Independent Contractors and COVID-19 Liability Risk

By Paul P. Rooney

Businesses in New York that engage many independent contractors are sitting on a ticking liability time bomb in the form of personal injury claims for COVID-19 exposure. Fortunately, there is time to defuse it.

If employees get sick or injured in the course of their employment, because of COVID-19 or any other reason, they are cared for by the workers' compensation system as part of a grand compromise. Workers' compensation benefits are workers' exclusive remedy for such illnesses and injuries.[1] On the one hand, the workers receive: (a) medical care for the illness from the very first dollar; (b) wage replacement of a portion of their wages; and (c) relief from the burden of having to prove fault on their employer's part and from the defenses of contributory negligence and the fellow servant rule that barred recovery for workplace negligence. On the other hand, in exchange for these benefits, the law limits employees' remedies for their injuries against their employers and the employers' agents. The employees cannot win damages for emotional distress, pain, suffering, or punitive damages.[2] And the dispute is not fought before a jury in court but instead before the workers' compensation judge.

Not one word of what is written above applies to independent contractors.

If independent contractors get sick from COVID-19 in the course of their work, they can sue their principal for negligence in court before a jury of their peers. If the independent contractor can convince five out of six people on a jury that the business was negligent, they can win damages for pain and suffering, emotional distress, and punitive damages. Their health insurers can sue for the medical expenses that they covered starting with the $10,000 per day that it costs to treat an intensive care patient on a ventilator and ending with the rehabilitation services that may be required when they get out of the hospital. If the contractors do not survive the illness, their survivors can sue for wrongful death.

And it gets worse. If, in the eyes of the law, these purported "independent contractors" were "really" the business's "employees," and the business does not have workers' compensation insurance (because it thought it had no employees) then the employees get to choose whether they want the workers' compensation remedy or the remedy of suing the business for personal injury.[3] If they go the workers' compensation route, then the first dollar medical care and wage replacement will come directly out of the business's pocket, possibly for the rest of the "employee's" life. If they sue for personal injury in court, the business cannot raise the defenses of assumption of the risk, contributory negligence, or the fellow servant rule.

Finally, for good measure, the state will come down on the business with fines and penalties.[4]

For at least 10 years state and federal governments have been promising to get tough on "misclassification" of workers as independent contractors. Members of the bar have raised the alarm only to have their warnings (for the most part) ignored by businesses convinced that they will not be the ones pinched for "misclassification" and that the benefits of independent contractor status outweighed the potential liabilities.

COVID-19 completely changes that calculation. It also erases many of the advantages of using even *bona fide* independent contractors in the workplace.

Every independent contractor that walks in the door of a business is a potential multi-million-dollar COVID-19 personal injury claim. They are not worth the risk. In this new era, employers should use, whenever possible, *employees* to accomplish their business objectives.

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Endnotes

1. Section 11 of the New York Workers' Compensation Law provides that "[t]he liability of an employer prescribed by [§ 10 of the Law to pay workers' compensation benefits] shall be exclusive and in place of any other liability whatsoever, to such employee . . ." N.Y. Workers' Comp. Law § 11. Thus, "[t]he Workers' Compensation Law provides the exclusive remedy for an employee who seeks damages for unintentional injuries which he or she incurs in the course of employment." *Pereira v. St. Joseph's Cemetery,* 54 A.D.3d 835, 836, 864 N.Y.S.2d 491, 492 (2d Dep't 2008).
2. Under the Workers' Compensation Law, "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee ... when such employee is injured or killed by the negligence or wrong of another in the same employ." Workers' Compensation Law § 29[6]. "Thus, the Workers' Compensation Law 'offers the only remedy for injuries caused by [a] coemployee's negligence' in the course of employment." *Power v. Frasier*, 131 A.D.3d 461, 462, 15 N.Y.S.3d 382, 384 (2d Dep't 2015) (quoting *Tikhonova v. Ford Motor Co.*, 4 N.Y.3d 621, 624, 797 N.Y.S.2d 799, 830 N.E.2d 1127 (2005)).
3. "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee . . . except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee." N.Y. Workers' Comp. L § 11.
4. See N.Y. Workers' Comp. L. § 52.