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Things You Should Know Before Using Contractors for Drivers

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Some companies are inclined to hire independent contractors based on the idea that they can carry out business without incurring risk on behalf of the company.

Generally, this is true. An employer who hires an independent contractor (or contracts with a third party organization to provide drivers as subcontractors) is not liable for the torts of that person.

The legal principle of respondeat superior does not apply to independent contractors, since the hiring company is not deemed to be in control of the contractor and, thus, is not vicariously liable.

However, it is a misconception that the liability for negligence and respondeat superior never applies to independent contractors. The reality is, hiring an independent contractor is not a risk-free proposition and the hiring company may incur liability in several different ways.

Selection, Instruction & Supervision Responsibilities

Negligence is based upon a duty of care. When driving a motor vehicle, the driver (i.e., contractor), his or her employer, and any hiring company of the employer is under a legal duty to act as an ordinary, prudent, reasonable person would act, and courts have held that driving vehicles (trucks, in particular) is inherently dangerous, and extra care should be

taken to avoid injury. It should be remembered that negligence law is, at its base, a way to spread the risk fairly. So, it is logical that courts tend to stretch the scope of negligence liability to cover innocent injured parties when a defendant has been negligent.

The applicable standard of care is the reasonable-person standard of ordinary prudence under similar circumstances.

For fleet organizations, it is judged as what the reasonable, prudent fleet professional in the field of fleet management would do under similar circumstances. So, generally, for the organization to assume negligence liability for the acts of the fleet or fleet department, the court must find that the fleet organization's behavior was not consistent with the standards in the fleet industry.

As an example, if a driver is involved in a crash, and the other party claims that the driver was not competent to operate the vehicle and the organization was negligent in hiring the driver, the standard of care would be whether the fleet department (or other responsible organization) properly checked driver motor vehicle records, had reasonable safety programs, had appropriate and current driver policies and procedures, had a reasonable training and supervision program, etc., consistent with other similar fleet organizations in its geographic territory.

1. Selection responsibilities: A company can be liable for the failure to properly screen either employees or contractors since the company owes a duty of reasonable care to the public. If injured by a contracted driver, the hiring company may be liable for failing to anticipate and prevent injury to a third party by ensuring reasonable screening procedures, such as motor vehicle record reviews and background checks, are conducted. For example, a freight broker should, at a minimum, check the safety statistics and evaluations of the carriers with whom it contracts and maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory Federal Motor Carrier Safety Administration (FMCSA) safety ratings and measurements.

If the carrier is deemed to be a high risk, the hiring company (freight broker) may even be liable for negligently entrusting the contractor to operate or even load the motor vehicle.

2. Instruction responsibilities: A hiring company's responsibilities to know that a contracted driver has received reasonable instructions to operate a particular vehicle or piece of equipment includes, but is not limited to, the driver's ongoing participation in safety training and education, remedial training for "bad" drivers, driver knowledge of local, state, and federal rules and regulations, and the driver's understanding of company protocols for expected timeframe thresholds such as deliveries, number of sales calls, etc.

For example, if a company mandates that the hired driver be on time for pickups and deliveries, achieve a certain number of sales calls per day, and be penalized for not achieving such thresholds, the company is encouraging the driver to do whatever is necessary to satisfy the requirements. The courts may find that the company was negligent in failing to provide the appropriate standard of care.

3. Supervision responsibilities: While the hiring company does not have direct control over a contracted driver (i.e., as measured in legal terms, typically under IRS regulation and guidelines), the hiring company still bears a responsibility to reasonably know that the driver is, in fact, properly supervised so that he or she complies with applicable company policies, procedures, and guidelines. While the courts tend to find a greater degree of responsibility if the driver is operating a company-provided vehicle or equipment (since the company has greater control over the vehicle), the fact that a driver is operating his or her own vehicle does not completely shield the hiring company.

In both cases, a court may find that a hiring company either knew or should have known that the contractor was incompetent, reckless, or not qualified to operate the motor vehicle. For example, the company may be liable for a crash caused by a driver known to be reckless according to motor vehicle records.

Note of Consideration About Agency Law and Vicarious Liability: A company may also be held liable for the actions of an independent contractor if the contractor is considered an agent of the company. Under the rules of agency law, an agency relationship may be formed if the company's actions or words give the contractor or a third-party reason to believe that the contractor is an agent of the company.

Even a contractor that has not been paid or agreed to work without compensation for a particular project can still be deemed to be an agent.

If an agency relationship exists or if a third-party believes that the contractor is an agent of the company, then the company will be liable for injuries caused by the contractor in the course of carrying out its work. In determining whether a person is an agent, the primary consideration is the hiring company's right to control the manner of the performance of the work. Little weight is given to contractual labels or provisions.

Employers' Own Liability

Negligence is the failure to exercise ordinary care to avoid injury to another's person or property when one has an actual or constructive duty to that person. Whether one is negligent depends, in large measure, on all of the surrounding circumstances and failure to use "due care."

One is liable for negligent acts or negligent failure to act when such negligence is the proximate, foreseeable cause of the injury:

- Proximate cause is an event sufficiently related to a legally recognizable injury to be held to be the cause of that injury. There are two types of causation in the law: cause-in-fact, and proximate (or legal) cause. Cause-in-fact is determined by the "but for" test: But for the action, the result would not have happened.
- Foreseeable is a concept used in tort law to limit the liability of a party to those acts that carry a risk of foreseeable harm, meaning that a reasonable person would be able to predict or expect the ultimately harmful result of their actions. Under negligence law, the duty to act reasonably to avoid foreseeable risks of physical injury extends to any person.

The Restatement (Second) of Torts identifies a few exceptions to the Common Law doctrine of respondeat superior, where a hiring company is shielded from vicarious liability due to the negligence of an independent contractor.

The hiring company may be liable when it fails to exercise reasonable care to retain a competent and careful contractor and a third party is physically harmed, when an independent contractor acts pursuant to orders or directions negligently given by the hiring company, or when the hiring company exercises sufficient control over the independent contractor.

Non-Delegable Duties

The non-delegable duty doctrine is intended to prevent companies from outsourcing dangerous tasks in order to sidestep liability.

Liabilities for some duties cannot be shifted to a contractor. Generally, a company has a non-delegable duty to provide a reasonably safe environment to the general public.

Courts have not given obvious criteria to determine these duties, but the fact remains that a company cannot shield itself from knowing that a motor vehicle, whether it's owned by the company or the contracted driver, is properly maintained and reasonably safe.

The company remains responsible for maintaining a safe workplace and providing warnings about hazardous conditions. If the company knows or should have known about a dangerous condition, like a malfunctioning vehicle, the company may be liable for injuries caused by the condition.

Inherently or Intrinsically Dangerous Activities

A company that employs a contractor to perform inherently dangerous work can be sued for a contractor's negligent acts or omissions.

Companies may be held liable not only for the failure to take special precautions, but also for the contractor's failure to exercise reasonable care. Courts determine whether work is "hazardous" by asking whether the work is inherently risky and whether a reasonable person would recognize a need for safety measures. In these cases, the courts may find that the employer should have realized that the activity involved a greater than average risk of harm and, thus, could not avoid liability by hiring an independent contractor to perform the activity.

Under the Peculiar Risk doctrine, a company that hires a contractor to do work, which is considered to be "inherently dangerous" can still be held directly liable for damages when that contractor causes injury to others by negligently performing the work.

Peculiarly, this does not mean that the risk must be one that is abnormal to the type of work done, or that it must be an abnormally great risk, but instead, refers to a special recognizable danger arising out of the work itself. For the vicarious liability rules to apply, it is not essential that the work, which the contractor is employed to do be in itself an extra-hazardous or abnormally dangerous activity, or that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great.

A peculiar risk differs from "common risks" to which persons in general are commonly subjected by the ordinary forms of negligence that are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions.[1] Liability under the Peculiar Risk Doctrine can generally be imposed on the hiring company in two different ways:

- When a company hires an independent contractor to do inherently dangerous work, but fails to provide in the contract or in some other manner that special precautions must be taken to avert the peculiar risk of injury related to that work.[2]
- Even if the hiring company has provided special precautions in the contract or elsewhere, the company can still be liable for injuries to third parties if the independent contractor, having been advised to take special precautions, nevertheless ignores the advice, and an injury occurs even if advice was given.[3]

The result of this doctrine is that the hiring company must not only provide that specific precautions be taken to avoid peculiar risk of injury, but must also act to ensure that these precautions are actually implemented by the independent contractor. This places a heavy burden on those hiring independent contractors to perform work when some portion of that work might possibly be described as inherently dangerous.

Note of Consideration about Contracts and Non-Delegable or Inherently Dangerous Activities: It should be noted that a hiring company may be liable even if the independent contractor has agreed in writing to assume all risks in connection with his performance. This assumption of risk on the part of the independent contractor will not insulate the hiring company from liability. However, the company may sue the independent contractor for whatever amount of money it was ultimately forced to pay to the plaintiff under breach of contract or indemnity provisions.

Understanding Damages

Understanding the basis of how damages are awarded is important to fleet executives in today's environment of multi-million dollar lawsuits and settlements.

A party claiming damages has the burden of proving each of the following propositions:

- That he or she has sustained injury.
- That the party from whom he or she seeks a financial judgment was negligent.
- That such negligence was a proximate cause of the injury sustained by the claiming party.
- The injury was a foreseeable result of the negligence.
- If proven, the court may find damages to be:
- Actual damages (expenses associated with property damage and medical costs).
- Economic damages (lost wages and earning capacity).
- Emotional and physical pain and suffering (past and future).

In addition, the court may award punitive damages where the negligence is so egregious and where the punitive damages will act to inhibit further similar acts.

FOOTNOTES:

1 Restatement Second of Torts Section 416

2 Restatement Second of Torts Section 413

3 Restatement Supra, Section 416

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