

PEO INSIDER

Direction and Control

Doctrine of Vicarious Liability and Facts of the Case Get PEO Dropped from Suit

Brian M. Nugent, Esq.

In the world of employment and employment law, there is no more widely used phrase of significance than “direction and control.” This term is often the linchpin in determining whether an individual is in fact an employee. Those of us who have provided legal advice to the PEO industry have had to wrestle with this term often. At times it is used against a PEO, and at times a PEO will use it either as a “sword” or a “shield.”

The co-employment relationship is one that by definition involves two employers. The question (or debate) is the extent to which each of the employers assumes various employer responsibilities and risks. Perhaps the most difficult employer risk for a PEO to assume is the risk of the effects of a negligent act by a co-employee (worksite employee) over whom the PEO exerts little influence, direction, or control. Perhaps the most frequent example is when a worksite employee, acting in the role of a supervisor at a client location, discriminates against or illegally harasses an employee. Despite a PEO’s best efforts to train and warn against such conduct, the PEO can face liability for the acts of such an employee who, in essence, is directed and controlled by another employer — the PEO client.¹ Although such circumstances can be frustrating, the PEO at least

has some ability to minimize the risk through careful client selection, training, and quick response. There are other risks of negligence or willfulness that the PEO simply cannot foresee or control. The following is a real-life example of how a PEO can find itself a defendant in a case notwithstanding its complete and total lack of direction and control over the employee or circumstances.

On a relatively quiet Friday afternoon, the PEO receptionist received a visit from a process server who served a copy of a complaint filed by the estate of a former worksite employee who had been involved in a tragic vehicular accident. It appeared that every vehicle remotely involved in the accident was named as a defendant. The deceased was traveling south on one of Dallas’ busy highways when another vehicle, heading north, crossed the centerline and hit a second vehicle, causing a chain reaction of collisions. One of the vehicles eventually hit was the one the deceased was driving.

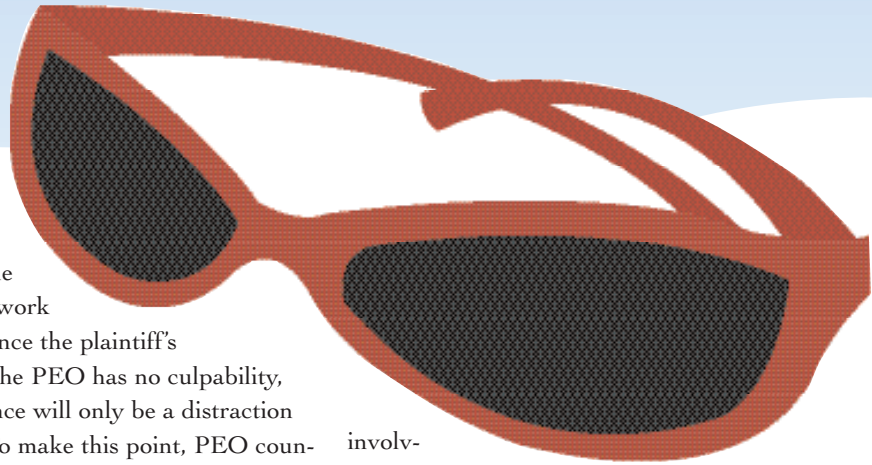
¹ Under the doctrine of vicarious liability, an employer can be held responsible for the acts of its employees/agents if it knew or should have known that the conduct of such employees would cause injury. Please note that the doctrine is actually much more complex than as simply stated above, and employers should consult legal counsel when confronted with a potential liability based on the acts of others.

The PEO’s client was in the graphics design business, and one of its employees (let’s call him Bill) was



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making a delivery as part of his routine duties. Through no fault of his own, his vehicle unfortunately became part of the accident caused by the northbound car jumping the median. The only thing he was guilty of was being in the wrong place at the wrong time. Incredibly, the PEO was named as a defendant in the lawsuit.

As a co-employee, Bill received his paycheck from the PEO. He was enrolled in the PEO's group health plan, retirement plan, and deducted his premiums pre-tax through the PEO's Section 125 plan. The PEO secured and maintained in its name the workers' compensation insurance that covered Bill on the day of the accident and paid unemployment taxes based on Bill's wages out of an account in the PEO's name. The PEO also provided an employee handbook and helped solve employee relations and human resources problems. What the PEO did not do was direct Bill on how to do his job or where to go each day. He also received all of his training on how to do his job for the graphics design company from the PEO client. The PEO was not aware of the condition of the vehicle or that Bill was even on the highway on the day of the accident. So, could the PEO get dismissed from the lawsuit by alleging it had no direction or control over the employee, despite its employer role and activities, and self-described status as an employer? Was this an appropriate circumstance for a PEO to advance such an argument?

In my opinion, the answer to both questions was yes. Not only should the PEO be dismissed in this situation, legal

counsel for the PEO should work hard to convince the plaintiff's counsel that the PEO has no culpability, and its presence will only be a distraction to her case. To make this point, PEO counsel should be aggressive in its defense, careful in how it provides responses to discovery (i.e., focus on vicarious nature of the relationship), and present itself as a potential "fly in the ointment" of the plaintiff's case.

In this case, I engaged local counsel to represent the PEO in the litigation.² My role was to contact the plaintiff's counsel, explain a PEO's role and purpose and convince him that despite its role as an employer in the relationship the PEO had no culpability, and elicit a dismissal even before having to file a motion to dismiss. He was not receptive at first and insisted in submitting written discovery requests, including interrogatories seeking answers regarding the PEO's role as an employer. I assumed the responsibility of crafting the answers to discovery, and provided in the responses carefully worded descriptions of the PEO's role and its lack of direction and control over the employee on the day of the accident. Not too long thereafter, and prior to having to file a motion to dismiss and incur those costs, the plaintiff's counsel agreed that the PEO had insufficient direction and control to be held vicariously liable and dropped the PEO from the case.³

This is not the only case in which we have successfully convinced a plaintiff's attorney to drop the PEO from a lawsuit

involving the negligence of a co-employee. The key is to have a firm grasp of the law under the doctrine of vicarious liability and good enough facts to avoid direct liability of the PEO.⁴ Having these two elements, the PEO should approach the plaintiff's attorney aggressively, but also practically, and make the case that it is not worth the plaintiff's time and money to keep the PEO in the case. In the end, the plaintiff's attorney is likely to have taken the case for a contingency fee, and it is not in her best interest to spend time and money dealing with an aggressive defendant who is not likely to be held liable. The quicker the PEO can force the plaintiff's counsel to see this, the better. If this approach fails, the PEO should quickly make a legal argument to the court in a motion to dismiss.■

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Brian Nugent is principal of The Nugent Law Firm, P.C., Fort Collins, Colorado.

2 At the time I was serving as the general counsel of the PEO and decided that local counsel working with me on PEO-specific issues was the most effective and cost-efficient way to defend the case.
3 He also realized that the PEO would fight very hard to seek a dismissal, and would add a layer of complexity to the case that he was not willing to endure given the other potential targets and insurance policies available.
4 Practically speaking, it also helps a lot that the client is solvent and capable of paying a judgment!