JUNE 2011

Protecting employees working abroad for federal contractors

Civil claims under the Defense Base Act involve issues not typically present in California workers-comp cases

By Kimberly Wong
The Veen Firm, P.C.

Every year, the U.S. government pays private contractors several billion dollars to perform work on U.S. military bases, provide construction and services related to national defense or with war activities, and perform other public work for U.S. government agencies outside the United States. Consequently, there are numerous Americans employed by these private contractors working abroad who are often highly paid. Given the nature of the work provided by private contractors abroad, serious injuries can occur to the contractors' workers. Although these employees are not working in the United States, there is still a system of workers' compensation in place to provide benefits to them if they are injured in the course and scope of their employment which is known as the Defense Base Act (DBA). (42 U.S.C. §§ 1651-1654.)

The DBA offers civil remedies to an injured worker when the employer is uninsured similar to California's Workers' Compensation Act. However, attorneys who represent clients in civil suits authorized by the DBA will likely encounter certain issues not typically present in cases where an employee was injured while working locally. This article will provide a basic overview of the DBA and discuss some of the unique legal and strategic issues attorneys will face when filing a civil suit on behalf of an injured worker covered by the DBA against an uninsured employer or a third party.

Employees covered by the DBA

Attorneys may have some familiarity with the Longshore Harbor Workers' Compensation Act (LHWCA), which provides workers' compensation benefits to specified employees of private maritime employers who are injured while on the navigable waters of the United States and adjoining areas, such as piers, wharfs, and terminals. (See, 2 U.S.C. §§ 901, et seq.) However, few are likely familiar with the DBA, which is an extension of the LHWCA that was passed in 1941. Congress originally enacted the DBA to provide compensation for disability or death to civilian employees working at military, air and naval bases on lend-lease military bases during World War II. The DBA has evolved over time to cover civilian employees working outside of the United States performing a broader range of activities, such as work on U.S. military bases, public work contracts with a U.S. government agency, national defense and military operations, and foreign assistance to U.S. allies.

Despite its name, the Defense Base Act's coverage is not limited to work related to defense or military bases. For example, employees of private contractors hired by a U.S. government agency providing humanitarian assistance to Japan following its recent earthquake and tsunami are covered under the DBA. (<http://www.dol.gov/owcp/dlhwc/dbacoverageinJapan.htm.>) Workers performing any of the following employment activities outside the United States are covered under the DBA:

- Work for private employers on U.S. military bases or on any lands used by the U.S. for military purposes;
- Work on public contracts with any U.S. government agency, including construction and service contracts in connection with national defense or with war activities;
- Work on contracts approved or funded by the U.S. under the Foreign Assistance Act, generally providing for cash sale of military equipment, materials, and services to its allies; or
- Work for American employers providing welfare or similar services for the benefit of the Armed Forces. (42 U.S.C. § 1651.)

DBA's insurance requirements

The DBA adopts the provisions of the LHWCA with just a few exceptions. (42 U.S.C. § 1651(a).) The DBA requires that all U.S. government contractors and their subcontractors secure insurance to cover potential workers' compensation claims for their employees working abroad. General and subcontractors who secure

the insurance specified under the DBA receive immunity from a civil suit filed by an employee for injuries occurring during employment. (42 U.S.C. § 905; see also, *Washington Metropolitan Area Transit Authority v. Johnson* (1984) 467 U.S. 925 (holding that the general contractor receives immunity where the subcontractor employer is immune for securing insurance under the LHWCA).) In other words, the injured worker's exclusive remedy in this situation is compensation under the DBA.

Civil liability under the DBA

The consequences of an employer's failure to secure insurance required under the DBA are in many ways similar to the California Workers' Compensation Act. Under California law, an injured worker whose employer was uninsured for Workers' Compensation at the time of injury may file a claim in the Workers' Compensation Appeals Board and bring a civil suit against the uninsured employer under Labor Code section 3706. The exclusive remedy provisions of the Act do not apply to an uninsured employer. Significantly, in the civil action the employer may not avail itself of several important defenses otherwise available in negligence actions. Likewise, an injured worker covered by the DBA may file a civil suit against his or her uninsured employer for tort damages in which the employer may not plead defenses of contributory negligence by the employee, assumption of risk, or negligence by a co-employee. (42 U.S.C. § 905.)

Multi-contractor settings

There are also important differences between the DBA and California's Workers' Compensation Act regarding immunity when the injury occurs in a multi-contractor setting.

Scenario 1: Imagine a situation in which a subcontractor is the employer who failed to secure proper workers' compensation coverage, but the general contractor has workers' compensation insurance and provides such benefits to the subcontractor's employee. Under California's Workers' Compensation Act, the uninsured subcontractor employer is exposed to tort damages for failing to secure insurance, whereas under the DBA the subcontractor is not exposed to a tort claim. The general contractor in this scenario would have immunity under the DBA, but under California law could be exposed in certain circumstances to a tort claim unrelated to the failure to maintain workers' compensation coverage, such as a claim of negligent exercise of retained control, negligent performance of an undertaking, or premises liability.

Scenario 2: The subcontractor is still an uninsured employer, but this time the general contractor also has no workers' compensation insurance. Under California law, the injured employee has the right to seek tort damages from the subcontractor employer under Labor Code section 3706. The employee may also be able to file suit against the general contractor as an uninsured employer, but only in a dual employment situation in which the employee is considered a "borrowed servant." By contrast, the DBA allows the employee to file a tort claim against both the subcontractor and the general contractor for failing to secure insurance.

Here's the explanation for the different results. California law requires that every "employer," as determined by the "right to control" test and other relevant factors, secure workers' compensation insurance or risk exposure to tort damages. (For a discussion of the test of employment, see *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) If a subcontractor is determined to be the employer without insurance, California law does not require the general contractor to maintain workers' compensation coverage for the subcontractor's employees, unless the general contractor is also determined to be the employer under the Borello test. The uninsured subcontractor is still exposed to a civil suit under Labor Code section 3706 even if the general contractor voluntarily provides workers' compensation benefits to the subcontractor's injured employee.

The DBA also requires that every employer secure compensation insurance specified under the Act. However, the DBA imposes contingent liability on the general contractor when the subcontractor is an uninsured employer. This means that when the subcontractor employer fails to secure DBA coverage, both the subcontractor and the general contractor will be exposed to civil liability, unless the general contractor had proper insurance in place at the time of injury. (*Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. at 932; 42 U.S.C. § 904.)

Regardless of whether the employer is uninsured under either California workers' compensation law or the DBA, the exclusive remedy provisions do not prevent you from filing a tort claim against a non-employer, such as a manufacturer of a defective product, contractor or property owner. Some examples of potential third-party claims include negligence, products liability, negligent exercise of retained control and premises liability.

Jurisdiction: Where to file the complaint

Once you have decided to file a tort claim on behalf of a client who suffered an injury covered by the DBA against an uninsured employer or a third party, you will need to decide where to file the complaint. Although attorneys commonly file suit in the county where the injury occurred, that may not be your best option or even a viable option when the injury occurred in a foreign country. For example, in 2009 Fiji's president abrogated the country's Constitution, closed its courts, and dismissed all of its judges. In some countries, the law may not be consistent with our traditional notions of justice or have well-developed case law and statutes. As a practical matter, however, it is preferable to seek jurisdiction in a U.S. state or federal district court to avoid the headache of spending additional resources on travel, associating with foreign counsel, and researching foreign law.

Subject Matter Jurisdiction – Any state court should have subject matter jurisdiction

over your client's claims as they are courts of general jurisdiction. A federal court will have jurisdiction only if there is complete diversity of citizenship between the plaintiff and defendants, as it is unlikely that your tort claims will be based in federal law.

Personal Jurisdiction – The states in which you will be able to file suit will depend on where you can obtain personal jurisdiction over the defendants. A court has personal jurisdiction over a defendant domiciled in its state. (*Milliken v. Meyer* (1940) 311 U.S. 457, 462.) For defendants that are business entities, you will need to research the location of each defendant's principal place of business or "nerve center," which is commonly where the corporation maintains its headquarters. (*Hertz Corp. v. Friend* (2010) 130 Sup.Ct. 1181, 1192-1193.) Keep in mind that if you file suit against more than one defendant, it may be difficult to obtain personal jurisdiction over all defendants in the same state if they do not share a common domicile. Depending on the facts in your case and the forum state's long-arm statute, you should try to argue that the court has general and/or specific jurisdiction over the nonresident defendant.

General jurisdiction arises when the nonresident's contacts in the forum state are substantial, continuous and systematic, such that the defendant may be sued for claims unrelated to its activities within the state. (*Perkins v. Benguet Consol. Min. Co.* (1952) 342 U.S. 437, 445-446.) A nonresident defendant may also be within the court's jurisdiction if it has sufficient "minimum contacts" with the forum state that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) If you cannot get the court to exercise jurisdiction over the nonresident defendant, you may be forced to file suit against the nonresident defendant in the state of the defendant's domicile.

Additional issues requiring research before filing

Now that you have determined the potential forums for jurisdiction, you should research the law that would apply, especially if there is more than one state in which you can file. Issues that you should research include: the applicable statute of limitations, any damages caps, relevant law regarding liability, conflict of law analysis and jury composition.

Statute of Limitations – The statute of limitations to file a tort action should be researched immediately because it is different in each state. Although the limitations period to file a negligence claim and a products liability claim in California is two years, other states have limitations periods as short as one year and as long as six years. Also, some states have different limitations periods for a negligence claim and a products liability claim.

Damages Caps – In California, we are accustomed to having no damages caps on general damages in non-medical malpractice personal-injury cases. Due to tort reformists, there are now many states that are not so fortunate. Several states have followed the rationale of the Medical Injury Compensation Reform Act (MICRA) by extending caps on general damages to non-medical malpractice tort cases. Most states that have caps limit general damages to $250,000 to $500,000. The amount of the caps and the circumstances in which the caps apply vary by state. For example, some states' caps apply in all personal injury actions, whereas other states provide a higher cap or no cap when the injuries are more severe, such as injuries involving loss of limb, spinal cord damage, or traumatic brain injury.

General damages are often a large component of an injured client's recovery. Our catastrophically injured clients typically suffer the most from these damages caps. It is therefore important to do your research to avoid the application of law in states with damages caps that could drastically reduce your client's recovery.

Substantive Law – You should also research the relevant law in each potential forum state to determine which theories you can use to support your claims and the standard for establishing liability under them. In California, the Privette-Toland line of cases bars an employee of a subcontractor from recovering against the general contractor under the peculiar risk doctrine under either a theory of vicarious liability or direct liability. (*Privette v. Sup. Ct.* (1993) 5 Cal.4th 689; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253.) However, other states, such as New Hampshire and Wisconsin, would allow such recovery.

Choice of Law – After you file the complaint, a defendant may seek to have law that is more favorable to it apply to the action by filing a motion based on conflict of law, which seeks a determination regarding the applicability of a particular state or country's law. A conflict of law occurs when there are multiple states that have a legitimate interest in having their law applied to a particular action and application of any of the laws would have different results. For example, under the law of one state a person may have the right to file a claim under a certain set of facts, but the law of a different state would prohibit recovery on that claim. Another significant conflict you could encounter involves states with different limitations regarding the amount of recoverable general damages. These examples highlight the importance of researching in advance the relevant law in the available jurisdictions.

When presented with a conflict of law motion, the court must first determine that an actual conflict exists. The court will then choose which law will apply by performing an analysis under the choice of law rules established under its own state law. California uses a government interest analysis by applying the law of the state whose interest would be more impaired if

its policy were subordinated to the other state. (*McCann v. Foster Wheeler, LLC* (2010) 48 Cal.4th 68, 87-88.) Several states use a variation of a multi-factor test to determine the applicable law. Commonly used factors include: predictability of results, maintenance of interstate and international order by deferring to the jurisdiction that is substantially concerned, simplification of judicial task, advancement of the governmental interest of the forum, and application of the sounder rule of law.

Civil Jury Composition – Not all states require a twelve-person jury in civil cases. Your case may be heard by as few as six jurors in some states. If you prefer a twelve-person jury, you should research the jury composition rules of the state in which you intend to file.

Forum non conveniens

Keep in mind that even if the court in which you file has subject matter and personal jurisdiction, the defendant could move to have the court stay or dismiss the action on the ground of inconvenient forum. In ruling on the motion, most courts will typically consider whether there is an adequate alternative forum available in terms of statute of limitations, availability of a remedy, and personal jurisdiction over the defendants. Courts also balance various private and public interest factors, such as access to sources of evidence, cost, availability of witnesses, local interest in the issues, and any burden on local courts. If you had already researched the issues recommended above prior to filing, most of the research you will need to oppose a motion based on inconvenient forum will already be done.

Conclusion

Full analysis before filing is key to successful resolution of the injured worker's civil claims arising under the DBA. By adequately researching ahead of time the available jurisdiction's statute of limitations, damages limitations, third-party remedies, and choice of law rules, you will be in a much better position to maximize your client's recovery.


Wong

Kimberly Wong is an associate on the Lancaster Trial Team at The Veen Firm, P.C. *She litigates complex catastrophic injury cases involving negligence, wrongful death, products liability, industrial accidents, and exceptions to workers' compensation exclusive remedy doctrine.*

For more information on this article or a copy of a helpful checklist of exceptions to the exclusive remedy rule and third-party causes of action, please e-mail k.wong@veenfirm.com or visit our Web site at www.veenfirm.com.