment. Establishing vicarious responsibility of the staffing agency is often an uphill battle but a viable option in many cases that can provide a source of recovery for your clients. For any briefing on this topic please feel free to contact the author.

Spencer Lucas is a trial lawyer at Panish Shea & Boyle *and specializes in litigating catastrophic personal injury, products liability and wrongful death cases. He has received numerous recognitions for his work including being named as CAALA Trial Lawyer of the Year Finalist (2014) and CAOC Trial Laywer of the Year Finalist (2011). Mr. Lucas is from Seattle originally and graduated from the University of Washington with a degree in Business Administration. He graduated from Pepperdine University School of Law and has been practicing since 2004. He has been a board member of* the Los Angeles Trial Lawyers Charities (LATLC) *since 2012.*