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We are departing from our usual newsletter format to bring you this article from FUBA's General Counsel, Karen Phillips. This article is reprinted with permission from the June 2017 issue of Rough Notes Magazine, Florida Special Report.

THE PERILS OF PEO'S FOR FLORIDA'S CONSTRUCTION INDUSTRY

Under Florida's workers' compensation law, companies working in the construction industry can be held liable if they hire subcontractors who do not have proper workers' compensation insurance to cover all of their employees.

In Florida, everyone on a construction job site is required to be covered by workers' compensation insurance or must have a valid exemption issued by the Division of Workers' Compensation. If a subcontractor without proper workers' compensation insurance for all his/her employees comes onto a job site, and one of the sub's employees gets hurt, the responsibility for that injury falls on the contractor who hired the sub; the contractor's workers' compensation insurance company can be held responsible for paying for the worker's medical care and lost wages.

There's not a problem when a contractor subs out to a company with a valid workers'

compensation policy issued by a traditional workers' compensation carrier. The subcontractor's policy will take care of all workers the subcontractor brings to the job site, even if it's just for one day or even one hour. However, when a contractor subs out to a subcontractor who receives workers' compensation insurance through a professional employer organization/employee leasing arrangement, it's a very different scenario, and one that leaves the contractor (and the contractor's insurance company) very exposed.

How so? When a company signs up with a professional employer organization (known as a "PEO"), that company's employees are technically no longer employees of that company; they become "employees" of the PEO. While the employees still report to work at the same place, their payroll checks now come from the PEO. The PEO also assumes the responsibility for providing workers' compensation coverage for these employees through the PEO's workers' compensation carrier. Under this arrangement, the PEO is the actual policyholder; the employer itself (the subcontractor in our example) is not insured by the PEO's carrier and does not have its own workers' compensation insurance policy.

Along with the use of PEOs is the potential for a "PEO coverage gap." The gap could occur when the subcontractor hires new employees but

doesn't report them to the PEO in a timely manner. Because the PEO is now the employer, the PEO's contract with the sub can state that workers' comp coverage exists only for "employees" listed on its contract with the sub. Of course, the subcontractor is free to hire new workers, but they won't be covered by the PEO until they are specifically reported as employees to the PEO.

For example, the subcontractor could hire a new worker on Monday, put him or her right to work, but not send the worker's paperwork to the PEO until Monday afternoon. If the new worker gets hurt on the job before the PEO knows about him or her, its workers' compensation policy will not cover that new worker. This forces the injured worker to seek payment for his/her medical bills and lost wages from the contractor who hired the sub, even though the sub had "coverage" through the PEO.

The same holds true for any casual labor or uninsured subcontractors that the subcontractor hires. Because these people are not considered "employees" by the PEO, the PEO does not provide workers' comp insurance for them and will not pay if one of them is hurt on the job.

In all of these cases, the contractor's workers' comp policy will have to step in and pay for these injuries. It also will lead to the contractor owing additional premium to its insurance company for that exposure.

Another potential issue with hiring subcontractors who have a PEO arrangement is that the subcontractor's workers' compensation insurance can be cancelled at any time and without much notice. Because they are not providing insurance, PEOs are not subject to the same cancellation notice provisions that traditional insurance companies are subject to. Traditional insurance companies have to give their

policyholders advance notice before they cancel a policy – 10 days' notice if the cancellation is for not paying premium, 45 days' notice of non-renewal, etc.

However, the PEO, because it is not an insurance company, does not have to comply with these notice provisions. The PEO can give immediate notice that it is cancelling the contract, which also cancels the subcontractor's workers' comp insurance.

A subcontractor whose workers' comp insurance can be cancelled at any time with short notice brings substantial potential exposure to a contractor hiring that sub. If the sub's insurance is cancelled, all of its employees/casual labor/uninsured subs become employees of the contractor who hired the sub. Again, the contractor will be billed for premium for all that payroll, and its insurance company will be on the hook for all on-the-job accidents.

Contractors who rely on a certificate of insurance showing a subcontractor's PEO arrangement need to understand that the subcontractor itself is not insured and is not provided the coverage referenced on the certificate of insurance. The certificate is for the PEO's coverage only and, again, does not cover workers hired by the sub whom the PEO doesn't know about, casual labor, or uninsured contractors.

PEOs provide services for many small employers, such as weekly payroll processing and access to group benefit plans. The segment of the Florida workers' compensation marketplace that turns to PEOs is growing. But because of the liabilities that Florida law puts on contractors in the construction industry, Florida contractors subbing out work to companies with PEOs need to understand the limitations of this coverage and the potential expense it could mean for them.