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UNLICENSED CONTRACTORS AND THEIR WORKERS – AN EXCEPTION TO THE EXCLUSIVE-REMEDY RULE. A LOOK AT HOW IT APPLIES TO BOTH BUSINESSES AND HOMEOWNERS

When we hear that an injury has taken place at a worksite, we often tend to assume that the case will be limited to workers' compensation remedies. California law, however, provides very specific exceptions and presumptions for when an unlicensed contractor, or someone who works for an unlicensed contractor, is injured on the job. Depending on the facts, your clients may be able to bring a direct civil action against their employer. This article outlines the legal analysis that can be used to determine if (1) an unlicensed contractor, or (2) a worker of an unlicensed contractor, may bring a civil suit for an injury that occurred at a business or residence.

Under Labor Code § 2750.5 an unlicensed contractor or worker may be considered a "statutory" employee

The first question to ask when analyzing a potential case dealing with a work-related injury is, "Did the job that the potential client was doing at the time of injury require a license and was the potential client licensed?" Alternatively, "Was my client working for someone who was required to have a license?" California labor laws encourage hiring licensed contractors for specific types of work. Chapter 9 (commencing with section 7000) of Division 3 of the Business and Professions Code outlines circumstances and jobs that require a license. The law disfavors businesses who hire unlicensed contractors and creates significant penalties for those who do. Specifically,

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Labor Code section 2750.5 creates a rebuttable presumption that an unlicensed independent contractor is an employee when: (1) s/he is hired to perform services for which a license is required; or (2) s/he is performing services for a person who is required to have a license and does not have one. Notably, Labor Code section 2750.5 applies to tort cases as well as workers' compensation. (*Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 797-798.) When broken down, this code requires a three-part analysis.

1. Did the work that your client was doing at the time of the subject incident require a license under the Business and Professions Code?

First, determine whether the work that your client was performing required either: (1) him or her to have a valid license, or (2) the hirer to have a license. Chapter 9 (commencing with section 7000) of Division 3 of the Business and Professions Code outlines many circumstances that require a license. The most common circumstance that requires a license is when a worker is hired for a job and the aggregate contract price of the labor, materials, and all other items, is more than five hundred dollars ($500). For such jobs the worker must hold a valid license with the Contractors State Licensing Board.

2. Is your plaintiff an unlicensed contractor or working for one?

Here, simply ask your client whether s/he holds a valid license with the Contractors State Licensing Board. If your client states that s/he does not have a license, you must additionally ask your client whether s/he held him or herself out to be licensed. If your client did hold him or herself out to be licensed, these codes will not apply. Alternatively, if your client was working for an unlicensed contractor, you will need to ask the same questions regarding the unlicensed contractor.

Practical Tip: You can check whether a person or contractor is licensed at https://www.cslb.ca.gov/OnlineServices/CheckLicenseII/CheckLicense.aspx

If the answers to the questions above are yes, meaning the work your client was hired to perform required a license, your client is unlicensed (or your client was working for an unlicensed contractor), and your client did not hold themselves out to be licensed, then your client is considered a statutory "employee" rather than an independent contractor under Labor Code section 2750.5. Accordingly, their "employer" must provide workers' compensation benefits.

Note: *The only way this presumption can be rebutted is if the defendant can show your plaintiff was in fact licensed at the time when the work was being performed.*

3. Did the defendant secure workers' compensation insurance for the "employee"?

After determining whether your client qualifies as a statutory "employee," the next phase of the analysis includes determining whether the defendant employer had workers' compensation insurance for the "employee" at the time of injury. Under California law the consequences for hiring an unlicensed contractor become even more severe when a defendant hires an unlicensed contractor *and* fails to secure workers' compensation insurance.

Ordinarily, when an employee sustains a worksite injury, his or her remedy against his or her employer is exclusively governed by workers' compensation law. Workers' compensation law grants employers immunity from lawsuits for damages. (Lab. Code, §§ 3600, 3601, 3602, subd. (a).) However under Labor Code section 3706, when an employee is injured during the course and scope of their employment and the employer has failed to secure workers' compensation coverage at the time of the injury, the employer *may be sued in tort and the injured employee may bring a civil suit against his or her employer.*

Practical Tip: You can check whether an employer has secured worker's compensation coverage at https://www.caworkcompcoverage.com/Search.aspx

It is also important to note that when an employer has failed to secure workers' compensation insurance, the employee is not limited to filing in civil court; rather, the employee may bring both a claim before the Workers' Compensation Appeals Board and also decide to pursue the employer in civil court under Labor Code section 3715, subdivision (a). Labor Code section 3715, subdivision (a) states:

> (a) Any employee, except an employee as defined in subdivision (d) of Section 3351, whose employer has failed to secure the payment of compensation as required by this division, or his or her dependents in case death has ensued, may, in addition to proceeding against his or her employer by civil action in the courts as provided in Section 3706, file his or her application with the appeals board for compensation and the appeals board shall hear and determine the application for compensation…..

This means the plaintiff can present a claim to the Uninsured Employers Benefit Trust Fund (UEBTF) for workers' compensation benefits and pursue a civil action. Practically speaking, most plaintiffs just pursue the civil action since recovery through the UEBTF is minimal.

The defendant employer is presumed negligent and is barred from asserting many common defenses

In addition, under Labor Code section 3708, there is a presumption of negligence against an uninsured employer. The burden then falls on the employer to rebut this presumption. Furthermore, Labor Code section 3708 prohibits an uninsured employer from using many common affirmative defenses, including, but not limited to contributory negligence, assumption of risk, or claiming that the injury resulted from the negligence of a co-worker. Labor Code section 3708 states:

> In such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of

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the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. No contract or regulation shall restore to the employer any of the foregoing defenses.

This section shall not apply to any employer of an employee, as defined in subdivision (d) of *Section 3351*, with respect to such employee, but shall apply to employers of employees described in subdivision (b) of Section 3715, with respect to such employees.

(Discussed below - applicability of California Labor Code § 3708's negligence presumption to residence workers.)

The plaintiff is entitled to attorney's fees if they prevail at trial

Lastly, Labor Code section 3709 provides for an award of attorney's fees to a prevailing employee in a civil action against an uninsured employer.

Summary

In short, when pairing the law together, the following rule may be drawn:

IF:

(1) your client was an unlicensed contractor (or was working for one),
(2) didn't hold themselves out as being a licensed contractor,
(3) was performing a job for which a license was required, and
(4) their employer failed to secure worker's compensation insurance.

THEN:

(1) you can maintain an action in tort,
(2) the defendant will be presumed negligent,
(3) the defendant will be barred from using many common affirmative defenses, and
(4) your client will be entitled to attorneys' fees.

This legal analysis is nuanced, but when taken step by step it is not complex. To maximize value on these types of cases, it is important to outline the law clearly in your demand letter and/or mediation brief. If done properly, the benefits to your case can be tremendous.

Case example

In a recent case our firm handled, our client was an unlicensed worker hired by the defendant property owner to fix an electrical conduit on the roof. While on the roof, our client fell through the skylight and suffered severe and catastrophic injuries. The property owner had failed to secure workers' compensation insurance. Outlining the legal authority clearly for the defense and mediator proved crucial in getting the case resolved, specifically why the defendant's "defenses" would fail at summary judgment. Additionally, the presumptions under Labor Code section 3708 worked to our advantage and prevented the defense from pointing the finger at our client for climbing up onto the roof and failing to take precautions while working on the skylight.

Plaintiffs can still recover even if they were never "hired"

One of the key issues in our client's case was that defendant tried to claim our client was never hired, instead he was only on the property to give an estimate at the time of the subject incident. The defense tried to claim since our client was only there to give an estimate, he was never "hired" within the meaning of Labor Code section 2750.5. However, Business and Professions Code section 7026 requires contractors to be licensed when a "person undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid…" Therefore, regardless of whether our client was on the property to do the work or give an estimate at the time of the injury, he was still required to be licensed under the code.

What about when a homeowner hires an unlicensed contractor?

The above Labor Code section usually applies when general contractors or business owners hire unlicensed contractors. The question remains: Do the same principles apply when a homeowner hires an unlicensed contractor to perform work and they are injured? Can the injured worker sue in tort under Labor Code section 2750.5? The case law is unsettled, but California courts have seemed to imply that the answer is yes. In fact, it appears both the homeowner and the unlicensed contractor can be jointly liable in tort for an injury to an unlicensed contractor's worker.

Vebr v. Culp (2015) 241 Cal.App.4th 1044, 1051

In *Vebr v. Culp* (2015) 241 Cal.App.4th 1044, 1051, the defendant homeowners (Culps) hired a painting contractor (OC Wide) for a painting project in their home. OC Wide contracted a painter (plaintiff Vebr) to complete the work. Plaintiff Vebr was unlicensed and the painting contractor was also unlicensed and was uninsured. Plaintiff Vebr was injured when he fell off a ladder while working in the Culps' residence. Plaintiff Vebr sought to establish the Culps as his statutory employer under Labor Code section 2750.5 in order to seek worker's compensation benefits through the Culps' homeowners' insurance policy. Plaintiff Vebr also argued that because he was the Culps' statutory "employee" under Labor Code section 2750.5, the Labor Code section 3708 presumption of negligence also applied to him. Lastly, Plaintiff Vebr brought a general negligence and premises-liability suit alleging employees for OC Wide Painting negligently secured the ladder which was unsuitable for the job. Vebr argued that since OC Wide was unlicensed and uninsured, the Culps should be liable for the negligence of their "employee," OC Wide, and its workers.

Note: *Labor Code section 2750.5 applies to both workers' compensation and tort cases. Vebr presents a perfect example of a plaintiff using the code in both circumstances. One, as a way for an "employee" to get worker's compensation benefits through homeowners' or general liability insurance – Vebr being the Culps' employee and seeking worker's compensation benefits through*

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Culps' homeowner's insurance. Second, as a way for an "employee" to establish vicarious liability through tort – Culps being vicarious liable for the tort, negligently securing the ladder, of their statutory "employee," OC Wide.

The *Vebr* court noted that the "Culps were *potentially* liable in tort to Vebr for their own direct negligence and also as Vebr's employer, within the meaning of Labor Code section 2750.5." However, ultimately, the Court held that the Culps were *not* the statutory employer of Vebr "because he was employed less than 52 hours in the 90 calendar days prior to the injury" and therefore was excluded from workers' compensation coverage under Labor Code section 3352, subdivision (h) (discussed below.)

The *Vebr* court also ruled that the advantageous presumptions of negligence and contributory fault under Labor Code section 3708 generally do not apply to residence workers. The court examined section 3708's exception for "any employer of an employee, as defined in subdivision (d) of Labor Code section 3351." The court noted that Labor Code section 3351, subdivision (d)'s definition of employee includes persons "who are hired to make repairs on a residence," and that carpenters, plumbers, and house painters fall within this category. The *Vebr* court concluded that the injured worker, a painter, fell within the description of the class of employees expressly excluded from Labor Code section 3708, and thus, the presumption did not apply. Therefore, the presumption under Labor Code section 3708 has been interpreted by the courts to be inapplicable to injured workers classified as "employees" who were hired by homeowners to make repairs on a residence. (*Vebr v. Culp* (2015) 241 Cal.App.4th 1044, 1056-1057.)

Lastly, in *Vebr* the plaintiff had also brought general negligence and premises-liability claims against the Culps under the theory of vicarious liability, specifically for the tortious conduct of their employee, OC Wide. The *Vebr* court assumed, without deciding, that because the Culps had hired OC Wide, the Culps could be vicariously liable under respondeat superior for OCs Wide's negligence. The *Vebr* Court ultimately declined to rule on the issue because undisputed facts determined the cause of Vebr's fall to be a mystery and there was no evidence of negligence against OC Wide.

Jones v. Sorenson, 25 Cal.App.5th 933

Just a few years after *Vebr,* the Court of Appeal seemed to finally settle the issue and extended Labor Code section 2750.5 to homeowners. (It should be noted, however, that the legislature has yet to amend Labor Code section 2750.5 to include homeowners). *Jones* involved a homeowner who hired an unlicensed contractor gardener to trim a tree over 15 feet tall on his property. The contractor gardener then hired a worker to help assist with the tree-trimming. The worker fell from a ladder while trimming the tree and brought a personal injury action against the homeowner under the theory of "respondeat superior." At issue before the court was whether the worker was required to have a specialty license when trimming trees over 15 feet tall as it would then trigger Labor Code section 2750.5. The court decided that a gardener must have a specialty license when trimming trees over 15 feet. On a broader level however, the decision was significant because the court noted that a homeowner who hires an unlicensed contractor is the "employer" of the contractor and their workers for tort purposes. As such, this can result in vicarious or respondeat superior liability for torts committed by such a contractor's workers under Labor Code section 2750.5.

Other considerations for residence workers

One other exception to be wary of when it comes to an unlicensed residence worker is Labor Code section 3352, subdivision (a)(8), which states:

> (a) "Employee," excludes the following:
> (8) A person described in subdivision (d) of Section 3351 whose employment by the employer to be held liable, during the 90 calendar days immediately preceding the date of injury, for injuries as described in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury, for diseases or injuries as described in Section 5412, comes within either of the following descriptions:
> (A) The employment was, or was contracted to be, for less than 52 hours.
> (B) The employment was, or was contracted to be, for wages of not more than one hundred dollars ($100).

Essentially, when a worker works fewer than 52 hours or earns less than $100 in the 90 days before the injury, the worker may be deemed a statutory employee for tort purposes only, but will not be eligible for workers' compensation benefits under the homeowner's insurance or general liability policy.

The seminal case on this matter is *Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72, 77. In *Mendoza*, a homeowner hired his neighbor Ernesto Mendoza, an unlicensed roofer, to replace the roof of his house. On his first day on the job, Mendoza fell from the roof, broke his leg and suffered other injuries. Mendoza sued the homeowner, seeking compensation for his injuries.

The Court of Appeal concluded that Mendoza was not able to recover workers' compensation benefits from the homeowner's workers' compensation insurance because he had not reached the 52-hour or $100 threshold under Labor Code section 3352. However, the Court of Appeal held that the homeowner could still be civilly liable since Mendoza was a statutory employee under Labor Code section 2750.5 and his employer owed him a duty of care. Therefore even if a homeowner's workers' compensation coverage is inapplicable, the homeowner can still be subjected to liability if there is evidence of the homeowner's negligence.

Similarly, in *Zaragoza v. Ibarra*, (2009) 174 Cal.App.4th 1012, 1014, an employee of an unlicensed contractor was working for a homeowner when the employee fell from an extension ladder after trying to pry out a nail. The court

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held that since the worker had worked fewer than 52 hours in the 90 days prior to the accident, any claim the worker had against the homeowner for the injury was outside the workers' compensation system. Instead, the worker could *only* sustain an action of ordinary negligence against the homeowner. The court cited to *Mendoza* and noted that in such cases the injured person must only prove the homeowner's negligence (e.g., providing an unsafe workplace causing injury).

Practical considerations and insurance coverage

In the initial stages of the case, it would be wise to request a copy of any applicable insurance policy through a request for production, including any homeowner's insurance or any general liability insurance. Many of these policies have a provision for workers' compensation benefits. Therefore, if your client is deemed a statutory "employee" of the homeowner and has worked more than 52 hours in the 90 days prior to the injury, they should be able to seek workers' compensation benefits through the general liability or homeowner's insurance policy if the policy allows for it.

Additionally, if the plaintiff does not meet the requirements for workers' compensation, presumably because they worked fewer than 52 hours in the 90 days prior to the injury, and is left with a simple negligence claim in tort like in *Zaragoza*, then the homeowners/general liability insurance may also apply. Once again, it is imperative to check the policy language to ensure there are no applicable exclusions. Unfortunately, if the homeowner does not have applicable insurance, the homeowner would have to pay out of pocket for any judgment.

Summary for residential workers

There are two scenarios in which you can maintain a tort action.

Scenario one:

IF:
(1) your client was hired by a homeowner,
(2) didn't hold themselves out as being a licensed contractor,
(3) was performing a job for which a license was required, and (4) worked fewer than 52 hours in the 90 days prior to the date of the injury *or* was paid, or was contracted to be paid, less than $100.

THEN:
(1) your client can maintain an action in tort,
(2) your client will be considered a statutory employee of the homeowner,
(3) and therefore as your client's "employer," the homeowner, owes your client a duty of care.

Note: In this kind of a case, you would need evidence of the homeowner's negligence to show they breached their duty.

Scenario two:

IF:
(1) your client was hired by an unlicensed contractor,
(2) didn't hold themselves out as being a licensed contractor,
(3) was performing a job for which a license was required, and
(4) worked fewer than 52 hours in the 90 days prior to the date of the injury *or* was paid, or was contracted to be paid, less than $100

THEN:
(1) your client can maintain an action in tort,
(2) your client will be considered a statutory employee of the unlicensed contractor,
(3) the unlicensed contractor will be considered the statutory employee of the homeowner,
(4) and therefore the homeowner is liable for the negligence of their "employee" (the unlicensed contractor).

Note: In this kind of a case, you would need evidence of the unlicensed contractor's negligence.

ALTERNATIVELY, IF:
(1) your client was hired by a homeowner,
(2) didn't hold themselves out as being a licensed contractor,
(3) was performing a job for which a license was required, and (4) worked *more* than 52 hours in the 90 days prior to the date of the injury *or* was paid, or was contracted to be paid, less than $100.

THEN:
(1) your client will have a workers' compensation claim,
(2) and can pursue the workers' compensation benefits through the homeowners' insurance policy.

Our office has made a flow chart for this law and how it applies to both residential and non-residential workers. Feel free to email either one of us at lucas@psblaw.com or khedry@psblaw.com. We are happy to provide you a copy.

Pursuing a worker's compensation claim through UEBTF and civil liability when it comes to residential workers

In the same way non-residential workers can pursue a civil action and a claim through the UEBTF, the same benefits also apply to residential workers, however very specific requirements need to be met. Labor Code § 3715(b) states:

> any person described in subdivision (d) of Section 3351 who is (1) engaged in household domestic service who is employed by one employer for over 52 hours per week, (2) engaged as a part-time gardener in connection with a private dwelling, if the number of hours devoted to the gardening work for any individual regularly exceeds 44 hours per month, or (3) engaged in casual employment where the work contemplated is to be completed in not less than 10 working days, without regard to the number of persons employed, and where the total labor cost of the work is not less than one hundred dollars ($100) (which amount shall not include charges other than for personal services), shall be entitled, in addition to proceeding against his or her employer by civil action in the courts as provided in Section 3706, to file his or her application with the appeals board for compensation.

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Again, even if your case has facts that meet one of the above scenarios, practically speaking, most plaintiffs pursue the civil action solely as the claim process may not be worthwhile.

Conclusion

Determining whether these laws and labor codes are applicable to your case can be complex at times, but the best approach is to be methodical. By taking a step-by-step analysis, this complex law becomes much easier to digest whether that is for yourself, the mediator, defense counsel, insurance adjuster, or the judge. Ultimately, if you are unable to explain the law clearly, even extremely favorable laws and presumptions can be of little use.

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