



## EMPLOYMENT OF UNDOCUMENTED WORKERS BY SUBCONTRACTORS: EVALUATING GENERAL CONTRACTOR WORKERS' COMPENSATION POTENTIAL LIABILITY

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The construction industry is built on a series of complicated relationships with detailed contracts touching upon many responsibilities. A general contractor wins a bid and then often hires subcontractors to perform the actual work. Subcontractors commonly hire second- and third-level subcontractors to provide the services discussed in the agreement. Subcontractors often sign a contract certifying they have workers' compensation insurance and will only hire legal workers for the job. In practice, however, the subcontractor sometimes fails to obtain proper workers' compensation insurance entirely or hires undocumented workers.

When an undocumented worker becomes injured, attempted arguments to avoid liability often include that the worker was not an employee or that the subcontractor simply does not have a worker's compensation policy. In many states, however, although an uninsured subcontractor may be subject to fines and/or penalties, the workers' compensation board will go "up the chain" through each level of subcontractor to the general contractor to find a properly insured entity to hold liable for the claim. That can expose general contractors and higher-level subcontractors to significant risk in any project where there is concern regarding the insurance status of a subcontractor or legal status of one of their employees.

### IMMIGRATION REFORM AND CONTROL ACT OF 1986

One of the first considerations for contractors should be the Immigration Reform

and Control Act of 1986 (IRCA). In this statute, the federal government wields the power to impose serious civil fines and potential criminal penalties on employers who hire or continue to employ undocumented workers. Civil penalties range from a minimum of \$250 for a first offense and up to \$10,000 for repeat offenders with criminal penalties potentially including a \$3,000 fine and up to six months of imprisonment.

### WHICH STATES' WORKERS' COMPENSATION LAWS COVER UNDOCUMENTED WORKERS?

Notwithstanding IRCA's prohibition on the employment of undocumented workers, most states have adopted statutes which expressly or implicitly include undocumented workers as employees entitled to workers' compensation coverage. Often, these states have case law concluding that IRCA does not prohibit a state from exercising its power to protect its workers, including Connecticut's decision in *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396 (1998).

States that expressly include undocumented workers as entitled to coverage by way of statute or existing case law which explicitly or implicitly suggests that these workers will be able to obtain benefits include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode

Island, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. In many of these states benefits may be suspended if the reason the worker cannot return to work is due solely to his or her illegal status.

A handful of other states also provide partial benefits, require an analysis of whether the employee is part of a class of workers expressly excluded from definition as employees, or do not explicitly address undocumented workers' entitlement to workers' compensation benefits in statutory or case law. These include Indiana, Maine, New Hampshire, North Dakota, South Dakota, Vermont, Washington, and West Virginia.

Finally, a small minority of states have statutes excluding undocumented workers from entitlement to workers' compensation benefits. This includes Alabama, Idaho, and Wyoming.

### IN WHICH STATES ARE PARTIES LIABLE FOR UNINSURED SUBCONTRACTORS?

A significant concern in claims where a subcontractor is, knowingly or unknowingly, using undocumented workers is whether that subcontractor has also obtained proper workers' compensation coverage. Putting to one side the issue of whether your state requires you to have workers' compensation coverage, a majority of states may impose liability on a general contractor or higher-level subcontractor when an uninsured subcontractor's worker is injured. In many of these states, the Court may analyze the relationship of the parties (and the similarity of the work to be per-

formed by each entity) in order to determine whether the injured worker will be a “statutory” or “dual” employee of multiple contractors on site. These states include Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

Some states, however, merely require a general contractor to maintain valid proof of insurance received from its subcontractor. These include Delaware, Indiana, North Carolina, and Rhode Island. Similarly, Oklahoma will find that a general contractor is not liable where the contractor relies in good faith on evidence of proper coverage.

A handful of states do not require a general contractor to obtain a workers’ compensation policy in the stead of an uninsured subcontractor. This includes Iowa and, based on implicit findings in case law, Washington.

Finally, two states have little instructive statutory or case law on this topic, including Alabama and Wyoming.

#### OTHER CONCERNS OR DEFENSES

Although beyond the scope of this article, a few other concerns in claims by undocumented workers employed by uninsured subcontractors are worth additional consideration.

First, a common attempted defense is that the worker is an “independent contractor” and therefore not within the definition of an “employee” for workers’ compensation purposes. However, it should be noted that states generally have their own tests for determining whether a worker constitutes an independent contractor, and individual state law should be consulted before attempting to raise this argument. For instance, New York’s Fair Play Act, which took effect in 2010, makes it difficult to obtain a finding of an independent contractor relationship, regardless of the existence of any purported independent contractor agreement. In short, the contractor who relies solely on agreement with a worker (undocumented or otherwise) does so at its own risk without a thorough understanding of its jurisdiction’s law on this issue.

A second major concern is potential civil and penalties for being uninsured. Although a contractor may hope to avoid direct liability in a workers’ compensation

proceeding by pleading a lack of workers’ compensation coverage and citing to a subcontractor’s responsibility to obtain coverage, this often is not a valid defense. For instance, California’s Labor Code provides generally that a failure to secure workers’ compensation coverage can result in a misdemeanor conviction along with a fine of \$10,000 or more. Further, states which have an Uninsured Employers Fund, such as Pennsylvania, often provide that where the Uninsured Employers Fund is found liable for the claim due to a lack of coverage on the part of all parties, that fund may seek reimbursement from the parties who failed to secure coverage.

A third concern arises in states which do not expressly provide immunity from third-party suits to insured contractors who are found liable for an uninsured subcontractor’s claims. For instance, in Illinois, even where a general contractor secures its own workers’ compensation insurance and is found liable in the place of an uninsured subcontractor, that general contractor does not obtain immunity from a third-party action.

#### WHAT SHOULD YOU DO?

Considering all this risk facing contractors and higher-level subcontractors, the question becomes: What can you do to protect yourself?

- (1) **Obtain coverage for your company.** Whether you are a general contractor or subcontractor delegating construction tasks, work with your agent to obtain your own insurance coverage and ensure that you are in compliance with your state’s workers’ compensation law.
- (2) **Do your due diligence and know who you are subcontracting with.** Some states, such as Florida, have electronic databases which reflect whether stop-work orders have been issued as a result of a failure to secure coverage. Other available databases, such as the Georgia State Board of Workers’ Compensation website, may allow you to search online for the current coverage status of a potential subcontractor and may even show you the subcontractor’s insurance company and policy number.
- (3) **Obtain a written subcontract.** Do not let a subcontractor onto your site until you have a signed subcontract agreement in place. To maximize the chances that your subcontractor is properly insured, that you retain any contractual right to indemnification, and that you are not running afoul of IRCA, ensure that the

subcontract agreement requires the subcontractor to obtain valid workers’ compensation insurance, provide you with a certificate of insurance, and confirm that they will have all the necessary paperwork demonstrating a legal employment relationship with their employees.

- (4) **Follow up on certificates.** Crucially, and in an often overlooked step, follow up on insurance certificates. Although a certificate of insurance may be issued, that document alone is often not conclusive evidence that there is a proper workers’ compensation policy issued in full compliance with the jurisdictional requirements of your state.

Although no one answer will fit every jurisdiction, working with counsel to understand your risk and available defenses, and engaging in proactive strategies like those noted above, will help to reduce your potential liability.



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