

The Legal Intelligencer

Pennsylvania's Statutory Employer Defense: A Primer
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General construction contractors in Pennsylvania have a unique defense against tort claims brought by workers who claim they were injured while on the job.

Most employers are already aware that the Pennsylvania Worker's Compensation Act provides the exclusive remedy against them for an employee's tort claims arising out of work-related injuries. Under the act, an employer is liable to pay benefits to employees injured on the job, regardless of fault. In return, the employer is protected from common law tort liability for those work-related injuries.

This act also provides the basis for a lesser-known method of defending against an employee's claims for injuries sustained at work. As most practitioners are aware, Section 302(b) of the act imposes "primary responsibility" upon general contractors for the payment of benefits to the employees of a subcontractor. In Pennsylvania, however, the provisions of the act are not just applicable to an employer and its direct employee. The statutory employer doctrine also provides immunity from tort liability to an employer in connection with a subcontractor's employee, or any other worker considered to be a "statutory employee."

In essence, the Pennsylvania statutory employer doctrine allows general contractors to stand in the shoes of the injured party's employer and grants to those contractors absolute immunity from common law claims brought as a result of injuries sustained by an employee of their subcontractor.

The additional immunity conferred upon employers by the statutory employer doctrine arises out of Section 203 of the act, which specifies:

"Any employer who permits the entry upon the premises occupied by him or under his control of a laborer or an assistant hired by employee or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employee or contractor shall be liable for the payment of such compensation to such laborer or assistant unless such hiring employee or contractor, if primarily liable for the payment of compensation, has secured the payment thereof as provided for in this act. Any employer or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from another person if the latter is primarily liable therefore."

Arguments for statutory employer immunity are most often found in the construction industry, when a general contractor is hired by a building owner to perform work, and that general contractor hires a subcontractor, who in turn hires its own employees.

The statutory employer doctrine, and its broad grant of immunity, is narrowly construed by courts in Pennsylvania. In order to overcome this hurdle, attorneys must defeat the notion

articulated by some that the statutory employer doctrine is not only bad policy, but also contrary to "basic tenets of American law."

Despite its embattled history, the statutory employer doctrine is deeply rooted in Pennsylvania jurisprudence. In its first comprehensive discussion of the statutory employer doctrine, the Pennsylvania Supreme Court held in 1930's *McDonald v. Levinson Steel Co.* that in order to qualify for immunity from tort liability under the act, a general contractor must first clearly establish the existence of the following five elements:

- It is under contract with an owner or one in the position of an owner;
- It occupies or controls the premises;
- It made a subcontract(s) with another entity;
- Part of its regular business was entrusted to such subcontractor(s); and
- The injured party was an employee of the subcontractor(s).

A party seeking application of the statutory employer doctrine must prove each of the elements set forth above; attempts to apply the doctrine will be highly scrutinized by the court, as seen in 2002's *Peck v. Del. County Bd. of Prison Inspectors*. Due to the fact-specific nature of the inquiry, there has been much litigation in Pennsylvania with regard to the exact definitions of those terms and the proof required to confer immunity status.

Contract Between Employer and Owner

The term "employer" as used in the first element of the statutory employer requirement is considered by Pennsylvania courts to be synonymous with that of a general contractor, according to *Fonner v. Shandon Inc.* An employer may satisfy this element of the statutory employer test by providing evidence of a written building contract between it and the owner of the building or jobsite where the work is performed.

Under the statute however, the test does not hinge on the ownership of the jobsite. The general contractor need not show it contracted with the actual owner of the building or jobsite, as long as it contracted with an entity in the position of an owner. For example, this element of the statutory employer test can be satisfied if the general contractor entered into a renovation contract with an authorized lessee of the building, as seen in *Pozza v. U.S.*

Premises Occupied

The statutory employer doctrine does not require an employer to both occupy and control the jobsite in question in order to qualify for tort immunity. A general contractor can satisfy this element of the statutory employer doctrine with evidence that it either occupied the jobsite or was in control of the jobsite, according to *Emery v. Leavesly McCollum and John Rich Co. Inc.*

First, according to *Kelly v. Thackray Crane Rental Inc.*, a general contractor may establish it effectively "occupied" the premises when its supervisor was present at the site on a daily basis and when its employees were regularly present on the premises at the same time as the subcontractor's employees. The general contractor may similarly satisfy this element by showing it maintained and utilized an office, trailer or similar location on the jobsite for the duration of the project.

Second, a general contractor is not required to establish it provided day-to-day, detailed instructions to its subcontractors or their employees regarding how to do their jobs in order to maintain "control" of the site. Nor is it necessary for a general contractor to show it had exclusive control of the project or worksite.

An entity seeking the protections of the statutory employer doctrine must be able, however, to show more than just the mere right to control the premises, according to *Al-Ameen v. Atlantic Roofing Corp.* An employer can satisfy the "control" element of the statutory employer with evidence of an on-site superintendent who coordinated the work of the various subcontractors, who was responsible for overseeing the entire project, and had responsibility and authority to direct, manage or operate the construction project where the injury occurred, as per *Emery*.

Subcontracts

A general contractor seeking immunity under the statutory employer doctrine must also show it had sufficient vertical contractual privity under Pennsylvania law.

A party attempting to meet this element of the doctrine often does so with evidence of a written subcontract between the general contractor and the subcontractor. However, Pennsylvania courts do not require proof of an immediate contractual relationship as a prerequisite for statutory employer immunity, according to *Lascio v. Belcher Roofing Corp.* Instead, courts will find that an employer has met its burden with evidence of a vertical "chain" of contracts. For example, courts have found the requisite subcontract when a property owner contracted with a general contractor, and that general contractor in turn contracted with a subcontractor, who then contracted with another sub-subcontractor.

Moreover, a contractor need not be the general contractor on a construction project to qualify as a statutory employer with respect to its own subcontractor's employees, as long as it can provide evidence to support a vertical chain of contracts, according to *McCarthy v. Dan Lepore & Sons Co. Inc.*

First, the contractor seeking immunity must be under contract with the owner of the premises or with another contractor who is in the position of the owner. Second, the contractor seeking immunity must be in sole or common control of the job premises with a general contractor. Third, the contractor seeking immunity must subcontract a part of its regular business to the subcontractor whose employee suffers an injury.

Business Entrusted to Subcontractor

A general contractor can satisfy element four of the statutory employer test with a showing that the subcontracted work was an obligation assumed by the general contractor as part of its contract with the owner, or one in the position of the owner, according to *McCarthy v. Dan Lepore & Sons Co. Inc.*

The general contractor is not required to establish that the specific activities performed by the subcontractor were exactly the same as the activities performed by the general contractor as part of its day-to-day regular business. To the contrary, courts in Pennsylvania have recognized that

general construction contractors will, as part of their regular course of business, subcontract various portions of its contractual obligations to a qualified subcontractor.

Subcontractor Employees

Finally, in order to enjoy immunity status under the statutory employer doctrine, a general contractor must show that the injured party was an employee of the subcontractor, per McDonald. If, for example, the injured party was an independent contractor or a temporary worker, the statutory employer doctrine will not apply, and the general contractor can be held liable if that individual is injured.

Despite its criticisms, the statutory employer doctrine remains alive and well in Pennsylvania as an important defense for employers in the construction industry.

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