

# Examining Joint-Employer Liability for Texas Workers' Compensation Retaliation Claims

Article By:

Lawrence D. Smith

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The question of who provides workers' compensation insurance in employer–staffing company relationships is handled in different ways. Frequently, the staffing company will provide workers' compensation coverage for all individuals provided to the client company. Issues sometimes arise related to the client company's and staffing company's liability under a joint-employer theory for adverse employment actions involving workers provided by the staffing company to the employer. A Texas appellate court recently examined the scope of joint-employer liability in the workers' compensation retaliation context.

## Background

An employer/client company had contracted with various staffing (non-professional employer organization (PEO)) agencies to supply temporary contract personnel. The client company provided workers' compensation coverage for its permanent employees. The staffing company provided workers' compensation coverage for the temporary workers assigned to work with the client company. A dispute arose when a temporary worker left work because the tasks assigned to her were too physically demanding. After she left, the client company directed the staffing company to end her assignment. The next day, the temporary worker reported to work and claimed that she had been injured on the job the day before.

Following the termination of her employment, the temporary worker sued both the temporary staffing company and the client company under Chapter 451 of the Texas Labor Code claiming workers' compensation retaliation. The client company moved for summary judgment on the ground that it could not be liable under Chapter 451 because it had not provided workers' compensation coverage to the staffing company worker. The trial court denied the motion but permitted the client company to immediately pursue a permissive appeal on the question of whether it could be liable for worker's compensation discrimination since it had not provided workers' compensation coverage to the temporary worker.

## The Appellate Court's Analysis

In analyzing the issue on appeal, the appellate court focused on language in Chapter 451 allowing a retaliation claim against a "person" who "discharge[s] or in any other manner discriminate[s] against

an employee because the employee has ... filed a workers' compensation claim in good faith." The court observed that previous Texas Supreme Court cases had limited the scope of the term "person" under the law by excluding "employers that are nonsubscribers to the Texas Workers' Compensation Act" from the definition of "person." Relying on the logic of a Fifth Circuit case that had addressed a similar question involving a similar factual scenario, the appellate court noted that it was not enough to be a workers' compensation subscriber for liability to arise under Chapter 451; there must also be an employer-employee relationship involved for liability under Chapter 451 to attach. Further, the employer must have provided the coverage to that particular plaintiff-employee. Relying on this reasoning, the appellate court determined that since the client company had not provided workers' compensation coverage to the temporary worker, she could not maintain a cause of action under Chapter 451 against the client company.

The temporary worker specifically argued that liability could extend to the client company because the staffing company and client company were joint employers. The court, however, determined that the joint-employer issue was irrelevant because the pertinent issue concerned whether the client company had provided workers' compensation coverage for the temporary worker. Since the client company was not the subscriber responsible for covering the temporary worker, the argument concerning joint employment failed.

## Key Takeaways

This decision provides guidance with regard to liability under Chapter 451 in situations involving a client company and a staffing company. The decision provides that for liability under Chapter 451 to attach, a direct nexus must exist between the entity that provides the workers' compensation insurance coverage for the injured individual and the injured individual, and a joint-employer relationship will not provide a substitute for the actual purchase of insurance coverage.

Despite this determination, there exist outstanding issues not specifically addressed in the case. The court did not have to address a situation in which a staffing company provides workers' compensation insurance coverage and includes the employer/client company on the certificate of insurance as an additional insured. The court also did not address joint-enterprise liability because the issue had not been properly raised at trial. The court also observed that the temporary worker had not been left without a remedy, as she might have common law claims against the client company, including for allegedly providing false information that injures another.

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