

The Statutory Employer Law In Virginia

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Agenda

- **Virginia Coverage Requirements**
- **Statutory Employer Law and Related Laws**
- **The Basic Tests**
- **Governmental Entity and Statutory Duty**
- **Industry Considerations**
- **Claim Considerations**
- **Coverage and Penalty Considerations**

Why is the Statutory Employer Law Important?

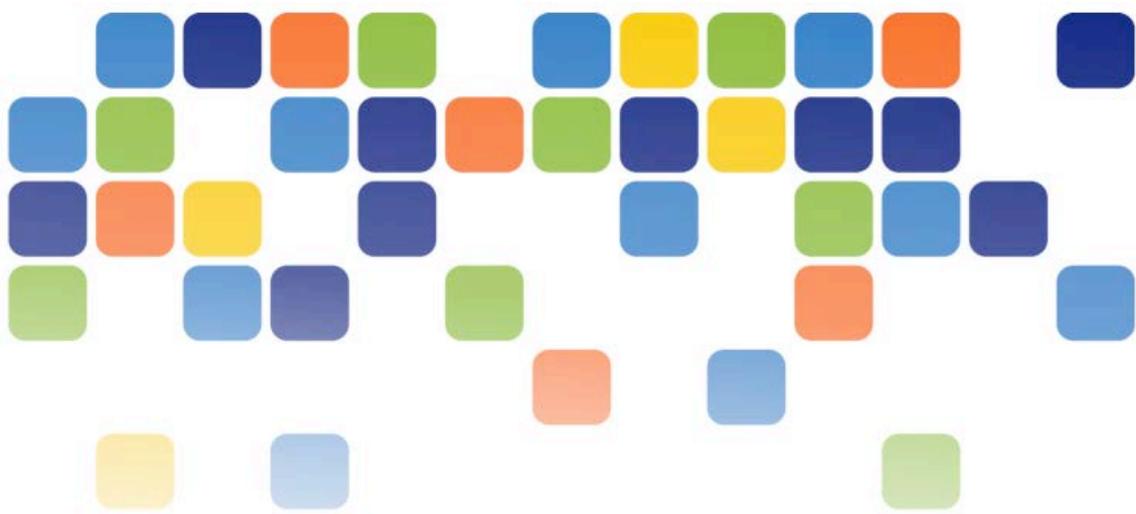
■ Claim considerations

- Right to workers' compensation
- Right to civil suit
- When to accept a claim
- When to deny
- Subrogation and adding a party



■ Coverage considerations

- Properly insuring
- Avoiding penalty



Start by looking at coverage requirements

Virginia Coverage Requirements

Coverage is required for more than two employees

- This is commonly known
- ***But there's much more to coverage requirements!***



Virginia Coverage Requirements

- **Statutory Employer law, § 65.2-302:**
 - A business that hires subcontractor(s) to perform the same trade, business or occupation or to fulfill a contract must include the subcontractor's employees in determining total number of employees.
 - Therefore, if the total of the business owner's employees **plus** all subcontractor's employees is more than two, coverage is required.
- **Number of workers matters**
 - Whether it is direct employees or subcontractor's employees

Statutory Employer Law



■ Purpose of the law

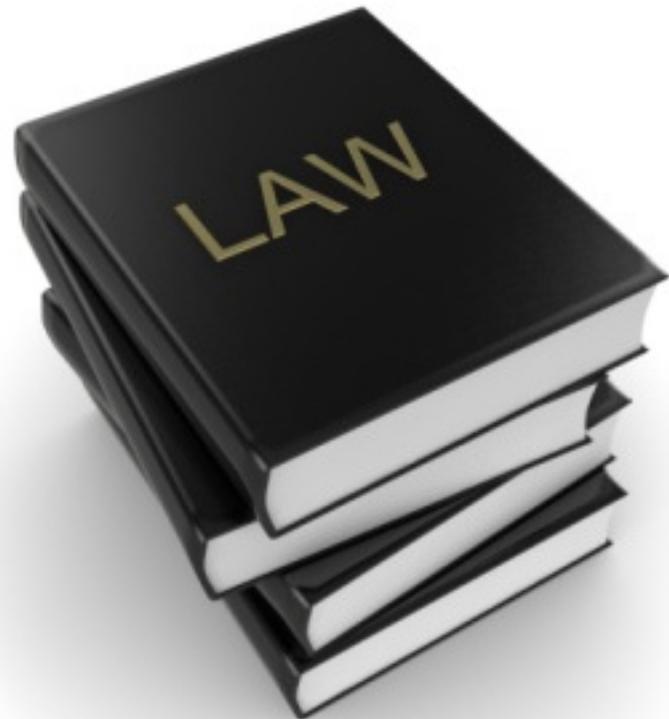
- To prevent an owner from escaping liability under the Act by simply hiring subcontractors instead of employees
- To insure compensation coverage for employees of independent contractors and subcontractors

■ Important points

- Don't overly focus on terms contractor or subcontractor
- Law refers to any **person**
- Person or business can hire a subcontractor or other **person**

Statutory Employer Law

- **The law has four parts**
 - Complex legal language
 - A B and C impose liability
 - D provides one exception
- **Primary Focus**
 - Parts A and B



Statutory Employer Law – Part A

- **When a person performs or executes work for another, and**
 - The work is part of his **trade, business or occupation**, and
 - He contracts or subcontracts out any of the work
 - Then the owner shall be liable to pay any worker employed in the work as if the worker were immediately employed by him
- **Example**
 - Roofing contractor hires a roofing subcontractor



Statutory Employer Law – Part B

- **When a person contracts to perform or execute work for another person, and**
 - The work is *not* part of his trade, business or occupation
 - And he **contracts** or **subcontracts** any part of the work
 - Then he bears liability under the Act to any worker employed in the work as if the worker were immediately employed by him
- **Example**
 - Homebuilder sells houses
 - Subcontracts out all of the work to subcontractors (foundation, electrical, etc.)



Statutory Employer Law – Part C

- **When subcontractor on the job contracts with another person**
 - To perform or execute any part of the subcontractor's work
 - Then the owner bears the same liability to workers as in A or B

- **Example**

- Homebuilder subcontracts out lot development
- Lot developer subcontracts out tree trimming
- Homebuilder is liable to the worker performing tree trimming

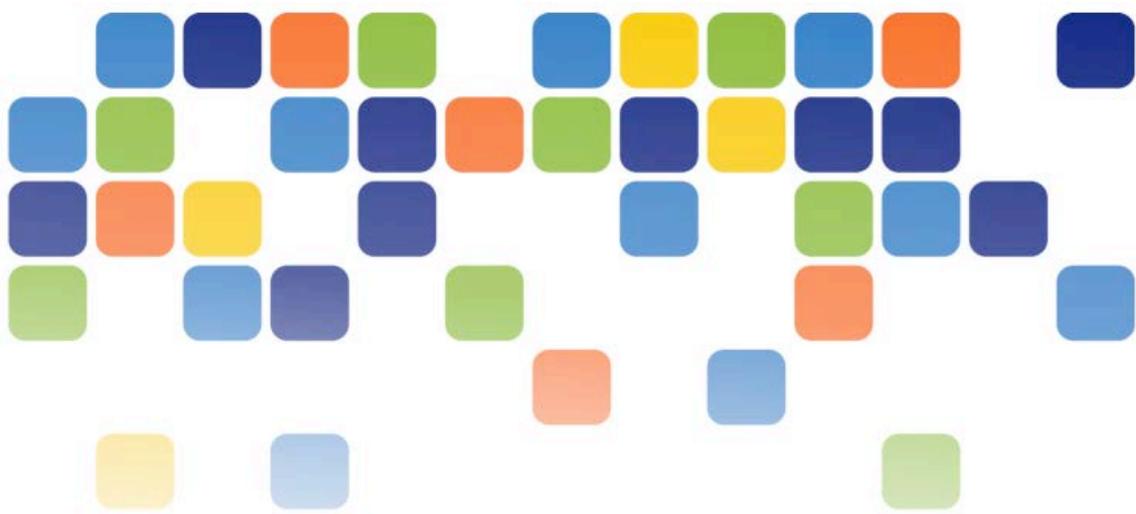


Statutory Employer Law – Part D

- Provides an exception for a person engaged in the **business of real property maintenance and repair, if:**
 - Work is performed on behalf of property owners
 - Injured worker engaged in real property maintenance or repair
 - Person / business had no employees in the same trade, business or occupation as worker seeking compensation; and
 - Person / business **did not seek or obtain a profit** from the homeowners

- **Limited case law**





Related Laws

Exclusivity Provision



- **§ 65.2-307. Employee's rights under the Act exclude all others**
 - Injured worker's “**exclusive remedy**” with employer for a work injury is workers' compensation
 - Employer is “Shielded” from civil suit by an employee
- **Workers' compensation provides limited benefits**
 - Test cases over the law or suits are workers filing civil suits or employers wishing to be found to be statutory employers
 - Reason: no non-economic damages in workers' compensation
 - Non-economic damages increase claim costs significantly

Non-Economic Damages

- **Civil suit often takes longer but damages are potentially greater**

- Pain and suffering
- Loss of consortium
- Loss of enjoyment of life



- **Punitive damages can increase costs substantially**

- Conduct must be found reckless or willful and wanton
- Awarded to punish employer
- Deter bad behavior



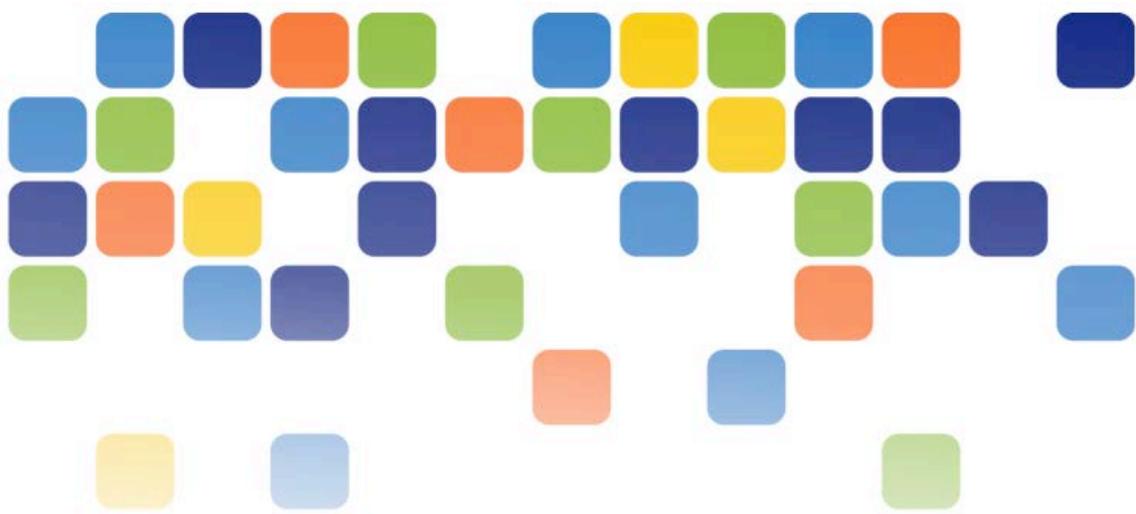
Related laws

- **§ 65.2-309 - employer lien against 3rd party settlement proceeds**
 - Reimburses employer compelled to pay (worker) by law
 - Eliminates worker double recovery
- **§ 65.2-310 - employer protection in 3rd party suit**
 - Authorizes deducting a proportionate share of reasonable expenses for attorney fees to reimburse paying attorney
- **§ 65.2-311 - provides for apportionment of attorney fees and expense reimbursement**

Related laws

- **Locating a responsible third party can be advantageous**
 - Right to reimbursement or lien
 - Does require work and investigation





The Basic Tests

(Statutory Employer Law)

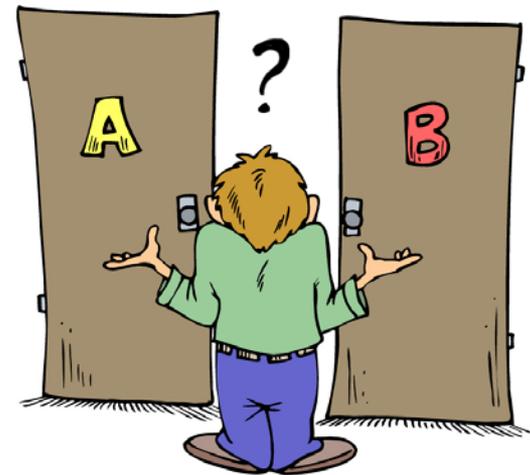
The Basic Tests

- **Normal Work Test**
 - Shell Oil case
- **Subcontracted Fraction Test**
 - Part B – Statutory Employer law
- **Stranger to the Work Test**
 - Allows a worker to sue an employer



Statutory Employer Tests

- **Whether a person is a statutory employer presents a mixed question of law and fact**
 - Look at the facts in each case
 - Important to investigate and gather facts
- **Two main questions to ask to figure out which part of the law applies**
 - Is the work the same trade or business as the owner?
 - Is there a contract or agreement?



Normal Work Test



- **Shell Oil Co. v. Leftwich**, 212 Va. 715, 187 S.E. 2d (1972)
 - Shell Oil Co. appealed a Commission finding that they were a statutory employer
- **The Facts...just a few**
 - Robinson leased a station from Shell and employed Leftwich
 - Leftwich was injured on a service call for the service station
 - The wrecker he was in had a “Shell” emblem
 - Robinson posted a Shell sign
 - The service station sold Shell fuel



Normal Work Test

■ The Test – from Larsons

- **Not** whether the subcontractor’s activity is useful, necessary or even **absolutely indispensable** to employer’s business
- Test is whether work performed by subcontractor’s employees is “normally” performed by owner’s employees.
- Thus, the **Normal Work Test**

■ Court considered

- Shell explores for oil, digs wells
- Refines crude, transports in bulk
- Distributes to dealers & jobbers
- Does not sell gas to the public
- Not Shell’s **normal work**
- **Reversed**, not a statutory employer



COURTESY: SHELL

Subcontracted Fraction Test

- **Cooke v. Skyline Swannanoa, Inc.**

226 Va. 154, 307 S.E.2d 246 (1983)

- Restaurant worker was injured working, received workers' comp.
- Filed a civil suit against Skyline, operating an Inn.
- Trial court ruled Skyline was Statutory employer.

- **The Facts**

- Cooke worked for Aberdeen Barn, a restaurant
- The restaurant was located in an Inn
- Skyline agreed to operate a Holiday Inn
- Entered into a license agreement
- Agreed to provide lodging, food and other accommodations.”



Subcontracted Fraction Test

- **Which test to apply**

- Cooke argued Skyline was not her Statutory Employer because its employees did not normally perform restaurant work. (normal work test)

- **Supreme Court ruled**

- The work Aberdeen Barn contracted to undertake is “obviously a **subcontracted fraction**” of Skyline’s **agreement** with Holiday Inn
- That is the correct test to apply.
- Affirmed. Cooke’s only remedy is workers’ compensation

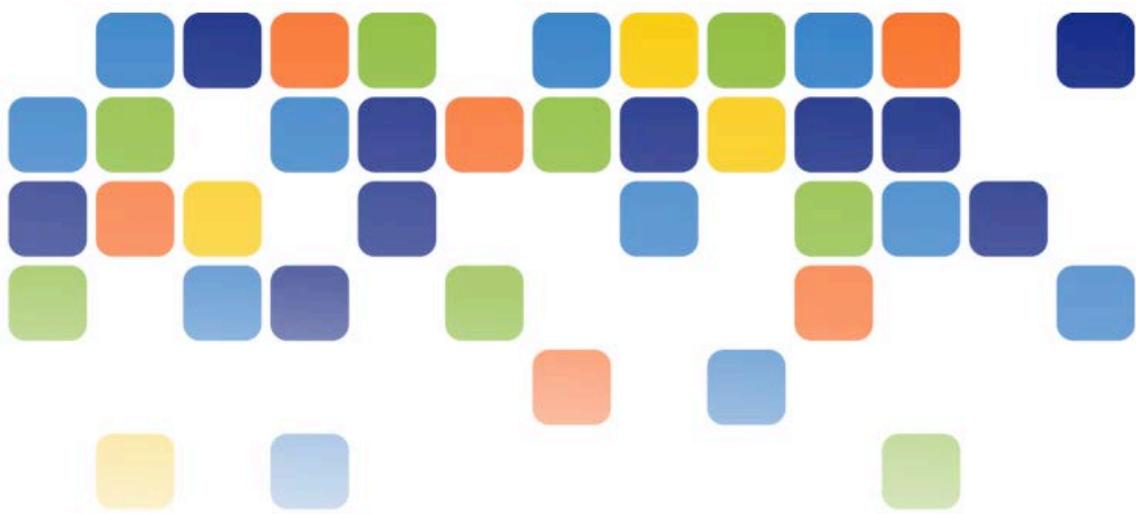


Stranger to the Business Test

- **Test applied to determine when an owner's employee may file civil suit against subcontractor**
 - Test: is the subcontractor a stranger to the owner's business?
- **Whalen v. Dean Steel Erection Constr. Co.,**
229 Va. 164, 327 S.E.2d 102 (1985)
 - Whalen was the Gen'l Contractor's worker injured by the steel subcontractor's work
 - Whalen filed a tort action against a subcontractor, this issue of Statutory Employer went to the Supreme Court of Virginia
- **Court ruling**
 - Dean Steel was **no stranger** to erecting buildings.
 - Whalen **barred from civil suit.** His remedy was workers comp.

Stranger to the Business Test

- **Test applied to determine when an owner's employee may file civil suit against subcontractor**
 - Test: whether subcontractor is a stranger to the owner's business
- **Stone v. Door-Man Manufacturing Co.,**
260 Va. 406, 537 S.E.2d 305 (2000)
 - Ford worker injured at work in the course of his employment
 - Attempted to drive thru doorway which closed, hit head and chest
 - Files civil suit against the Overhead Door Co.
- **Court ruling**
 - Door-Man Mfg. **was a stranger** to manufacturing and selling cars
 - Therefore, worker Stone was allowed to proceed with a civil suit



Governmental Entity

Governmental Entity

- **Jones v. Commonwealth**, 267 Va. 218, 591 S.E.2d 72 (2004)
 - Jones worked for Waco as an asbestos abatement worker
 - Performed a job at University of Virginia
 - Suffered electrical shock injury removing conduits
 - Brought suit against the University for negligence
 - Commonwealth defended that UVA was a statutory employer



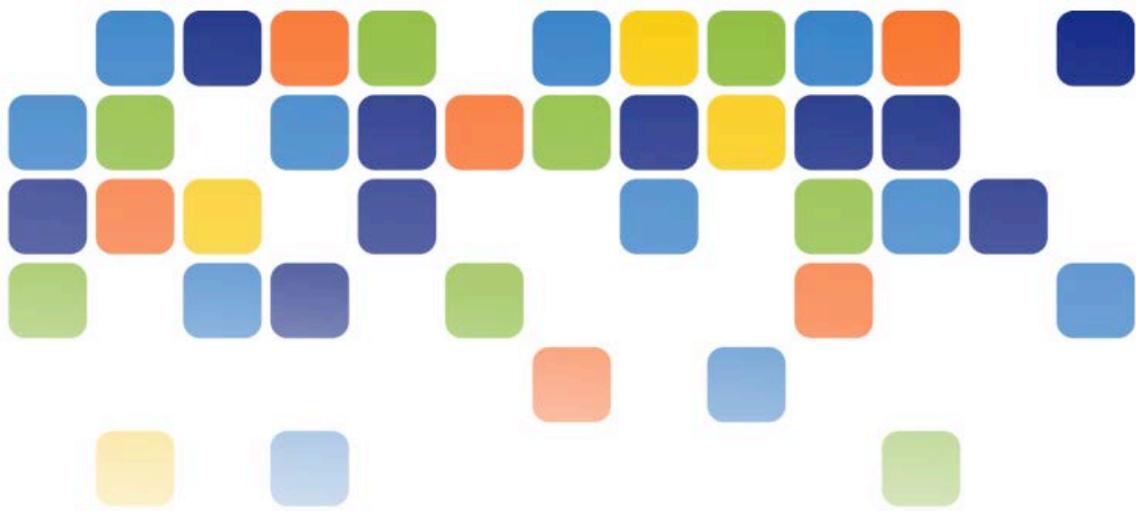
Governmental Entity or Public Utility

■ **Supreme Court opinion**

- UVA owned the building where Jones was injured working
- “The liability as an owner for governmental entities and private entities differs.”
- Any activity authorized or required is considered part of the entity’s trade, business or occupation.
- Noted that the normal work test is not applicable

■ **Governmental entity cannot choose its activities**

- The University was Jones statutory employer.
- Trial court judgment affirmed.
- Tort claim barred.



Industry Considerations

Industry Considerations

■ Construction

- Construction industry has many statutory employers
- This is evident in numerous hearing decisions
- VWC also has a Contractor Compliance Project
- Insurance investigates uninsured entities that hire subcontractors
- Educates contractors about coverage requirements; most obtain coverage voluntarily



Industry Considerations

■ Property Maintenance

- Turf Care Inc. v. Henson, 51 Va. App. 318, 657 S.E.2d 787 (2008)
- Johnson worked for Turf Care, fell from a 40' extension ladder
- Turf Care cared for the common areas in Windsor Farms
- Windsor Farms was found to be a statutory employer

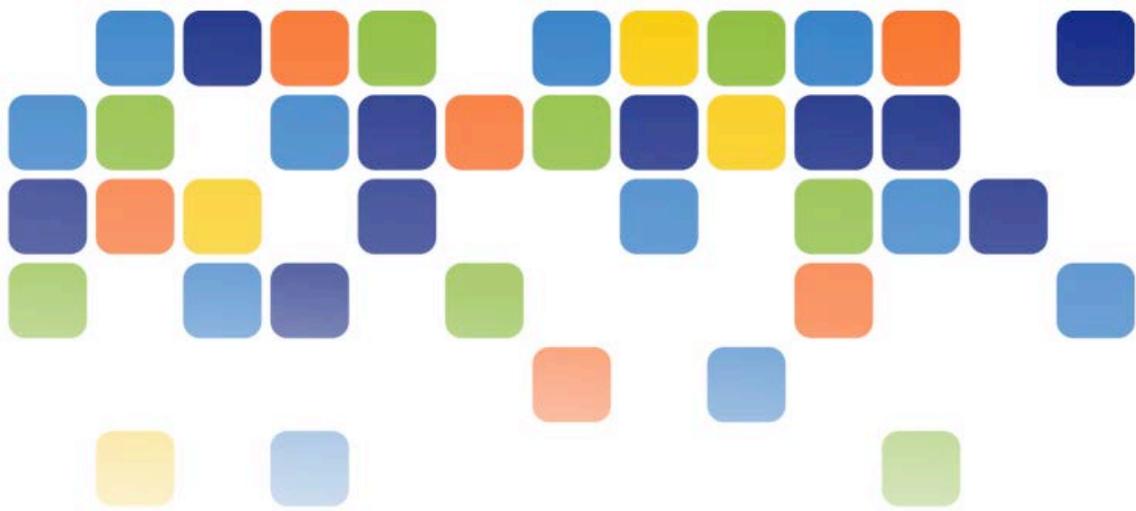


Industry Considerations

■ Trucking

- Clean Sweep Professional Parking Lot Maintenance, Inc. v. Talley, 267 Va. 210, 591 S.E. 2d 79 (2004)
- Paving company paving part of I 95 for VDOT
- Hired Coleman Trucking to assist in transporting asphalt
- Truck driver, Talley, injured responding to disabled truck
- Talley found to be statutory employee of Virginia Paving Co.





Claim Considerations

Claims considerations

- **Perform an independent investigation**
 - Ask questions
 - Consider the industry
 - Is there a contract or agreement?
 - Obtain and review any and all contracts or agreements

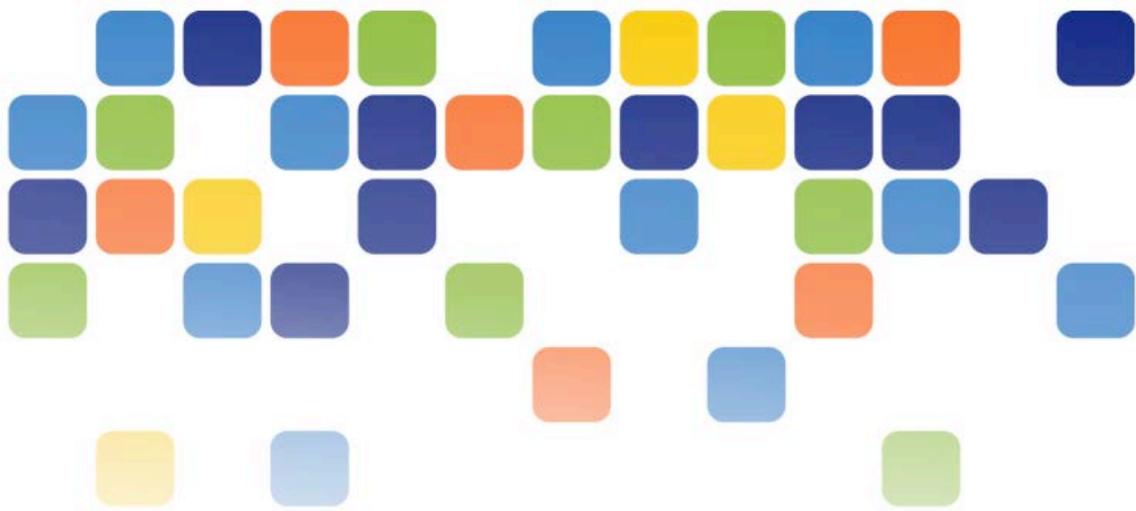


- Governmental entity or public utility?
- Is another business or employees on site or involved?
- Consider the work performed by each business entity

Claim considerations

- **Employer may not consider itself a (statutory) employer**
 - An injured worker can make claim against statutory employer
 - Claim professional should evaluate
 - May accept or deny
 - Manage claim





Coverage Considerations

Coverage Issues

- **Statutory employers not always properly insured**
 - Some are intentionally uninsured due to the cost
 - Some due to lack of understanding of coverage requirements which are complex
- **Insurance Department experience**
 - Frequent employer and agent calls and questions
 - Insurance compliance programs demonstrate a continuous level of uninsured contractors requiring education, enforcement
- **Claim filings**
 - VWC Judicial opinions

Penalty Considerations

- **Employers subject to the Act must properly insure**
 - § 65.2-805 provides a civil penalty for failing to insure of up to \$250 per day uninsured, subject to a maximum of \$50,000.00
 - Also liable to any employee for compensation (WC or lawsuit)
 - In the event of suit employer not permitted several defenses
 - If after hearing and continued noncompliance, Commission may order employer to cease and desist all business operations
- **Other penalties**
 - § 65.2-806 provides for criminal penalties for an employer who knowingly and intentionally fails to comply with the Act

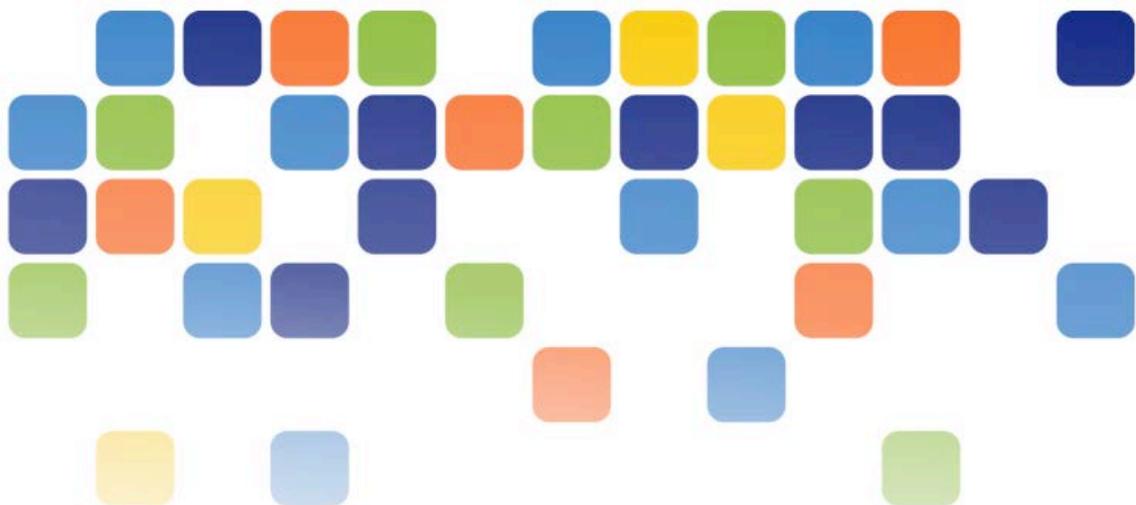
Review

- **Statutory Employer law broadens the definition of employer in Virginia**
- **Sword and a Shield**
- **Claim considerations**



Any Questions?





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