



Tipsheet 11 Hired-In Labour

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Contracts for labour hire – what are the insurance issues when using “hired in” workers?

What is “hired in” labour?

Under a labour hire arrangement, the employer known as the “host employer” engages a recruitment or labour hire firm to supply skilled or semi skilled workers on a part time, casual or fixed term basis.

“Hired in” labour is used in many different industries and professions including primary production, manufacturing, mining, cleaning, transport, slaughterhouse and the building/construction industries. The ‘skills’ shortage throughout Australia means it is now being used in “white collar” industries such as banking and financial services, accounting/legal and other professions.

In the current economic environment, “hired in” labour will increase in popularity because it allows an employer to fill casual vacancies or “scale up” or “scale down” their workforce at short notice. Hired in labour is also used as a means for businesses to transition new employees from a temporary to permanent position on a “try before you buy” basis.

Another form of “hired in” labour is where the hirer supplies a person to operate hired equipment. This is referred to in the industry as “wet hire” or in some cases is simply sub-contracting.

Example: Bill Jones owns a forklift contracting business and hires seven forklifts along with seven employees to operate them.

Is a “hired in” worker an employee?

Typicallyⁱ, “hired in” workers are employed by the labour hire firm that supplies their services to the host employer. These “hired in” workers carry out work under the direction, supervision and control of the host employer.

The labour hire firm has responsibility for “hired in” workers (eg vicarious liability for the worker) and legal liability for superannuation, PAYE tax and other employment entitlements, such as annual leave.ⁱⁱ

Example: Marrickville Engineering (ME) is a specialist engineering company with a wage roll of \$2m of which labour hire workers make up \$500k. ME uses labour hire to supplement its existing workforce and to resource certain projects for its clients.

What sort of insurance is required for “hired in” workers?

The labour hire firm should have the following insurance:

- Workers compensation (as required by the law that applies in the state where the employee works)
- Public liability (covering legal liability for personal injury and property damage caused by employees whilst on assignment);
- Professional indemnity (for professional exposure as a recruitment company and for any vicarious liability for the professional activities of their employees (if any)).

A labour hire firm cannot purchase insurance for damage or liability arising

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from use of a vehicle by an employee while on assignment, so invariably the host employer must have insurance for that.

The host employer needs to have other insurance to protect it for its direct liability arising from incidents involving the hired in worker. Because the worker is under the direct supervision and control of the host employer, there can be increased exposure to claims for injury which are not covered by the host employer's workers compensation.

In most cases, the host employer's policy will only cover vicarious liability for the acts or omissions of its own employees. In the overwhelming majority of cases, it is the labour hire company who is the employer of the worker so there is no vicarious liability for the host employer. However there is still exposure for liability where the host employer has contributed to the cause of the liability claim.

The main problems for host employers are the exposure that "hired in" workers bring in the form of:

- third party injury claims (ie where a member of the public or another worker is injured by the "hired in" worker);
- common law claims for compensation arising from injury suffered by the "hired in" worker; or
- a subrogated recovery action by a workers' compensation insurer after paying a workers compensation claim under the labour hire firm's policy.

Example: Under the terms of its labour hire agreement with Excel Labour Ltd, ME is required to have insurance to cover labour hire employees while they work in its business.

ME asks its insurance broker to check to see whether it has appropriate insurance to cover injury claims for "hired in" workers.

ME has a:

- *Public liability policy (eg property damage or personal injury claims); and*
- *Workers compensation; and*

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- *Motor vehicle insurance policies (comprehensive for some vehicles and third party property damage for others).*

The broker identifies a number of areas where the current policies will not cover injury or liability claims involving the "hired in" workers. The broker also reviews the terms of the labour hire agreement to check whether ME has the policies required by the contract and to see whether there are indemnities in the agreement.

Are "hired in" workers covered under liability policies held by a host employer?

When advising clients on the suitability of policies for a labour hire arrangement, brokers need to examine which policies are likely to respond.

A standard public liability policy will not usually insure the "hired in" worker.

For example, the Steadfast General and Products Liability policy covers employer's liability where the claim would not be met by workers compensation. However it includes only those persons deemed to be workers under workers compensation law. This does not extend to "hired in" workersⁱⁱⁱ.

It can be difficult to obtain an extension to a public liability policy to cover "hired in" workers and to have the necessary waivers of subrogation given for other policies (eg host employer's property and workers compensation insurers). However it is possible to purchase insurance that is specifically designed to insure host employer liability.

A motor vehicle policy held by the host employer needs to be extended to drivers who are "hired in" workers to properly protect the host employer from third party claims. In most cases, a labour hire firm will want to know that the host employer's motor vehicle policy covers the "hired in" workers.

Insurance requirements under a labour hire agreement

Some labour hire contracts^{iv} specify who is responsible for purchasing insurance and the types of insurance required. Usually they require the host employer to maintain the following insurance for their business:

- Public liability insurance;
- Professional indemnity (if professional services are provided);
- Motor vehicle; and
- Workers compensation (to the extent necessary by law).

Example: In the hire labour agreement, ME is required to hold comprehensive motor vehicle insurance and insurance to cover public liability arising from the conduct of the workers while engaged by ME.

The broker advises ME that their motor policies will need to be changed to comprehensive insurance and the names of the “hired in” workers will need to be added to the policy as drivers of the vehicles (and updated regularly to take account of changes). ME instructs the broker to make the necessary changes and notify the insurer.

The broker also suggests a specialist host employer liability policy because ME’s workers compensation insurance and public liability insurance will not cover injury suffered by the “hired in” worker nor public liability for property damage or personal injury caused by the “hired in” worker. ME instructs the broker to seek quotes and terms.

“Hired in” workers and proportionate liability

The general rule is that:

- Proportionate liability legislation applies to compensation claims for economic loss or property damage claims^v; and
- Contributory negligence (as determined by statute and the case law) applies to compensation claims for personal injury claims^{vi}.

This means courts will apportion liability between a “hired in” worker, labour hire

firm and a host employer for a property damage or economic loss claim by or involving the “hired-in” worker.

For a personal injury claim, the ‘hired in workers’ contributory negligence will be taken into account but either the host employer or the labour hire firm can be sued for damages. Usually the party sued will bring a recovery action against the other party and the court will make an award for damages against each of them.

If the “hired in” worker is an employee of the labour hire firm and the worker causes loss or damage, the labour hire firm is vicariously liable for the worker’s share.

The labour hire firm should always hold its own insurance to cover their share of any legal liability for a compensation claim.

Until 2006, it was generally accepted that a labour hire firm would be liable for 25% of a third party property damage or personal injury claim and the host employer would be liable for 75%.^{vii}

More recently^{viii} the courts have apportioned the liability differently with as much as 35% to 50% liability for the labour hire firm.

The primary reason for this has been due to the failure of the labour hire firm to appropriately discharge its duty of care to the employee. In one case^{ix} involving a 35% allocation of liability, this was due to a failure of the labour hire firm to:

- Properly instruct their workers and warn them of the risks that they may face when working on site with a host employer; and
- Inspect the workplace and ensure that the host employer provided a proper induction program.^x

In another case^{xi} involving a 50% allocation of liability, this was due to a failure of the labour hire firm to:

- Properly manage ‘return to work’ obligations in consultation with the employee’s general practitioner; and
- Inform the host employer of the employee’s recent injuries.

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Indemnity or 'hold harmless' clauses in labour hire agreements

In some cases^{xii}, labour hire companies will try to pass on liability for accidents involving the "hired in" worker to the host employer under the labour hire agreement.

Host employers should not assume contractual liability for the work performed by a "hired in" worker by agreeing to indemnify the labour hire firm 100% or hold them completely 'harmless'.

Any attempt to transfer legal responsibility for injury or damage claims to another party should be avoided because it triggers a potential 'uninsured loss' for the host employer.

If proportionate liability or contributory negligence applies and the host employer assumes 100% of liability for personal injury, the 'contractual liability' exclusion in the host employer's liability policy will be triggered. The outcome is that the insurer will not pay the labour hire firm's share of any compensation claim (usually somewhere between 25 – 35% of the claim) but it can be as high as 50%) – the host employer's insurer will only pay the host employer's share.

Example^{xiii}: Excel Labour has a clause in its labour hire contract with ME that states "You agree to indemnify us to the full extent of our liability to any party for all damage, loss or injury of whatsoever nature or kind, caused by your negligence or that of one or more of your employees or independent contractors, their servants or agents which may be suffered or incurred whether directly or indirectly in respect of any work performed for or on behalf of you."

This means ME must indemnify Excel for 100% of any damages claim involving its negligence or that of the hired in worker. This is inconsistent with ME's liability at law and will trigger the 'contractual liability' exclusion. ME's broker raises this issue with ME and ME have asked the broker to assist in negotiating to have this indemnity clause amended to take

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account of proportionate liability and contributory negligence principles.

Both labour hire firms and host employers must focus on risk management as this is the best way to mitigate claims.

The labour hire company should properly brief its workers, conduct workplace inspections and work cooperatively with the host employer to educate and inform "hired in" workers about workplace safety procedures.

Host employers need to treat "hired in" workers the same way they treat their own employees in this regard.

For more assistance, contact your broker.

ⁱ The exception is independent contractors. In rare cases, (eg a "hired in" worker who is an independent contractor to the labour hire firm) depending on the amount of "control" the host employer has over the worker, the "hired in" worker can be deemed to be an employee of the host employer. The "control" test is complex and outcomes vary according to the circumstances of the worker and the way in which they were managed in the workplace. If the "hired in" worker is deemed to be an 'employee', then the host employer can be responsible for superannuation, workers compensation, PAYE tax and accrued leave entitlements amongst other things. It is important that host employers clarify the employment status of "hired in" workers – in some cases it may be too risky to accept a worker who is an independent contractor to the labour hire firm.

ⁱⁱ *Deutz Australia Pty Ltd v Skilled Engineering Ltd & Anor* [2001] VSC 194

ⁱⁱⁱ Again this depends on whether the person meets the definition of "worker" under workers compensation legislation.

^{iv} Some contracts such as the standard RCSA contract actually transfer primary contractual responsibility for hired in workers to host employers by requiring the host employer to give an indemnity to the labour hire company for loss, liability, injury or death caused by the hired in worker. In most cases this will trigger the contractual liability exclusion in a liability insurance policy.

^v For more details about proportionate liability see our Tipsheet 3. Ask your broker for a copy.

^{vi} The courts will discount compensation claims to take account of the plaintiff's own negligence before awarding a compensation claim. It is only if a party is joined to the proceedings that the court will consider the respective liability of each party.

^{vii} *TNT Australia Limited v Christie & Ors* [2003] NSWCA 47

^{viii} *Victorian Workcover Authority v Carrier Air Conditioning Pty Ltd* [2006] VSCA 63

^{ix} These were the primary reasons the court in *Victorian Workcover Authority v Carrier Air Conditioning Pty Ltd* [2006] VSCA 63 assessed the labour hire firm to be more responsible for the injury claim. The courts now say that each instance needs to be reviewed based on the facts of the case and there is no presumption that the labour hire company would be only 25% liable.

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^{xi} *Papadopoulos v. MC Labour Hire Services Pty Ltd & Anor (No 4)* [2009] VSC 193 and *Victorian WorkCover Authority v. Concept Hire Ltd & Ors* [2009] VSC 194

^{xii} Including where the RCSA standard labour hire contract is used by a labour hire firm.

^{xiii} Gold Seal acknowledges the use of an indemnity clause from a labour hire contract which was sent into the Contractual Liability Helpline by a Steadfast Shareholder. The name of the labour hire firm is confidential!

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