TECHNICAL ADVISORY

TA 110 **September 9, 1997**

SUBJECT: **SENATE BILL 922 (DARDENNE)**
LEGISLATIVE REPEAL OF KIRKLAND v RIVERWOOD

BACKGROUND: There are two fundamental issues at the heart of the current worker's compensation debate. First, who is ultimately responsible for injuries to an employee, especially where contracted work is involved? Second, which employer(s) receive tort immunity?

As to the first question, *R.S. 23:1061.A.* holds a principal ultimately liable for injuries to employees of contractors/subcontractors. Secondly, under *R.S. 1032.A.,* workers injured in the course and scope of employment are barred from suing their direct, or actual, employer, or principal, for negligence. Workers compensation is the worker's exclusive remedy against his actual employer, or principal.

The Workers Compensation Act, enacted in 1914, requires a "principal" to pay workers compensation benefits to a contractor's/subcontractor's injured employee when the contractor/subcontractor does not pay benefits. A "principal" is any upstream owner or employer who contracts work to various general contractors or subcontractors that work for the benefit of the principal's business. The principal is the statutory employer of the contractor's/subcontractor's employees and has traditionally enjoyed the tort immunity granted to the actual employer. Thibodaux v Sun Oil Company 49 So. 2d 852 (LA 1950). In Thibodaux, the Louisiana Supreme Court decided the principal was protected when the work being performed by the actual employer was a part of the "trade, business or occupation of the principal."

MAIN POINTS: In 1986, however, the Louisiana Supreme Court radically revised the standard to determine the availability of the statutory employer defense, in Berry v Holston Well Service, Inc. 488 So. 2d 934 (LA 1986). In Berry, the court enunciated this standard:

1. Is the contract work specialized? Specialized work, as a matter of law, was not a part of the principal's trade, business or

occupation, and the principal was not the statutory employer of the specialized employer's employees.

2. Where the contract work is non-specialized, the court had to compare the contract work with the principal's trade, business or occupation. At this level, the court was required to make the following inquiries:

(i) Is the contract work routine and customary? Is it regular and predictable?
(ii) Does the principal have the equipment and personnel capable of performing the work?
(iii) What is the practice of the industry? Do industry participants normally contact out this type of work or do they have their own employees perform the work?

3. Was the principal engaged in the work at the time of the alleged accident?

Berry created so many questions of fact that it virtually eliminated the statutory employer defense in Louisiana. In most cases, however, a principal was successful in transferring its newly created liability exposure to the actual employer through the Hold Harmless and Indemnity Agreement contained in the work contract. As a result of Berry, actual employers found themselves in the position of having to pay workers compensation benefits and defend the tort suit of its own employee against the principal.

The increased exposure to its membership prompted the Louisiana Association of Business and Industry to lead an effort in 1989 that resulted in the legislature amending the Workers Compensation Act (LA R.S.23:1061) to add the following language:

"….The fact that the work is specialized or non-specialized is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work."

Presumably, the liability exposure created by Berry was cured.

In 1996, however, the Louisiana Supreme Court had an opportunity to review the 1989 amendment in Kirkland v Riverwood International, USA, Inc. 68 So. 2d 329.

Riverwood, a pulp mill owner, hired a contractor, Republic, to update its conveyers. Roger Kirkland was employed by Republic; he was injured and sued Riverwood for negligence. Riverwood raised the statutory employer defense, citing the 1989 amendment.

The Louisiana Supreme Court allowed Kirkland's cause of action against Riverwood and held that the appropriate standard for determining whether the contract work is part of the principal's trade, business or occupation is for the court to consider all pertinent factors under the "totality of the circumstances." Those factors were:

1. The nature of the business of the alleged principal;
2. Whether the work was specialized or non-specialized;
3. Whether the contract work was routine, customary, ordinary or usual;
4. Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
5. Whether the alleged principal had the equipment and personnel capable of performing the contract work;
6. Whether those in similar businesses normally contract out this type of work;
7. Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and
8. Whether the principal was engaged in the contract work at the time of the accident.

In 1997, again at the urging of the business community, the legislature amended the Workers Compensation Act, this time to remove the broadened exposure created by Kirkland.

Senate Bill 922, authored by Senator Dardenne, passed the 1997 legislative session and was signed into law by Governor Foster, Act 315, effective 6-17-97.

R.S. 23:1061 was amended to entirely delete the 1989 language and added language creating a presumption (rebuttable by the plaintiff) of a statutory employer relationship "….whenever there is a written contract between the principal and the employee's immediate employer which recognizes the principal as a statutory employer. This presumption may be overcome only by showing that the work does not affect the ability of the principal to generate any portion of that individual principal's goods, products or services."

Please note that there are two critical factors necessary to establish this statutory employer immunity from tort suits. First, there must be a written contract between the principal and any contractors or subcontractors working for the principal which contains a provision specifically recognizing the statutory employer relationship between the principal and any employees performing work under a contract.

Second, the work performed by the injured employee must be part of the principal's business, occupation or trade. To qualify, the injured employee must be engaged in work which is essential to the ability of the principal to generate their products or services.

Therefore, no principal will be protected after 6-17-97 for injury to its contractor's employee unless that principal has declared itself in writing to be the statutory employer in the work contract with the contractor.

NECESSARY ACTION:

Agents and company representatives should immediately notify those insureds affected by the exposure to:

1. Amend all contracts in force on 6-17-97; and

2. Include the necessary language in any contract struck after 6-17-97.

Absent language declaring the principal to be the statutory employer of the immediate employer's employees, the principal will not have Summary Judgment relief available. The principal will have to defend the claim on its merits or render its defense to the immediate, or actual, employer under the Hold Harmless Agreement normally contained in the work contract between the two.