New Law Changes Exemption for Safety Companies

On June 5, 2014, Governor Pat Quinn signed SB 3287 into law and it became Public Act 98-633, which is effective immediately. It modifies section 5 of the Illinois Worker's Compensation Act (820 ILCS 305/5) to remove from the Act the limitation of liability for companies that provide safety consulting and other safety services– unless those companies are wholly-owned by the employer, insurer or insurance broker. Despite strong opposition from the business community, the bill hastily passed along party lines in both chambers of the legislature and was swiftly signed by Governor Quinn. The politically potent Illinois Trial Lawyers Association was the principal proponent of the bill.

Illinois business groups, including construction industry associations and, specifically, the Illinois Mechanical & Specialty Contractors Association or IMSCA are concerned about the impact of the new law on insurance rates and workplace safety. Because safety consultants are now exposed to greater liability in the event of a workplace accident, it is predicted that insurance rates for those companies will increase and, therefore, they will charge considerably higher fees for their work. In addition, some of those service companies may now be unable or unwilling to provide consulting services and, therefore, the use of safety consultants by businesses may decline. Smaller companies especially use consulting firms to provide this expertise and to assist in keeping their business compliant with OSHA standards. Some have opined that the new law will especially hurt small employers who typically cannot afford and do not require a full-time safety professional on their staff to address safety issues. There is a concern about what consequences will arise from the unavailability of affordable safety consultants. Still others in the construction industry are concerned with the impact the new law will have on safety seminars and the giving of advice related to safety issues in an educational context.

The Role of Safety Service Companies in the Workers Compensation System

As a general matter, the workers compensation laws in Illinois and elsewhere hold employers liable for work related injuries of their employees without requiring the employee to prove any fault by the employer or its agents. What the employer gets in return for this benefit to its employees is a limitation on the amount it must pay to compensate an injured employee. Section 5 of the Illinois Workers Compensation Law provided that the limitation of liability enjoyed by employers was also extended to safety service companies whom the employer hired. The new law takes that liability limitation away, except if the safety company is owned by the employer, its insurer or broker. Most are not.

SB 3287 was promoted as a means of legislatively overturning an Illinois Appellate Court decision which dismissed third party service and maintenance companies from a negligence lawsuit by an injured employee. In the case of *Mockbee v. Humphrey Manlift Co., Inc.,* 973 N.E.2d 376 (1st Dist. 2012), Brenda Mockbee sued Harris (two related companies) and Humphrey Manlift Company after she was injured in a fall through a floor opening in a manlift platform system at Quaker Oats Company plant in Danville, Illinois, where she worked. There was no guardrail at the floor opening of the manlift. The severe injuries rendered Ms. Mockbee a paraplegic. The workers compensation case reportedly settled for $200,000, not including payment for medical treatment and lost time. Ms. Mockbee sought additional compensation in the Circuit Court for her injuries from Harris and Humphrey, who were responsible for safety inspection and maintenance of the manlift. Ms. Mockbee contended Harris and Humphrey owed her an independent duty of care and breached that duty when their inspections failed to note the need for a safety guardrail required by OSHA.

The Appellate Court agreed with the Circuit Court that Harris and Humphrey were both immune from liability for injuries sustained by *Mockbee* under section 5(a) of the Illinois Workers Compensation Act, as providers of safety services to the employer. The *Mockbee* case held that a safety engineer or inspector stood in the shoes of an

employer when it provided safety services or maintenance and, therefore, it would be entitled to the same limitation of liability as the employer. It is important to note that another recent case involving a paraplegic that went to a jury trial in Illinois resulted in a verdict of $64 million. So, obviously, the limitation of liability in the workers compensation system to a settlement of $200,000 was greatly significant.

Concerns with the New Law

With the new changes to the Workers Compensation Act, concerns have been expressed that there will be a "flood of new lawsuits" or a "cottage industry of new litigation" for all significant injuries in the workplace. Some warn that safety consultants and safety inspectors will likely get sued anytime they have been consulted by an employer prior to a significant injury. Of course, it is unavoidable that some injuries will occur, even if the services provided by safety consultants and inspectors are perfect, and they will not always be perfect. So there will be some suits.

Those who opposed the law pointed out that an exemption for safety companies promoted workplace safety and that Illinois has seen some success in reducing workplace injuries. The Illinois' injury rate is 16% lower than the national median, according to the Illinois Workers' Compensation Commission 2012 Annual Report. The injury rate in Illinois is lower than most states, declining significantly since 2009. The new law likely will make it more expensive for Illinois employers to utilize the services of safety companies. If that occurs, it will result in decreased workplace safety, resulting in more workers' injuries. Many businesses are right to be concerned that the added cost of this change could cripple some small businesses and result in unnecessary and unproductive litigation. Both proponents and opponents of the change to the Act should agree that there will be more litigation against safety consultants and inspectors in the wake of this change to the Workers Compensation Act.

Plaintiffs' lawyers would argue that holding negligent safety service companies responsible for severe injuries to Illinois workers is a worthy goal for our legal system. Arguably, making people and

organizations responsible for their own deficient behavior is a principle with which there can be little disagreement. Further, making service companies responsible for their own carelessness may cause them to perform their duties more carefully, and that will, in turn, result in safer, not less safe, workplaces.

What Can be Done to Minimize Exposure?

To remedy the harmful effects of this change in the law, some companies might want to hire a full or part time safety consultant as an employee rather than an independent contractor. Of course, just calling the consultant an employee will not make him one. It will be necessary to consider the attributes of the relationship between the consultant and the employer to assure it is truly an employment relationship. Another possible outcome is that some safety companies might require indemnification agreements from the companies to which they provide services, obligating the employer to pay any damages incurred by the safety company if it is sued by one of the employer's employees. Unfortunately, for the employer, this will have the same financially disastrous outcome caused by the so called "Kotecki" debacle, which arises when an employer indemnifies third parties against claims by its own employees. In both situations, the employer is contractually sacrificing its liability limitation under the Workers Compensation Act and risking financial ruin in doing so. The loss likely would not be covered under many commercial liability policies purchased by employers.

A Chilling Effect on Safety Training and Education

To the extent that the new law makes it possible to sue providers of safety training and education courses, it has gone too far. The construction industry heavily relies for safety compliance education and training on the Joint Apprentice Training Committees and The Chicago Construction Safety Council and other organizations offering safety training. These not-for-profit groups provide training in such areas as OSHA certifications, first aid, CPR, fall protection, working in confined spaces and more. A trade association conducting a general safety seminar for its member companies to explain how to maintain safety standards and comply with OSHA requirements is a long way

from the fact scenario in the Mockbee case that the new law was intended to address. Safety training and education should be promoted, not curtailed with the threat of liability from lawsuits. The not-for-profit groups are understandably alarmed that they now must be concerned about liability if a seminar attendee has a workplace accident following a training session. The chilling effect of this presumably unintended consequence is a troubling turn that does not promote positive public policy.

One possible remedy to curb the new law's potential overreach would be an amendment to clarify that merely providing safety education services or training seminars would not result in liability beyond the limitations in the Workers Compensation Act. The proponents of SB-3287 presumably did not intend to discourage safety training or education seminars. Further, it would be difficult to argue that a seminar sponsored by a union group or a trade association at its offices should not be encouraged as a means of helping companies and their workers reduce accidents in the workplace. The amendment could be accomplished by adding a phrase to section 5 of the Workers Compensation Act to include among those exempted from liability outside of the Act "… organizations that provide safety training or safety education …." Trial Lawyers, the business community and other interested parties might all find such a modest change acceptable.

Conclusion

In conclusion, the business community is right to be concerned about the elimination of this exemption for safety companies, especially given how quickly it became law without significant deliberative consideration by the legislature. However, it is too early to predict that the change will be financially catastrophic to large numbers of Illinois businesses. The impact of the new law will only be determined after assessing the reaction of Illinois insurers, safety service firms and the courts. Meanwhile, a modest amendment to the law that assures education and training seminars are exempt would be advisable.