

April 7, 2016

To: Montana Board of Electrical Safety

From: Mark Jette, Board Counsel

RE: Do Employment Referral Agencies Need an Electrical Contractor's License?

Introduction:

At the last meeting, you asked staff to place this issue on the next agenda as a discussion topic. To aid discussion, your Board book contains this memo and a similar memo from Jennifer Massman, the Board's prosecutor. Importantly, Ms. Massman's memo is in response to one particular complaint, with its own specific facts. Although the legal analysis is valid, each case is slightly different. The Board enjoys the right to consider each complaint on a case-by-case basis. However, the following analysis generally applies.

Issue: Must employment referral entities, such as temporary service contractors, staffing agencies, and etc. obtain an electrical contractor's license before referring licensees to perform licensed work?

Short Answer:

No. Employment referral agencies are not "Electrical Contractors". Although responsible to determine – and communicate – the licensure status of each referral, such entities are not responsible for what happens at the job site. The responsible electrician of an electrical contractor is obligated to comply with all regulations that pertain to a particular job site; including, that each worker is properly licensed for the work performed.

Rules:

- 37-68-102)(4)(a) defines "Electrical Contractor" to mean an entity that undertakes or offers to undertake for another the planning, laying out, supervising, and installing or the making of additions, alternations, and repairs in the installation of wiring apparatus and equipment for electrical light, health, and power.
- 37-68-301(3) gives all employment referral agencies a responsibility to ensure the person is properly licensed before referring them.
- A.R.M. 24.141.403(3) and (4) require residential, journeyman and master electricians to perform work only in the employment of a licensed electrical contractor.
- A.R.M. 24.141.403(5) requires the responsible electrician of an electrical contractor to make sure all electrical work is properly licensed and permitted.

Analysis:

Although Mont. Code Ann. § 37-68-102(4)(a) does not apply to employment referral entities, those entities still have responsibilities to protect the public. The intent of these laws is to protect public safety by ensuring that people get, and maintain the correct license, before performing licensed work. Mont. Code Ann. § 37-68-301(3) gives employment referral entities a responsibility to communicate licensure status before referring a person for employment. And, although no specific law requires the agencies to ensure compliance with A.R.M. 24.141.403(4) & (5), agencies should only refer licensees to properly licensed electrical contractors. Once a licensee reaches the job site, A.R.M. 24.141403(5) requires the responsible electrician of an Electrical Contractor to ensure compliance with all related regulations.

Conclusion:

Although they do not need to obtain an Electrical Contractor's license, employment referral agencies are responsible to protect the public by ascertaining and communicating a person's license status, before referring them to perform electrical work. However, once a licensee is appropriately placed in the employment of an electrical contractor, the loaned servant doctrine applies to hold the responsible electrician accountable for legal performance.



Montana Department of
LABOR & INDUSTRY

Steve Bullock, Governor
Pam Bucy, Commissioner

Office of Legal Services
Business Standards Division

To: Screening Panel of the State Electrical Board

From: Jennifer Massman, Department Counsel

Date: June 23, 2015

Issue: Temporary Service Contractors Leasing Employees to Montana-licensed Electrical Contractors

Summary:

Temporary service contractors may provide workers, who are electricians, to clients that are Montana-licensed electrical contractors.

The electricians leased from the temporary service contractor are under the direct control and supervision of the Montana-licensed electrical contractor. Applying the loaned servant doctrine, the electrical contractor is responsible for the leased electricians and must make sure that the leased electricians are licensed in Montana before having them perform electrical work.

Temporary service contractors do not need to be Montana-licensed electrical contractors.

Discussion:

A **temporary service contractor** is a person conducting a business that hires its own employees and assigns them to clients to fulfill a work assignment with a finite ending date to support or supplement the client's workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects. MCA §§ 39-8-102(12) and 39-71-116(38). A temporary service contractor is not a construction contractor or a professional employer organization. MCA §§ 39-8-102(11) and 39-9-102(1). A temporary service contractor is the employer for purposes of workers' compensation and unemployment insurance. MCA § 39-71-117 and ARM 24.11.2011.

Workers supplied by a temporary service contractor are governed by the **loaned servant doctrine** regarding supervision, control, and tort liability. Under the loaned servant doctrine, when one person lends his employees to another for a particular employment, the employee, for anything done in that employment must be dealt with as the employee of the one to whom he has been lent, although he remains a general employee of the one who lent him. Black's Law Dictionary, 6th edition (1990).

Other jurisdictions have specifically applied the loaned servant doctrine to temporary service contractors supplying electricians to clients that are licensed electrical contractors. City of Columbus v. Tradesmen International, Inc., 1997 WL 52905 (1997) (not reported in N.E.2d); Tradesmen International, Inc. v. City of Massillon, Case No. 2000CV00286, Stark County, Ohio (2000). In these cases, local building code ordinances prohibited licensed electrical contractors from allowing any person to do work under the electrical permit except for "direct employees" of the electrical contractor. City of Columbus v. Tradesmen International, Inc., 1997 WL 52905 (1997) (not reported in N.E.2d); Tradesmen International, Inc. v. City of Massillon, Case No. 2000CV00286, Stark County, Ohio (2000). These courts determined that the loaned servant doctrine applied to workers leased from the temporary service contractor because they were under the direct supervision and control of the electrical contractor and the electrical contractor had the same degree of supervision and control over the leased workers as it did over its own employees. The courts further found that applying the loaned servant doctrine to the leased workers was consistent with the purpose of the building code to protect the public safety and welfare.

Montana recognizes and applies the loaned servant doctrine. Davaney v. Lawler Corp., 101 Mont. 579, 56 P.2d 746 (1936); Kish v. Montana State Prison, 161 Mont. 297, 505 P.2d 891 (1973). In Davaney, trucks and drivers were leased from Lawler Corp. by the Civil Works Administration (CWA) to transport materials and employees to job sites. The truck drivers and trucks reported to the CWA which controlled when and how long truck drivers and trucks should work and what the trucks were used for. 101 Mont. at 585-87, 56 P.2d at 747-49. CWA employee Devaney was injured when riding in a truck and sued Lawler Corp. alleging the driver was negligent. Id. The Supreme Court agreed with Lawler Corp. that, under the loaned servant doctrine, the CWA was responsible for the driver. The Supreme Court held that who paid the loaned worker and who could select and discharge the loaned worker were not controlling factors in determining who was responsible for the loaned worker. 101 Mont. at 589, 56 P.2d at 749. Instead, the Court found that the determinative issue was under whose control and direction was the work conducted and for whose benefit was the worker engaged. Id.

Montana courts would likely apply the loaned servant doctrine to leased workers from temporary service contractors which would be consistent with the statutes regarding temporary service contractors and would also achieve the objective of the licensing laws to protect the public safety and welfare. Accordingly, the temporary service contractors do not need be licensed as electrical contractors and their clients (electrical contractors) would be responsible for the leased workers.

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