THE LAW OF “LEASED WORKER” AND “TEMPORARY WORKER” UNDER A CGL POLICY

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In the twenty-first century, workplace employers are increasingly utilizing the services of alternative staffing arrangements under which they employ workers furnished by employee or labor leasing firms because these types of arrangements provide employers with a number of financial and administrative benefits. These leasing firms often assume all of the labor, payroll, insurance, administrative, and overhead costs associated with the workers they furnish. This can result in a substantial savings to the employer, who normally would pay these costs for its regular employees. However, when one of these workers is injured while working at the client/insured company where the worker was placed by the leasing company, an issue arises regarding whether the client company’s commercial general liability (CGL) policy covers the loss. Due to the existence of an employer’s liability exclusion, the resolution of this issue hinges on whether the worker was

1. In some states, the staffing or employment firm is considered the worker’s general employer and the client company his special employer. In these states, the workers’ compensation bar to an employee suing his employer does not apply to a suit against the special employer. See, e.g., Lang v. Edward J. Lamothe Co., Inc., 479 N.E.2d 208, 209 (Mass. App. Ct. 1985).

2. Different insurers variously refer to this exclusion as the employer’s liability exclusion, employer’s exclusion, employee exclusion, and employee injury exclusion. Except where this article is quoting from a case, the author has used employer’s liability exclusion for the sake of uniformity.
an “employee” of the client company at which he or she was placed at the time of the accident. If the worker is found to be an employee, coverage is excluded under the CGL policy.

A CGL policy addresses coverage for injuries to workers provided to client companies by employment-type organizations through the policy terms *leased worker* and *temporary worker*. A leased worker is considered an employee of the client company and excluded from coverage under the employer’s liability exclusion in the CGL policy, but a temporary worker is not. Accordingly, insureds seeking coverage will argue that the injured worker was a temporary worker, and insurers seeking to disclaim coverage will maintain that the worker was a leased worker.

The terms *leased worker* and *temporary worker* are often defined as follows:

“Leased worker” means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. “Leased worker” does not include a “temporary worker.”

“Temporary worker” means a person who is furnished to you to substitute for a permanent “employee” on leave or to meet seasonal or short-term workload conditions.

In pertinent part, the employer’s liability exclusion provides as follows:

2. Exclusions
   This insurance does not apply to:
   e. Employer’s Liability
      “Bodily injury” to:
      (1) An “employee” of the insured arising out of and in the course of:
          (a) Employment by the insured; or
          (b) Performing duties related to the conduct of the insured’s business[.]

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3. In the case of workers hired directly by the company, state law on what constitutes an employee or independent contractor will govern.


5. 2007 FORM § I.2.e. Except for providing that an employee “includes a ‘leased worker’” but “does not include a ‘temporary worker,’” the CGL policy does not define the term
On the surface, the issue appears to be straightforward, but divining whether a worker is a leased or temporary worker can be more complicated than initially thought. There is also much at stake for employers: even though they can realize substantial savings by utilizing workers provided by staffing or employment-type agencies in place of employees whom they hire directly, employers will give back much, if not all, of this savings if it turns out that the injured worker is a leased worker employee because, under such circumstances, there will be no insurance coverage.

This article canvasses the law of “leased worker” and “temporary worker” as it has developed since the insertion of these terms into the Insurance Services Office (ISO) CGL form in 1993. It exposes and explores the multiple legal issues raised by these terms. It also offers advice for employers who want to reap the financial benefits of using workers furnished by staffing or employment-type companies but not negate that benefit by incurring a large uninsured judgment because a court finds that the injured worker was an uninsured leased worker rather than an insured temporary worker.

II. PURPOSE OF THE LEASED WORKER/TEMPORARY WORKER DICHOTOMY IN THE CGL POLICY

At the outset, it is important to understand the reason why the employer liability exclusion applies to leased workers but not temporary workers. The reason is grounded in the difference between a CGL policy and a workers’ compensation policy. The former is designed to cover an employer’s liability to third persons for the negligence of its agents, servants, and employees. CGL policies typically exclude injuries to employees because the expectation is that the employer will have in place workers’ compensation insurance or self-insurance. In contrast to a CGL policy, a workers’ compensation policy limits defense and indemnity of the employer to claims for benefits made by injured employees required by the

\[employee. \text{E.g., } \text{id. } \text{§ V.5. Close attention needs to be paid to the policy language because other policies contain employer’s liability exclusions that exclude coverage for temporary workers. See Wellington Specialty Ins. Co. v. Ling, No. 3:08-CV-738-L, 2009 U.S. Dist. LEXIS 61569, at *16 (N.D. Tex. July 17, 2009).} \]
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workers’ compensation statute. “The primary purpose of the exclusion is to draw a sharp line between employees and members of the general public.” A CGL policy covers the claims of the former but not the claims of the latter.

The reason the employer’s liability exclusion applies to leased workers but not temporary workers is generally based on the language of a state’s workers’ compensation statute. Because the texts of these statutes vary from jurisdiction to jurisdiction, counsel need to consult their local statutes to understand the local justification for the employer’s liability exclusion applying to leased workers but not temporary workers. For example, in Kentucky, the workers’ compensation statute expressly states that a “temporary help service shall be deemed to be the employer of a temporary worker.” Thus, under Kentucky law, a temporary worker furnished to a client company by an employee leasing company is not an employee of the client company and not subject to the employer’s liability exclusion. Similarly, § 468.520(4)(a) of the Florida Statutes defines a “temporary help arrangement” as one in which an “organization hires its own employees and assigns them to a . . . client’s workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.” Thus, under Florida law, these temporary workers should be viewed as employees of the temporary help company, not the client company, and should not be subject to the employer’s liability exclusion. In Massachusetts, the rationale for subjecting leased workers to the employer’s liability exclusion is that Massachusetts law requires

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8. See HDH Corp. v. Atl. Charter Ins. Co., 681 N.E.2d 847, 850–53 & n.12 (Mass. 1997) (recognizing that the common practice for employers seeking coverage for claims outside of the workers’ compensation system is to purchase some form of general liability insurance to protect against such risks).


10. See Scottsdale I, 460 F. Supp. 2d. at 255 (holding that because leasing companies also are required by state law to have workers’ compensation insurance for their employees, leased workers are usually considered employees for the purposes of the CGL exclusions as well); AMCO Ins. Co., 2007 U.S. Dist. LEXIS 2440, at *20 (An employer that hires leased workers or that hires temporary workers who were not furnished by a staffing company would have to purchase workers’ compensation insurance to cover such workers, but an employer that hired temporary workers furnished by a staffing company would not have to purchase workers’ compensation insurance to cover these workers because they would be covered by the staffing company’s workers’ compensation carrier. Thus, it makes sense to exclude the former from the employer’s workers’ compensation policy but to include the latter.).


employee leasing companies, like regular employers, to provide workers’ compensation insurance for their employees.\textsuperscript{14}

### III. TEMPORARY WORKER ISSUES

Most of the cases dealing with the leased worker/temporary worker distinction have addressed the issue of what constitutes a temporary worker. Moreover, because the CGL policy provides that \textit{leased worker} does not include a temporary worker, an initial understanding of what constitutes a temporary worker will inform what constitutes a leased worker.

**A. Furnished to: Does It Require the Injured Worker to be Provided to the Client Company by a Third-Party Employment-Type Business?**

The majority of cases that have applied the employer’s liability exclusion to deny coverage have done so by finding that the worker was not “furnished to” the insured client company, as is required by the CGL policy’s definition of \textit{temporary worker}. These cases, therefore, generally do not reach the issue of whether the worker was furnished to “substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.” However, the courts are in disagreement about the meaning of the “furnished to” requirement in the definition of \textit{temporary worker}. The majority line of cases holds that to be a temporary worker, the worker must be furnished to the client company by an employment-type agency. The minority line of cases finds no requirement that the temporary worker be furnished to the client company by such a business. Both lines of cases are presented in chronological order below in order to track the development of the law on this issue.

1. **Cases: Temporary Worker Must Be Furnished by an Employment-Type Business**

In \textit{Monticello Insurance Co. v. Dion},\textsuperscript{15} the decedent (Mellen) was killed when her cousin (Dion), making a chainsaw cut, caused a tree to snap and fall on her while she was operating a wood chipping machine on the same job.\textsuperscript{16} An issue before the court was whether Mellen had been working the job as an employee of Dion, the insured, or as a temporary worker, who under the policy definitions would not be an employee of Dion. The insured’s


\textsuperscript{16} Id. at 1113.
argument that Mellen was a temporary worker and not an employee foun-
dered on the shoals of Dion’s failure to satisfy the “furnished to” element
of the definition of temporary worker.\textsuperscript{17} The court rejected the temporary
worker argument by reasoning that the term furnished to connotes some
involvement of a third person and requires something more than Dion
asking his cousin if she would work for him for a few days and his cousin
agreeing.\textsuperscript{18} The court also turned away the “interesting” argument that
Mellen had been furnished to Dion because she was in effect a landscaping
company sole proprietorship who “furnished her services to Dion [on] the
day of the accident.” The court found that this approach would read the
“furnished to” requirement out of the policy because every employee fur-
nishes his or her services to the employer, and Mellen’s sole proprietorship
had no existence separate from her own.\textsuperscript{19}

The case of \textit{Nautilus Insurance Co. v. Gardner}\textsuperscript{20} arose out of the parents of
a female minor bringing suit against the insured, the operator of a haunted
house, based on allegations that the insured’s employee sexually assaulted
the minor during her nine days of employment as an “actor” at the haunted
house display.\textsuperscript{21} In the coverage litigation, the court predicted that the
Pennsylvania Supreme Court would hold that the term furnished to you was
unambiguous and meant “supplied, provided or equipped to another ent-
ity or person.”\textsuperscript{22} Ultimately, the court held that the minor did not qualify
as a “temporary worker,” irrespective of the brevity of her employment,
because the insured presented no evidence suggesting that she was “sup-
plied, provided or equipped” to the insured by “a headhunter, employment
agency manpower service provider or any similar service.”\textsuperscript{23} Under these
circumstances, the court found the minor to be an employee of the insured
and subject to the employer’s liability exclusion.\textsuperscript{24}

The case of \textit{Brown v. Indiana Insurance Co.}\textsuperscript{25} arose out of the deaths
of Garcia and O’Banion in an automobile accident. At the time of their
deaths, they were employees of Willowbank Garden Co. and were act-
ing within the scope of their employment for Willowbank.\textsuperscript{26} Both de-
cedents were hired directly by Willowbank. The estates of Garcia and
O’Banion brought suit against Willowbank, and Willowbank demanded

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 1115.
\item \textsuperscript{18} \textit{Id.} at 1114–15.
\item \textsuperscript{19} \textit{Id.} at 1115.
\item \textsuperscript{20} No. 04–1858, 2005 WL 664358 (E.D. Pa. Mar. 21, 2005).
\item \textsuperscript{21} \textit{Id.} at *2.
\item \textsuperscript{22} \textit{Id.} at *7.
\item \textsuperscript{23} \textit{Id.} at *6.
\item \textsuperscript{24} \textit{Id.} at *7.
\item \textsuperscript{25} 184 S.W.3d 528 (Ky. 2005).
\item \textsuperscript{26} \textit{Id.} at 531.
\end{itemize}
that its insurer provide a defense. Willowbank contended that Garcia and O’Banion were temporary workers and that it was therefore entitled to coverage “because Garcia was a migrant worker and O’Banion intended to quit work and attend college.” The court rejected this argument because it would read the “furnished to you” requirement out of the definition of temporary worker. Because there was no dispute that Willowbank hired Garcia and O’Banion directly and that they were not provided by a temporary help service, the court held that Garcia and O’Banion were employees, not temporary workers, and that the employer’s liability exclusion barred coverage.

The court in *American Family Mutual Insurance Co. v. Tickle* also rejected the argument that the term temporary worker could be interpreted to include someone who works to meet seasonal or short-term workload conditions but who is not furnished to the employer. “Tickle was an individual who periodically sought and obtained employment [directly] from [] Kemper during periods when [] Tickle was laid off from his regular employment.” After Tickle was injured while working for Kemper, Tickle brought suit against Kemper. Kemper sought a defense from his CGL insurer, and the insurer instituted this declaratory judgment action. “Tickle concede[d] that he was not ‘furnished’ to [] Kemper” but contended that he was a temporary worker because it is ambiguous whether the verb furnished applies to a person who meets seasonal or short-term workload conditions. Tickle argued that the phrase is furnished only applies to those people who substitute for a permanent employee and not to those who meet seasonal or short-term workload conditions. The court rejected this grammatical argument and found no ambiguity in the policy definition of temporary worker. Accordingly, the court held that Tickle was an employee, not a temporary worker, and that the employer’s liability exclusion barred coverage.

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27. *Id.* at 538.
28. *Id.* at 539–40.
29. *Id.* at 537–39. The definition of temporary worker under the policy at issue in the case is somewhat different than the definition contained in the ISO CGL policy. The Brown policy defined a temporary worker to be “a person who is furnished to you for a finite time period to support or supplement your workforce in special work situations such as ‘employee’ absences, temporary skill shortages and seasonal workloads.” *Id.* at 534. It is not clear from the opinion whether this policy was an ISO form.
31. *Id.* at 30–31.
32. *Id.* at 28.
33. *Id.* at 30–31.
34. *Id.*
35. *Id.*
36. *Id.*
Nationwide Mutual Insurance Co. v. Allen\textsuperscript{37} also involved a situation where the injured worker was hired directly by the employer and was not furnished to the employer by an employment-type agency.\textsuperscript{38} Allen Landscaping provided landscaping services to customers for a fee. Shaw performed landscaping work for Allen in exchange for pay.\textsuperscript{39} Shaw was hired directly by Allen.\textsuperscript{40} Shaw was injured in an accident while operating a commercial riding mower owned by Allen.\textsuperscript{41} Shaw brought suit against Allen, and Allen’s insurer instituted this declaratory judgment action. The court concluded that the definition of temporary worker in the CGL policy was clear and unambiguous.\textsuperscript{42} It then held that Shaw was not a temporary worker because he was not furnished to Allen by an employment agency, manpower service provider, or similar service.\textsuperscript{43} Under these circumstances, the court found Shaw to be Allen’s employee and that the employer’s liability exclusion operated to bar coverage for Allen.\textsuperscript{44}

In Fulcrum Insurance Co. v. Barber,\textsuperscript{45} a case arising out a worker falling to his death while painting and relamping a communications tower, the court summarily concluded without analysis that both the employer’s liability exclusion and the temporary worker exception to that exclusion are not ambiguous.\textsuperscript{46} The court did not comment on the “furnished to” issue. However, it did find that the party relying on the temporary worker exception had the burden of proof on that issue and that the burden had not been met in the case.\textsuperscript{47}

The case of AMCO Insurance Co. v. Dorpinghaus\textsuperscript{48} arose out of Richie, Tommy, and Tony being injured while working for Tony’s father, Steven, who was doing business as Dorpinghaus Construction.\textsuperscript{49} “In the fall of 2004, Dorpinghaus Construction agreed to build a home and hangar garage for [] Delk.” Steven agreed with his son, Tony, that Tony would help with the framing of the house and hangar.\textsuperscript{50} At the time of this agreement, Tony was employed by another family-owned business, Meats, Meals and

\begin{footnotes}
\item\textsuperscript{37} 850 A.2d 1047 (Conn. App. Ct. 2004).
\item\textsuperscript{38} Id. at 1057.
\item\textsuperscript{39} Id. at 1051.
\item\textsuperscript{40} Id. at 1054.
\item\textsuperscript{41} Id. at 1051.
\item\textsuperscript{42} Id. at 1057.
\item\textsuperscript{43} Id.
\item\textsuperscript{44} Id.
\item\textsuperscript{46} Id. at *13–14.
\item\textsuperscript{47} Id. at *14.
\item\textsuperscript{48} No. 05–1296 (PJS/JJG), 2007 U.S. Dist. LEXIS 2440 (D. Minn. Jan. 11, 2007).
\item\textsuperscript{49} Id. at *1.
\item\textsuperscript{50} Id. at *2–3.
\end{footnotes}
More. “Knowing that he could not frame the Delk project alone, Tony [convinced] Richie, a close friend since childhood,” to help with the job. “Richie was the sole proprietor of Richie’s Dreamscapes, a ‘hardscape’ construction business.” “Richie spoke directly with Steven [ ] about the amount of work that needed to be done and the terms of payment. Tommy was a childhood friend of both Tony and Richie” and “the sole proprietor of Do-It-Rite Lawn Care & Snow Removal.” “Tommy heard about the [ ] project, and asked [Steven] if he could work on it.”

After making their own deals, Richie, Tommy, and Tony worked on the project until “the scaffolding on which they were working collapsed.” “All three suffered serious injuries.” Throughout the time they worked on the project, “[b]oth Tommy and Richie . . . continued to run their own businesses.”

At the time of the accident, “Dorpinghaus Construction was insured under a [CGL] policy issued by AMCO.” The policy included an employer’s liability exclusion and provided that employee includes a leased worker but not a temporary worker. “Dorpinghaus Construction . . . did not carry worker’s compensation insurance.” Steven and the young men argued that even if the young men were working as employees, they were temporary workers and thus excluded from the definition of employee under the policy.

AMCO argued that the “furnished to you” language in the definition of temporary worker unambiguously meant that the young men had to be furnished to Dorpinghaus Construction by a third party such as a temporary employment agency. Defendants argued that the term furnished is ambiguous because it does not necessarily require a third person to do the furnishing. Rather, defendants, like the worker in Dion, argued that “a worker can furnish himself to an employer.” Defendants also argued that “even if a third party must do the furnishing, Richie and Tommy were . . . furnished to Dorpinghaus Construction by a third party—either by their friend Tony or by their respective businesses (Richie’s Dreamscapes and Do-It-Rite Lawn Care & Snow Removal).”

51. Id. at *3.
52. Id. at *4.
53. Id. (internal citation omitted).
54. Id.
55. Id. at *4–5.
56. Id. at *5.
57. Id. at *7.
58. Id. at *9.
59. Id. at *10.
60. Id.
61. Id.
62. Id.
The court agreed with the insurer and the majority of courts “that the phrase ‘furnished to you’ is not ambiguous and ‘necessarily connotes some involvement by a third person.’” In doing so, the court observed that this interpretation of the policy is the only one that “gives meaning to all the words of the policy” because, under defendants’ construction, every worker would be “furnished to you” for the purposes of the policy. In the court’s view, this interpretation would render the phrase meaningless and would read it out of the policy. The court also rejected defendants’ argument that because the definition of leased worker refers to a third party (a labor leasing firm) and the definition of temporary worker does not, a “‘temporary worker’ can be self-furnished.” The court reasoned that both provisions require third-party involvement and that the third-party involvement necessary for a leased worker (a labor leasing company) is more specific and narrow than that required for a temporary worker.

The court rejected defendants’ argument that the insurer’s reading of the policy makes no sense in the context of the case, where Dorpinghaus Construction did not carry workers’ compensation insurance, because CGL policies exclude injuries to employees who are supposed to be covered by workers’ compensation insurance. The court, however, found rational the distinction between leased workers who are considered to be employees and temporary workers who are not considered to be employees because an employer, like Dorpinghaus Construction, which “hired leased workers or . . . hired temporary workers who were not furnished would have to purchase worker’s compensation insurance to cover them.” By contrast, the court observed that an employer, unlike Dorpinghaus Construction, which “hired temporary workers furnished by an agency would not have to purchase worker’s compensation insurance to cover them [because] those workers would remain covered by the agency’s worker’s compensation carrier.” Under these circumstances, it makes “sense to extend the employer’s CGL policy to cover lawsuits brought by such workers.”

Richie and Tommy’s argument that Tony furnished them to Dorpinghaus Construction fared no better because the court found that “Tony was not in the business of supplying workers to others.” Moreover, it was undisputed that neither Richie nor Tommy had ever worked for Tony.

63. Id. at *14–15.
64. Id. at *16–17.
65. Id. at *17–18.
66. Id. at *18.
67. Id. at *20.
68. Id.
69. Id.
70. Id. at *22–23.
thus “making it difficult for Tony to furnish them to anyone.”\textsuperscript{71} Richie and Tommy’s argument was also undercut by the fact that they both negotiated their deals directly with Steven Dorpinghaus.\textsuperscript{72} Similarly, because there was no evidence that Richie’s business, Richie’s Dreamscapes, or Tommy’s business, Do-It-Rite Lawn Care and Snow Removal, were in the business of providing temporary workers to do construction framing, the court brushed aside Richie and Tommy’s argument that they were furnished to Dorpinghaus Construction by their respective businesses.\textsuperscript{73} Like the court in \textit{Allen},\textsuperscript{74} the \textit{Dorpinghaus} court found that a business in the nature of “an employment agency, manpower service provider or any similar service” must furnish a worker to a business like Dorpinghaus Construction for that worker to qualify as a temporary worker.\textsuperscript{75}

Only the lead opinion in \textit{General Agents Insurance Co. of America, Inc. v. Mandrill Corp., Inc.}\textsuperscript{76} reached the “furnished to” issue. “Mandrill contracted to perform demolition work at two sites in Chattanooga, Tennessee.”\textsuperscript{77} During the work, “a wall collapsed injuring two workers . . . and killing a third . . . (. . . the ‘Laborers’).”\textsuperscript{78} “Mandrill paid the Laborers and other workers on site in cash, on an hourly basis, generally weekly, and did not withhold or pay social security taxes.”\textsuperscript{79} At the time of the wall collapse, “Mandrill did not have workers’ compensation insurance coverage.”\textsuperscript{80} The Laborers filed suit against Mandrill claiming that they were employees of Mandrill at the time of the collapse. Subsequently, one of the Laborers amended his complaint to allege that he was an independent contractor.\textsuperscript{81} Mandrill requested that its insurer defend and indemnify it, but the insurer declined to do so based on an employer’s liability exclusion contained in the CGL policy. The district court held that the allegation that underlying plaintiffs were employees of Mandrill triggered the employer’s liability exclusion.

The opinion concluded that the “mere use of the word ‘employee’ [in the underlying complaint] is not sufficient to invoke the employer’s exclusion . . . if the policy is construed to cover some subclass of temporary employee” for which the policy provides coverage.\textsuperscript{82} This conclusion led

\begin{footnotes}
\item[71.] \textit{Id.} at *23.
\item[72.] \textit{Id.} at *22.
\item[73.] \textit{Id.} at *23–24.
\item[74.] 850 A.2d 1047, 1057 (Conn. App. Ct. 2004).
\item[75.] \textit{Dorpinghaus}, 2007 U.S. Dist. LEXIS 2440, at *23–24.
\item[76.] 243 F. App’x 961 (6th Cir. 2007).
\item[77.] \textit{Id.} at 962.
\item[78.] \textit{Id.}
\item[79.] \textit{Id.} at 963.
\item[80.] \textit{Id.}
\item[81.] \textit{Id.} The court found Wynn to be an “employee” and “not an independent contractor.” \textit{Id.} at 966 n.1.
\item[82.] \textit{Id.} at 965.
\end{footnotes}
the court to consider whether the Laborers were temporary workers. The opinion lined up with the “majority of . . . courts” that have considered the “furnished to” issue because it held that the phrase furnished to unambiguously requires the involvement of a third party such as a temporary staffing agency that supplies the worker to the insured employer. Any other interpretation of the language of the policy would read the phrase furnished to out of the policy. Because there was not “a scintilla of evidence . . . to indicate that any of the Laborers were ‘furnished to’ Mandrill by [a] third party,” the court concluded that they were not temporary workers. As a result of this finding, the court held that the employer’s liability exclusion applied and operated to bar Mandrill’s claim for coverage.

Pacific Employers Insurance Co. v. Wausau Business Insurance Co. arose out of Hart being injured while working at Berman Brothers, Inc., a scrap metal company, while cutting up railcars. Hart had been assigned to Berman by Action Labor, an employment or staffing agency. Action Labor was Hart’s employer, and Berman was Action Labor’s client company. “Action Labor specialize[d] in providing industrial clients with daily workers,” both on a short-term and a long-term basis.

During the time Hart worked at Berman, “Action Labor provided [him] with workers’ compensation insurance, paid his payroll taxes and provided him with the income reporting documents required by [the] Internal Revenue Service.” While working at Berman, Hart “present[ed] [his supervisors at Berman] with either a daily or weekly work ticket to sign.” He then returned these work tickets to Action Labor. Upon receipt of his ticket, Action Labor paid him directly. Action Labor “then invoice[d] Berman for the amounts due [and] provide[d] Berman with a copy of [] Hart’s daily or weekly work tickets.” Berman then paid Action Labor. Action Labor charged Berman an hourly rate for Hart’s services. The hourly rate was comprised of Hart’s actual salary and an amount to cover Action Labor’s overhead cost and to provide Action Labor with a profit. Hart worked

83. Id. at 966–67.
84. Id. at 968.
85. Id. Both dissenting opinions did not reach the temporary worker issue. See id. at 971–72 (Batchelder, J., dissenting); see id. at 972–74 (Clay, J., dissenting). All three judges, for different reasons, affirmed the judgment below that there was a duty to defend. Id. at 966; id. at 971–72 (Batchelder, J., dissenting); id. at 973 (Clay, J., dissenting).
87. Id. at *5.
88. Id.
89. Id. at *6.
90. Id.
91. Id. at *7.
92. Id.
93. Id. at *7 n.9. Hart sued Berman in Florida state court. Id. at *12. Initially, Wausau, Berman’s CGL insurer, defended Berman under a reservation of rights. Id. Wausau then denied
at Berman continuously from at least May 25, 2000, until the date of his injury, August 18, 2000.  

On the “furnished to” issue, the court lined up with the “majority of courts” to hold that the language unambiguously required the involvement of a third party that supplies the worker. It also found that Action Labor was the undisputed third-party supplier of Hart.  

The case of *Burlington Insurance Co. v. De Vesta* arose out of Hernandez’s injury while he was working for De Vesta Carpentry, a subcontractor on a Cavaliere Customs, Inc. construction site. It appears that Hernandez was an employee of De Vesta. The insurer brought a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify on account of the employer’s liability exclusion in the policy. Hernandez argued that the exclusion did not apply because he was a temporary worker. In an opinion that is short on background facts relating to Hernandez’s employment status, the court concluded that Hernandez was not a temporary worker because he was not hired through “an employment agency, manpower service provider or any similar service.”  

The Colorado Court of Appeals agreed that a temporary worker must be a worker provided to the insured by a third party. In *Carl’s Italian Restaurant v. Truck Insurance Exchange*, the underlying complaint alleged that Arellano was injured in an automobile collision with Perigo, an employee of Carl’s Italian Kitchen. In the coverage action brought by Carl’s business owner’s liability insurer, the trial court applied an auto exclusion in the policy applicable to employees of Carl’s to grant summary judgment to the insurer. The policy defined an insured to include Carl’s employees, and  

coverage based on an employer’s liability exclusion and on Hart being a leased worker. *Id.* at *12–13. Wausau tendered the defense to Pacific, the workers’ compensation and employer’s liability insurer for Action Labor. *Id.* at *13. After the nearly $3 million judgment was affirmed on appeal, Berman assigned Pacific all rights to pursue all claims against Wausau. Pacific assumed and ultimately satisfied the state court judgment. *Id.*  

94. *Id.* at *5.  
95. *Id.* at *19–20.  
96. *Id.* For a discussion of the court’s treatment of the issue of whether Hart was furnished to meet short-term workload conditions, see *infra* note 256 and accompanying text. For a discussion of the issues of whether Action Labor was a labor leasing firm and whether Hart was leased by Action Labor to Berman “under an agreement” between Berman and a labor leasing firm, see *infra* note 290 and accompanying text.  
97. 511 F. Supp. 2d 231 (D. Conn. 2007).  
98. *Id.* at 232.  
99. *Id.* at 233.  
102. *Id.* at 638.  
103. *Id.*
the trial court found Perigo to be an employee of Carl’s at the time of the accident. On appeal, plaintiff argued that the trial court erred by finding Perigo to be an employee of Carl’s because he was a temporary worker.104

In an opinion that, like De Vesta, is short on facts relating to the circumstances of the injured worker’s employment status, the appellate court affirmed the judgment of the trial court on the basis that Perigo was not a temporary worker because he was not furnished to Carl’s by a third party.105 Like the courts in Dion, Brown, Dorpinghaus, and General Agents, the court found the definition of temporary worker to be unambiguous and rejected the argument that a person could furnish himself to an employer because this would effectively read the words furnished to out of the policy.106 The court also reasoned that its interpretation of the term furnished to was “consistent with Colorado appellate decisions defining the term in similar contexts.”107

Like the court in Dorpinghaus, the appellate court rejected the argument that the definition of temporary worker does not require the involvement of a third party because it, unlike the definition of leased worker, which expressly states that the leased worker must be provided by a labor leasing firm, does not contain any reference to a third party furnishing the worker to the insured.108 The court reasoned that just because one portion of the policy referred to third-party involvement more explicitly than another does not mean that third-party involvement is excluded from the latter provision.109

The court refused to follow Bituminous Casualty Corp. v. Mike Ross, Inc.110 and American Family Mutual Insurance Co. v. As One, Inc.111 because neither opinion, in its view, analyzed the definition of temporary worker “in the context of the insurance policy in which it is contained.”112 Both of those opinions, as discussed below, held that the language furnished to did not require the involvement of a third party.

Prior to the Missouri Supreme Court’s en banc opinion in Gavan v. Bituminous Casualty Corp.,113 the Missouri Court of Appeals had issued two opinions on the meaning of the term temporary worker. As explained above, although the court in Tickle114 did not have to reach the “furnished to”

104. Id.
105. Id. at 639–40.
106. Id. at 639.
107. Id. at 639–40.
108. Id. at 640.
109. Id.
111. 189 S.W.3d 194 (Mo. Ct. App. 2006).
112. Carl’s Italian Rest., 183 P.3d at 640.
113. 242 S.W.3d 718 (Mo. 2008) (en banc).
issue because the injured worker conceded that he was not furnished to the employer by a third party, the court found the definition of *temporary worker* not to be ambiguous because it applied both to people who substitute for a permanent employee on leave and to those who meet seasonal and short-term workload conditions. However, as discussed below, the court in *As One* did address the “furnished to” issue and held that the term did not require that the injured worker be provided by a third party because a worker can furnish himself to the employer. In *Gavan*, the Missouri Supreme Court, sitting en banc, squarely faced and resolved the issue of whether the language *furnished to* required that the injured worker be provided to the insured by a third party.

The case arose out of a May 2000 accident during which Gavan, a bricklayer, “was injured when a ladder on which he was standing collapsed” while he was working for Ste. Genevieve Building Stone Co. From 1996 to 2000, Ste. Genevieve periodically employed Gavan as its workload demanded. Gavan “sued two co-employees who worked at the construction site with him.” He settled this suit under an agreement that judgment would enter against them but only be satisfied by Ste. Genevieve’s insurance policies. Thereafter, judgment entered in the underlying case in the amount of $2.3 million, and Gavan then instituted the instant action. The insurers “denied coverage on the ground that the policies expressly excluded coverage for employees who cause bodily injury to a ‘co-employee.’” “Gavan contend[ed] . . . that he was not a co-employee but rather a temporary worker.”

Initially, Gavan argued “that he was a temporary worker because he was ‘furnished to’ Ste. Genevieve by a third party,” the bricklayer’s union. “However, the record show[ed] otherwise.” It demonstrated that “Gavan was hired in January 2000 when he came across one of Ste. Genevieve’s projects and asked a Ste. Genevieve project manager for a job.”

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115. *See supra* note 30 and accompanying text. Because *Tickle* involved a situation where the worker admitted that he was not furnished to the employer, *As One* is technically not inconsistent with *Tickle*. In this regard, the holding of *Tickle* is limited to the “furnished to” requirement of the definition of *temporary worker* applying both to people “who substitute for a permanent employee” and “to those who meet seasonal or short-term workload conditions.” The case did not deal with the issue of whether the “furnished to” requirement meant that the worker had to be furnished by a third party because Tickle admitted that he was not furnished to the employer.


117. *See infra* note 17 and accompanying text.

118. *Gavan*, 242 S.W.3d at 719.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*
was no evidence that Gavan on this occasion obtained the work through a union hall referral, although in the past he had obtained work in such a manner. The court also concluded that union membership alone was not sufficient “to meet the ‘furnished to’ requirement because membership simply makes a person eligible for employment on a union job.”

Gavan, relying on As One, then argued that the term furnished to does not require that a worker be supplied to the insured by a third party and that the term is ambiguous. The court rejected these arguments and held that the term furnished to was “not ambiguous and necessarily implies that a third party has been involved in providing or supplying the worker to the insured.” The court, like most of the courts that have addressed the issue, reasoned that “if the ‘furnished to’ clause were read to include the ability . . . to furnish oneself, then the clause would have no meaning” and would be read out of the definition of temporary worker. Accordingly, Gavan expressly overruled As One. Because Gavan was an employee of Ste. Genevieve at the time of the accident, the co-employee exclusion barred his claim.

The U.S. Court of Appeals for the Eighth Circuit in Northland Casualty Co. v. Meeks agreed with the district court that the language furnished to means furnished by another entity rather than hired directly by the employer. The case arose out of Meeks being “fatally injured in a [motor vehicle] accident while transporting agricultural products” for Rocky Harrell, d/b/a Rocky Harrell Farms. Harrell had contracted with Meeks to transport products on an as-needed basis during the upcoming harvest season. Meeks was hauling exclusively for Harrell during the relevant time period. The tractor used by Meeks was owned by Harrell, and the trailer was leased by Harrell. According to the district court, the parties were in agreement that Meeks was a “seasonal employee.”

124. Id. at 720.
125. Id.
126. Id. at 721–22.
127. Id. at 721.
128. Id. It also overruled the opinion of the Missouri Court of Appeals in American Family Mutual Insurance Co. v. As One, Inc., 189 S.W.3d 194 (Mo. Ct. App. 2006), which concluded that the term furnished to was ambiguous. See Gavan v. Bituminous Cas. Corp., No. ED88258, 2007 Mo. App. LEXIS 871, at *11 (Ct. App. June 12, 2007), superseded by Gavan, 242 S.W.3d 718.
129. 540 F.3d 869 (8th Cir. 2008).
130. Id. at 876.
131. Id. at 871–72.
132. Id. at 871.
133. Id.
134. Id.
The insurer took the position that the Employee Indemnification and Employer Liability exclusion in the policy barred coverage because Meeks was an employee of Harrell at the time of the accident.136 Although the district court found under Arkansas law that Meeks was an employee of Harrell, defendants argued that the exclusion did not apply because Meeks was a temporary worker, presumably because he only worked for Harrell during the harvest season in 2002. The district court rejected this argument because Meeks was hired directly by Harrell and not provided to Harrell by a third party.137 The district court also found the term furnished to to be clear and unambiguous and that any reading of the definition of temporary worker that does not involve a third party providing the worker to the insured would read the language furnished to out of the policy.138

The Eighth Circuit, like the courts in Dorpinghaus and Carl’s Italian Restaurant, also rejected the argument that the definition of temporary worker does not require the involvement of a third party because it, unlike the definition of leased worker, which expressly states that the leased worker must be provided by a labor leasing firm, does not contain any reference to a third party furnishing the worker to the insured.139 The court reasoned that just because one portion of the policy referred to third-party involvement more explicitly than another does not mean that third-party involvement is excluded from the latter provision.140

In Parra v. Markel International Insurance Co. Ltd.,141 “Parra worked intermittently for Interamerican on an as needed basis.”142 While working in Interamerican’s warehouse, Parra suffered a serious injury.143 Because Interamerican was not a subscriber to the Texas workers’ compensation program, it had no tort immunity. Therefore, Parra sued it under Texas tort law for damages.144 “Interamerican did not [inform] Markel of the suit and Parra obtained a judgment against Interamerican for a sum in excess of $1 million.145 Parra then sought to recover this judgment from Markel as a third-party beneficiary under Interamerican’s [CGL] policy with Markel.”146

“The record [showed] that Interamerican sometimes [contacted] Parra when it needed temporary workers.”147 It also showed that on other oc-
casions “Parra would contact Interamerican through its warehouse supervisor.”

On other occasions, the warehouse supervisor “would contact Parra when temporary help was needed. Parra argued that he was ‘furnished’ to Interamerican” by the warehouse supervisor and that he was therefore a temporary worker and not subject to the employer’s liability exclusion.

“The district court concluded that the clause ‘person who is furnished to you’ required a showing that a third person rather than an agent or employee of the employer referred the temporary worker to the employer for employment.” The court of appeals agreed. Following the Eighth Circuit’s decision in Meeks, the U.S. Court of Appeals for the Fifth Circuit found that the term ‘furnished to’ was unambiguous and “require[d] the involvement of a third party in furnishing a worker either to ‘substitute for a permanent ‘employee’ on leave’ or ‘to meet seasonal or short-term workload conditions.’” The court agreed with Meeks that “attaching any other meaning to the term [furnished to] would render the provision meaningless.”

The trial court in Rhiner v. Red Shield Insurance Co held that a worker who furnished himself to an employer was a temporary worker because this type of relationship satisfied the “furnished to you” requirement of the policy definition of temporary worker. The Court of Appeals of Oregon reversed. In doing so, the court rejected the contention that the definition of temporary worker can be read to apply “to any person who has been hired to meet seasonal or short-term workload conditions, regardless of who furnished the worker.” The court concluded that the phrase a person who is furnished to you, as used in the definition of temporary worker, means a person who is referred from, or provided by, a third party such as an employment agency, labor contractor, or other entity. The court reasoned that plaintiff’s proposed reading of this phrase, that a person can furnish himself to an employer, would render the “a person furnished to you” language of the definition of temporary worker “superfluous.”

148. Id.
149. Id.
150. Id.
151. Id. (internal citations omitted).
152. Id.
154. Id. at 590–91.
155. Id. at 594.
156. Id. at 593 (emphasis in original).
157. Id. at 594.
158. Id.
2. Cases: Temporary Worker Need Not Be Furnished by an Employment-Type Business

The following cases do not involve situations where an employment-type agency furnished the worker to the insured. Rather, they involve situations where the employer located and hired the worker through a newspaper advertisement or personal references from a friend, acquaintance, or current workers; or the worker simply presented himself to the employer. In each instance, the courts found the term furnished to to be ambiguous and construed the policy against the insurer.

In Ayers v. C&D General Contractors, a general contractor was hired “to replace the old styrofoam dock supports [for a marina on the Ohio River] with new supports.” The general contractor hired Ayers to work on this project. Ayers was hired through a newspaper advertisement. During the course of the job, a crane collapsed on Ayers and killed him. The issue in this declaratory judgment action was whether there was coverage for the general contractor because Ayers was a temporary worker.

Although virtually all the cases discussed in the previous section of this article expressly found the terms temporary worker and furnished to to be unambiguous, the Ayers court found the term furnished to you to be “too ambiguous to be given [the] literal interpretation” meaning supplied by a temporary agency. The court reasoned that such a reading would result in short-term employees responding to newspaper advertisements being excluded from coverage, whereas short-term employees supplied by a temporary agency would be covered. The court found that “such a literal interpretation . . . changes the basic meaning of the contract by including some temporary employees and excluding others” based on a distinction that the court found inexplicable and illogical. The court concluded that if the employee is hired to fill in for a permanent employee on leave or to meet short-term need, the employee is a temporary worker and thus exempt from the employer’s liability exclusion. In doing so, it read the “furnished to you” element of the definition of temporary worker out of the policy.

160. Id. at 766.
161. Id.
162. Id. at 768 n.7.
163. There was no dispute that Ayers was not a leased worker because he was hired as a result of a newspaper advertisement and there was no labor leasing firm involved. Id.
164. Id. at 769.
165. Id.
166. Id.
Like Ayers, the court in Mike Ross\textsuperscript{167} found the term \textit{temporary worker} to be ambiguous.\textsuperscript{168} Mike Ross arose out of an injury sustained by McCarthy while he was burning brush for Mike Ross, Inc.\textsuperscript{169} McCarthy got the job with Mike Ross as a result of a person named Bogert asking Mike Ross to find McCarthy a job.\textsuperscript{170} The insurer for Mike Ross brought a declaratory judgment action seeking a declaration that it did not owe the insured a duty to defend or indemnify because McCarthy was an employee of Mike Ross and the employer’s liability exclusion in the policy barred coverage. The insured countered by arguing that because McCarthy was a temporary worker, the employer’s liability exclusion in the policy did not apply.

The court found the policy definition of \textit{temporary worker} to be ambiguous because, among other things, “[t]he phrase ‘furnished to’ [was] not defined in the policy and [was] reasonably susceptible to multiple meanings”; it could mean being furnished by a temporary employment agency or by an individual who recommends a worker to an employer.\textsuperscript{171} The court reasoned that the latter interpretation was supported by the definition of \textit{leased worker}, which includes the reference to a labor leasing firm. The court concluded that the absence of such a reference in the definition of \textit{temporary worker} meant that a person could be a temporary worker even though he was not furnished by a temporary employment agency and was furnished by a third party, such as Bogert.\textsuperscript{172}

Although it was subsequently overruled by Gavan, the case of As One\textsuperscript{173} is instructive because it, like the Ayers and Mike Ross cases, concluded that the term \textit{furnished to} did not require the involvement of a third-party employment-type business.\textsuperscript{174} In As One, Stepp was injured while using a “bucket truck” owned by As One, Inc.\textsuperscript{175} The policy contained an employer’s liability exclusion and the standard definitions of \textit{leased worker} and \textit{temporary worker}. Stepp claimed that the exclusion did not apply because he was a temporary worker. Stepp, like the worker in Dion, argued, among other things, that he was furnished to As One for work by himself or Stepp Electric Service, a business that he owned as a sole proprietor.\textsuperscript{176} The insurer argued that the term \textit{furnished to} contains a requirement that, as a

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\textsuperscript{167} 413 F. Supp. 2d 740 (N.D. W. Va. 2006).
\textsuperscript{168} Id. at 744–45.
\textsuperscript{169} Id. at 742.
\textsuperscript{170} Id. at 743.
\textsuperscript{171} Id. at 744–45.
\textsuperscript{172} Id. at 745.
\textsuperscript{173} 189 S.W.3d 194 (Mo. Ct. App. 2006).
\textsuperscript{174} Id. at 198.
\textsuperscript{175} Id. at 196.
\textsuperscript{176} Id.
\end{flushleft}
matter of law, a third party furnish the worker to the insured. Thus, the issues formulated by the court were whether the word furnished, as a matter of law, “mandates that a third [party] supply a worker to the insured and, if it does, [whether there is] compliance with this [requirement] if a sole proprietorship supplies the worker.”177 The court described the case as one of first impression.178

The court held that the “furnished to” requirement in the definition of temporary worker could be satisfied by a worker supplying himself to work.179 The court reached this conclusion by finding that the literal words in the definition of temporary worker contained no express or implied requirement that the worker be supplied or furnished by a third party, such as an employment agency.180 Like the court in Mike Ross, the court found support for its conclusion in the definition of leased worker. The court reasoned that because the definition of leased worker contained an explicit reference to a worker provided by a labor leasing firm, the omission of such a reference in the definition of temporary worker meant that one could be a temporary worker if the worker was not furnished by an employment agency as long as the person, in the words of the definition of temporary worker at issue in the case, “worked for a finite period of time to support or supplement the workforce in special work situations such as employee absences, temporary skill shortages and seasonal workloads.”181

The court in National Indemnity Co. of the South v. Landscape Management Co., Inc.182 lined up with the cases holding that the language furnished to does not require the worker to be provided by a third-party employment-type agency. The case arose out of an injury to a Landscape Management Co., Inc. employee during a motor vehicle accident involving a Landscape-owned vehicle.183 The injured employee filed a lawsuit against Landscape and the permanent employee of Landscape who was driving the motor vehicle at the time of the accident.

177. Id.
178. Id. at 197–98. Although the case may have presented an issue of first impression in Missouri, it did not present an issue of first impression nationally because Monticello Insurance Co. v. Dion, 836 N.E.2d 1112 (Mass. App. Ct. 2005), had previously rejected the sole proprietorship theory. As One did not refer to the Dion decision. Subsequent to As One, AMCO Insurance Co. v. Dorpinghaus, No. 05–1296 (PJS/JG), 2007 U.S. Dist. LEXIS 2440 (D. Minn. Jan. 11, 2007), based on the facts of the case, also rejected the sole proprietorship theory. Id. at *23–24. See also Essex Ins. Co. v. Pingley, 839 N.Y.S.2d 208, 210–11 (App. Div. 2007) (concluding that a self-employed person working as a joint venturer was not an employee under a policy, which defined an employee as a “member, associate, leased worker, temporary worker or any person or persons loaned to or volunteering services”).
180. Id. at 198–99.
181. Id. at 199.
182. 963 So. 2d 361 (Fla. Dist. Ct. App. 2007).
183. Id. at 362.
At the time of the accident, the injured worker had been hired by Landscape to fill a seasonal need for workers during the summer growing season. The Landscape supervisor had asked his permanent employees to help find seasonal labor, and the injured worker’s brother-in-law, who was a permanent employee of Landscape, referred the worker to the supervisor as a result of that inquiry. The worker was hired with the explicit understanding that the employment would end in the fall.

Because it was undisputed that the injured worker had been hired to meet seasonal or short-term workload conditions, the only temporary worker issue was whether the injured worker was furnished to Landscape within the meaning of the policy. The appellate court agreed with the trial court that the phrase furnished to you is ambiguous because it is capable of different meanings. The court reasoned that because the policy language does not explicitly require that the temporary worker be furnished by a third party, such as a temporary worker leasing company or other business, a reasonable interpretation is that the worker could be furnished by any person or company, including another employee of the employer. The court further reasoned that because the policy is silent as to who must furnish the worker in order for the worker to qualify as a temporary worker and because there are several reasonable interpretations of who that might be, the policy is ambiguous and should be construed against the insurer.

The case of Nick’s Brick Oven Pizza Inc. v. Excelsior Insurance Co. arose out of a motor vehicle accident in which the employee, Schmidt, rear-ended a vehicle operated by Mendola. The insurer declined to defend Nick’s Brick Oven Pizza, Inc. in a lawsuit brought by Mendola based on an auto exclusion that applied to employees of Nick’s. Nick’s claimed that Schmidt was not an employee but rather a temporary worker to whom the exclusion did not apply. Although the court found sufficient evidence to establish that Schmidt was a worker who met seasonal or short-term workload conditions, the insurer argued that because Schmidt was not furnished to Nick’s by a third party, he did not qualify as a temporary worker under the policy. Schmidt came to work for Nick’s as a result of a referral from

184. Id.
185. Id.
186. Id.
187. Id. at 363.
188. Id. at 364.
189. Id.
190. Id.
191. 853 N.Y.S.2d 870 (Sup. Ct. 2008).
192. Id. at 871.
193. Id. at 873.
a friend of the principal of Nick’s. After the friend identified Schmidt, Nick’s contacted Schmidt and hired him for the summer season.

The court found the term *furnished to* to be ambiguous because it was susceptible to multiple meanings. It was unclear to the court whether the worker had to be furnished by an employment agency, headhunter, manpower service provider, or similar service or whether an individual could furnish the worker to the insured merely by recommending him. The court found the latter interpretation to be reasonable because the definition of *temporary worker*, unlike the definition of *leased worker*, did not refer to any type of employment agency, such as a labor leasing firm. However, it also found the former interpretation of *furnished to* to be reasonable. Because ambiguities in an insurance contract are to be construed against the insurer, the court construed the policy in favor of coverage for Nick’s.

3. Evaluation of Divergent Lines of Cases

The cases holding that the term *furnished to* does not require that the injured worker be placed or supplied by a third-party employment-type organization appear to be poorly decided because they ignore the plain language of the definition of *temporary worker* in order to reach a result that provides the insured with coverage. By doing so, these courts appear not to have appreciated that the difference between a leased worker being considered an employee and a temporary worker being considered a nonemployee is based on a distinction rooted in workers’ compensation law that comes into play when an employment-type agency provides or furnishes one of its employees to a client employer.

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 874.
199. *Id.* at 873.
200. *Id.* at 875. A twist on the usual temporary worker issue was presented in *Grable v. Atlantic Casualty Co.*, 280 S.W.3d 104 (Mo. Ct. App. 2009). There, the employer exclusion in the CGL policy was replaced by an endorsement that contained a broader definition of an employee. The court found that this broad definition unambiguously included a temporary worker because it included any worker “hired, loaned, leased, contracted, or volunteering.” *Id.* at 108.

201. Tellingly, the Supreme Court of Kentucky has refused to follow the Western District of Kentucky’s decision in *Ayers*. *Brown v. Ind. Ins. Co.*, 184 S.W.3d 528, 538–40 (Ky. 2005). Moreover, neither *Ayers* nor *Mike Ross* was cited in *As One*, and *As One* was overruled by *Gavan*. The court in *Dorpinghaus* also distinguished *Ayers* on the same grounds as the Kentucky Supreme Court did in *Brown*, No. 05–1296 (PJS/JJG), 2007 U.S. Dist. LEXIS 2440, at *19* (D. Minn. Jan. 11, 2007). The court in *Carl’s Italian Restaurant* refused to follow *Mike Ross* and *As One* because neither opinion analyzed the definition of *temporary worker* “in the context of the insurance policy in which it was contained.” 183 P.3d 636, 640 (Colo. Ct. App. 2007).

202. *See Brown*, 184 S.W.3d at 538–40 (observing that *Ayers* was decided under the Longshore and Harbor Workers’ Compensation Act, which, unlike the Kentucky Workers
Moreover, by effectively reading the “furnished to” requirement of the definition of temporary worker out of the policy, the cases also appear to blur the distinction between a regular employee, to which the employer’s liability exclusion would apply, and a temporary worker, to whom the exclusion would not apply.  

The reality of the workplace is that many employers obtain their workers either in response to advertisements that they place in a newspaper or on the Internet in response to recommendations from people they know or in response to people who come to them directly seeking employment. These people are classic employees to whom the exclusion is intended to apply. For such workers, the length of their employment, even if it is brief, is irrelevant because such workers under CGL policy definitions cannot be temporary workers. By making such people temporary worker nonemployees, to whom the exclusion would not apply, the cases appear improperly to read the exclusion out of the policy for many, if not most, employees.

B. Furnished to: Does It Apply to All Parts of Temporary Worker?

Related to the issue of whether the worker has to be furnished to the insured by an employment-type agency to be a temporary worker is the issue of whether the “furnished to” requirement of the definition of temporary worker only applies to a person furnished “to substitute for a permanent employee on leave” or whether it also applies to a person hired “to meet seasonal or short-term workload conditions.” Not surprisingly, the cases finding that furnished to means a person furnished by an employment-type agency to the insured also conclude that the “furnished to” requirement applies to all three types of workers described in the definition of temporary worker.

Compensation Act, draws no distinction between a temporary worker and any other employee); Gavan v. Bituminous Cas. Corp., 242 S.W.3d 718, 721–22 (Mo. 2008) (en banc).


204. See Baldwin, 503 F. Supp. 2d at 1263 (worker who was electrocuted while performing maintenance on a live electrical line owned by his employer’s client was not a temporary worker because he was a permanent employee of his employer for six years and was neither substituting for a permanent employee on leave nor serving as a seasonal or short-term worker).

In contrast, the courts that have found that the “furnished to” requirement could be satisfied even though the worker was not furnished through an employment-type agency have also concluded that the “furnished to” requirement only applies, at most, to a worker furnished to substitute for a permanent employee on leave. The court in *Mike Ross* found that a temporary worker could be a person either (1) “furnished” to the insured to substitute for a permanent employee on leave or (2) “hired” to meet seasonal demands and short-term workload conditions. Thus, the *Mike Ross* court relegated the “furnished to” requirement of the definition of temporary worker to people “substitut[ing] for a permanent employee on leave.” The court in *Ayers* went even further in parting ways with *Tickle* and *Allen* on this issue by finding that if an employee was hired to fill in for a permanent employee on leave or to meet a short-term need, the worker was a temporary worker. The court in *Nick’s Brick Oven Pizza* followed *Ayers* on this issue and expressly rejected the approach taken by *Allen*. Once again, the courts that have limited the “furnished to” requirement to the situation where the worker is substituting for a permanent employee on leave appear to have reached an incorrect result due to their failure to appreciate the workers’ compensation basis for the distinction between a leased worker and a temporary worker and their blurring of the distinction between a regular employee, to which the employer’s liability exclusion would apply, and a temporary worker, to whom the exclusion would not apply.

C. *Does Furnished to Mean Directly Furnished?*

A twist on the “furnished to” issue was presented in *U.S. Underwriters Insurance Co. v. Congregation Kollel Tisreth, Tzvi*. In this case, the congregation hired a general contractor to demolish a building it owned. The general contractor retained a subcontractor to do the demolition work. During the demolition work, one of the subcontractor’s workers was injured when a wall collapsed. The worker brought suit against the insured, which provided notice of the suit to its insurer. The insurer disclaimed and brought this declaratory judgment action. The insured argued that because the project was short-term and the injured worker was a temporary worker because he was not a permanent employee of the subcontractor, the employ-
er’s liability exclusion in the policy did not apply. The court rejected this argument because, inter alia, the record showed that the injured worker was not furnished to the insured. On this point, the court reasoned that the injured worker was employed by the subcontractor, who in turn was retained by the general contractor to perform the demolition work.

Accordingly, it appears that to be a temporary worker, one must be furnished directly by an employment-type agency to its client company, and that the concept of a temporary worker does not apply to workers furnished by an employment-type agency to a contractor that is to perform work at the insured’s place of business.

This result flows directly from the definition of temporary worker, which requires that the temporary worker be furnished to “you” [the insured]. If the reasoning of U.S. Underwriters is followed, then, irrespective of whether the worker is furnished by a third-party employment-type agency; through an advertisement or the recommendations of friends, acquaintances, or co-workers; or by the worker presenting himself to the employer, there will be no coverage if the employee is not furnished directly to the insured.

D. Short-Term Workload Conditions

There are cases that present straightforward and noncontroversial examples of short-term workload conditions. However, there are also fact patterns that are more troublesome.

1. Easy Cases

Dion provides an easy example of short-term workload conditions because it involved a worker retained to clear more than twenty trees over the course of a few days. Another easy case on what constitutes short-term workload conditions is Nick’s Brick Oven Pizza. There, Nick’s hired Schmidt only for its busy summer season, after which he was going back to college.

Although the court in Gavan found that an issue of fact existed regarding whether the injured plaintiff bricklayer was hired by Ste. Genevieve to meet short-term workload conditions, the case provides a good example of the type of facts that could support a finding of short-term workload

214. Id. at *5.
215. Id. at *6.
216. Id.; see also All-Tex Roofing, Inc. v. Greenwood Ins. Group, Inc., 74 S.W.3d 412, 417 (Tex. App. 2002) (worker not a leased worker subject to the employer's liability exclusion because he was not leased to the insured by a labor leasing firm but rather was leased to the insured's subcontractor).
218. See 853 N.Y.S.2d 870 (Sup. Ct. 2008).
219. See supra note 191 and accompanying text.
conditions.\(^\text{220}\) The facts in favor of plaintiff bricklayer included his being told when he was hired that he might work as long as two or three months; his understanding that he was being hired to fill an immediate, temporary need and that there was no promise of long-term or permanent employment; the testimony of the Ste. Genevieve representative that the company’s hiring of bricklayers depended on the “volume of work”; and the testimony of the business manager of the Bricklayers Union that a bricklayer’s employment with a contractor is considered temporary employment that ends when a project is complete or when there is not enough work to keep the bricklayer occupied.\(^\text{221}\)

2. More Complicated Cases

Notwithstanding these easy cases, there are factual scenarios that require a more detailed analysis of what is meant by the undefined term *short-term workload conditions*. Because the term is undefined in a CGL policy, it has been attacked as ambiguous due to its lack of temporal boundaries. The cases addressing this issue are sparse. At this juncture, the cases appear to employ two separate types of analysis. One type of analysis is termed the prospective approach, and the other is the retrospective approach. Under the prospective approach, *short-term* is measured at the time the lease agreement is made. Under the retrospective approach, *short-term* is measured at some point thereafter, most likely at the time of the accident. The prospective approach has resulted in the courts not finding the undefined term *short-term workload conditions* ambiguous. The retrospective approach has resulted in one court finding the term ambiguous. This case will be examined initially because it illustrates the type of mischief that this undefined term can cause.

\textit{a. Mike Ross Retrospective Approach}

Although the court in *Mike Ross* did not expressly address the prospective/retrospective dichotomy, it engaged in a retrospective analysis and thereby found the term *short-term workload conditions* to be ambiguous. The court rhetorically asked whether the “phrase mean[s] a worker can work only one hour to be considered ‘temporary?’ Five hours? Ten hours? One day? Ten days? Four months? Six months? One year?” The court concluded that the question was impossible to answer based on the language of the policy, which did not define the term *short-term workload conditions*.\(^\text{222}\)


\(^{221}\) Id. It is not clear from the opinion what facts the insurer was relying on for its position that plaintiff was not hired to meet short-term workload conditions.

\(^{222}\) Bituminous Cas. Corp. v. Mike Ross, Inc., 413 F. Supp. 2d 740, 745 (N.D. W. Va. 2006) (the worker at issue in the case had worked for the insured for approximately six months). For a discussion of the facts of the *Mike Ross* case, see supra note 167 and accompanying text.
b. Scottsdale Prospective Approach

In *Scottsdale Insurance Co. v. Carrabassett Trading Co.*, the district court (*Scottsdale I*) recognized and addressed the two analytical frameworks and ultimately concluded that the prospective approach was the correct one. Although the court of appeals (*Scottsdale II*) vacated the district court judgment and remanded the case for further proceedings, it did so based on what it viewed as a genuine issue of material fact relevant to the prospective approach. It did not question the propriety of the prospective approach. Interestingly, neither court mentioned the *Mike Ross* opinion even though it predated both opinions. Although the U.S. Court of Appeals for the First Circuit vacated the judgment in favor of the insurer and remanded the case for further proceedings, the case actually represents a significant victory for insurers because it adopted an analytical framework that permits courts to avoid having to find the term *short-term workload conditions* ambiguous.

In *Scottsdale*, the worker was placed at the client company on August 20, 2003, and worked there continuously until December 8, 2003. After an interlude of several weeks during the holiday season, the worker was again placed at the client company “beginning on January 19, 2004, and (with the exception of one week in June) worked there continuously until August 23, 2004. . . . During the course of his two assignments at the client company, the worker worked a total of 1,613.50 hours” at the client company. This contrasted with other workers placed at the client company by the same labor firm during the fourteen months prior to the worker’s accident, who recorded only 10, 30, 32, 117, and 280 hours during this time period. Notwithstanding this lengthy work record, the insured client company argued that the worker was a temporary worker because he was hired to meet short-term workload conditions. The client company identified those short-term workload conditions as a need for temporary workers to meet a short-term demand for its products.

The district court began its analysis of the short-term workload conditions issue by addressing what it viewed as the threshold issue of whether “the terms ‘seasonal’ and ‘short-term’ are to be measured at the time the [lease] agreement is made or at some point thereafter.” It framed this issue by explaining that “a worker might be supplied to meet an anticipated one-week shortage (and therefore be ‘short-term’ . . .), but wind up working . . . .

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224. *Id.* at 257.
227. *Id.*
228. *Id.*
229. *Id.* at 257.
for three years (and therefore be ‘long-term,’ as measured by hindsight).” The district court resolved this threshold issue by looking to the policy language furnished . . . to meet in the definition of temporary worker. The district court concluded that this language “suggests that the reasonable expectations of the parties concerning workload conditions, as measured at the time the employee is ‘furnished,’ governs whether the employee fits within either the ‘seasonal’ or ‘short-term’ category.” Accordingly, under the district court’s construct, “even if the duration of a worker’s assignment ends up being lengthy, [the worker] [would] still be considered a ‘temporary worker’ if the parties reasonably intended [at the outset] for [the worker] to fulfill a short-term workload condition.” Similarly, under the district court’s approach, “a worker will not be considered ‘temporary’ if the parties reasonably intended for him . . . to help with a long-term project or permanent workload condition, even if the assignment is cut short.” The district court reasoned that its prospective approach has a “practical advantage” over a retrospective approach. In the district court’s view, under the latter approach, “the parties have no way of knowing when a worker has crossed the line and is no longer working to meet ‘short-term’ conditions (and thus no longer a ‘temporary worker’), and thus no way of knowing when insurance responsibility shifts.” Thus, by employing the prospective approach, the district court avoided having to find the language short-term workload conditions ambiguous.

The district court’s treatment of this threshold issue raises serious questions about how employers and courts are to determine whether a particular worker is a leased worker or a temporary worker. Its reliance on the policy language furnished . . . to meet in the definition of temporary worker suggests that this language can only refer to the time that the lease is entered. This conclusion, however, is debatable because there is no reason that the language cannot refer to a subsequent point in time. For example, in the Scottsdale case, the worker was injured approximately a year after the original lease arrangement was entered. At the time of his injury, it could reasonably be argued that the worker was still being furnished to meet the labor requirements of the client company. Whether those labor requirements at that time constituted short-term workload conditions would seem to be a separate and distinct question.

The district court in Scottsdale I appears to have recognized the possibility that a retrospective approach may be appropriate because it also

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230. Id.
231. Id.
232. Id.
233. Id.
234. Id. at n.3.
concluded that even if such an approach were to be adopted, it was “highly doubtful” that a worker who worked at the client company for forty-seven weeks and 1,613.5 hours over the course of a year could be considered a temporary worker.235

The court of appeals, however, “eschew[ed] any reliance on the number of hours” that the worker ended up working at the client employer or any comparison of those hours to those of other workers placed at the client employer by the labor leasing firm in the same time frame.236 It did so based on the district court’s prospective approach.237 Thus, in the First Circuit, a retrospective analysis for determining what constitutes short-term workload conditions is not appropriate.

After passing the threshold, the Scottsdale district court addressed the substantive issue of what constitutes short-term workload conditions. Although the term was not defined in the policy, the district court found that this did not compel a conclusion that it was ambiguous because undefined terms are to be accorded their plain and ordinary meaning.238 The court concluded that the “plain meaning” of short-term “suggests a period of time that is relatively brief and finite.”239 For example, the district court pointed to “someone hired to complete a specific project or responding to an unexpected, temporary demand in goods or services” as a person who “could . . . be said to have been furnished to meet ‘short-term’ workload conditions.”240 This example is consistent with Massachusetts regulations that provide that an employee leasing arrangement “is long term and not an arrangement to provide the lessee temporary help services during seasonal or unusual conditions such as temporary skill shortages or temporary special assignments and projects.”241 By way of contrast, the district court also concluded that “‘short-term’ cannot mean ‘indefinite’ or ‘open-ended.’”242

Ultimately, the district court held that the injured worker was not working to meet short-term workload conditions because the record indicated that the parties, at the time the lease arrangement was agreed upon, intended that the worker work for the client company for an “indefinite amount of time.”243 This finding was based on the testimony of the presi-

235. Id.
236. Scottsdale II, 561 F.3d 74, 79 (1st Cir. 2009).
237. Id.
238. Scottsdale I, 460 F. Supp. 2d at 258.
239. Id.
240. Id.
243. Id. at 258–59.
dent of the client company, who testified that when the worker arrived at his company, “he was expected to stay as long as the company needed him.”244 This finding was also supported by the testimony of the labor leasing firm, whose representative testified that the worker at issue “‘was on assignment for [the client company] for an indefinite period of time based on the client’s needs.’”245

The court of appeals did not disagree with the district court’s legal conclusion that the lack of a definition in the policy of the term short-term workload conditions did not render the term ambiguous. It did, however, disagree with the district court’s conclusion that the worker’s “indefinite” placement at the client employer was “necessarily incompatible with the possibility that he was addressing a ‘short-term workload condition.’”246 The court of appeals reasoned that the president of the client company testified that the company’s “workload fluctuated and that times of heavy workload required additional help.”247 It also relied on the president’s testimony that the worker was brought in “just to meet [the company’s] workload at that time.”248

Although the court of appeals concluded that fact issues precluded the entry of summary judgment in favor of the insurer, it rejected the worker’s argument that the phrase short-term is ambiguous because “‘short-term conditions’ can extend for varying lengths of time, and thus an insured can never know what is covered.”249 It appears to have done so due to the existence of the same factual issues that precluded the entry of summary judgment in favor of the insurer. These factual issues are the client company’s “intent in using” the worker, “the nature of the company’s workflow[,] and how the worker’s placement fit within its ordinary course of business.”250

The court of appeals opinion raises a number of issues. There was no dispute in the case that the worker at issue was hired as a general floor worker who was to do what was necessary based on workload conditions. There was also no dispute that business was good enough that he worked for the client company for 1,613 hours over the course of a year and would have continued working for the company for an indefinite period of time if he had not been injured. Under these circumstances, it is not clear why the case was remanded for further development of the client company’s intent in using the worker or the nature of the company’s workflow and the placement fit of the worker within the company’s ordinary business.

244. Id. at 258.
245. Id.
246. Scottsdale II, 561 F.3d 74, 79 (1st Cir. 2009).
247. Id.
248. Id. at 79–80.
249. Id. at 80.
250. Id.
It may be that the court of appeals wanted the record to be further developed on the client company’s specific workload conditions for which the worker was hired because it believed that such facts would be relevant to whether the worker was furnished to meet short-term workload conditions. The court’s reference to “the nature of [the company’s] workflow” suggests that it may have been looking for evidence on how long it expected to employ the worker at the time it leased him from the labor leasing firm. Under the First Circuit’s prospective approach, this is the key inquiry.

Under the First Circuit’s approach, the fact that the worker wound up working 1,613 hours for the company over the course of a year would not be relevant or dispositive because such long-term or indefinite placement would not necessarily be inconsistent with short-term workload conditions. In a metaphysical sense, this can be true because the term *short-term* is a relative term and can include a wide variety of temporal periods. However, in the context of the case, there was no dispute that the worker was hired as a general floor worker who was kept on by the company because business or workflow was good enough to keep him employed as a general worker for a year. The court’s “eschew[ing]” “any” reliance on the number of hours that the worker wound up working seems, unnecessarily, to turn a blind eye to the reality of the workplace. The length of time a worker works at a place of employment would seem to be relevant to, but not dispositive of, the issue of the client company’s intent in using the worker. The district court recognized the reasonableness of this factor, a factor that comports with the maxim that insurance contracts, like all contracts, must be given a sensible and practical construction.

The court’s reference to the worker’s “placement fit within its ordinary course of business” may suggest a concern about the client company leasing the worker to perform work that was normally done by a regular employee because the leasing arrangement is a less expensive way for the client company to get its work done. If it was the client company’s intent to do so for a long period of time so that it would not have to hire a regular worker, this may undercut a conclusion that this worker was furnished to meet short-term workload conditions. The courts should not let such employers have it both ways. In other words, employers using such workers in place of regular employees for an indefinite or substantial period of time,

251. *Id.* at 79.

252. *See Scottsdale I*, 460 F. Supp. 2d 251, 257 n.3 (D. Mass. 2006); *see also* Gen. Agents Ins. Co. of Am., Inc. v. Mandrill Corp., Inc., 243 F. App’x 961, 968 n.3 (6th Cir. 2007) (finding the time on the job relevant); Pac. Employers Ins. Co. v. Wausau Bus. Ins. Co., 508 F. Supp. 2d 1167, 1176 (M.D. Fla. 2007) (in denying a motion for summary judgment, the court found the length of the worker’s employment relevant to the issue of whether he was a temporary worker).
in order to realize the payroll, administrative, insurance, and overhead cost savings associated with these workers, should not be able to claim that such workers are temporary workers covered by the employer’s CGL policy. Under the *Scottsdale II* prospective approach, it appears that the insurer would have the burden of proving that this was the client company’s intent when it leased the worker from the labor leasing firm.

c. Progeny of the *Scottsdale* Prospective Approach

It appears that the court of appeals in *Scottsdale II* may have been influenced by the posttrial opinion of the court in the case of *Wausau*, a case in which summary judgment had been previously denied due to the existence of genuine issues of material fact. In a previous opinion denying a motion for summary judgment, the court found the meaning of the term *short-term* to be unclear based on “the facts of the case presented to date.” At the summary judgment stage, the material facts in dispute included the length of Hart’s employment with Berman, a fact that the court, unlike the First Circuit in *Scottsdale II*, found material in determining whether the worker was a temporary worker, whether the Railcar Project was a “special project,” and whether Action Labor was a temporary help firm or a leasing company. The trial court resolved all these issues in a manner that resulted in Hart not being a temporary worker.

On the short-term workload conditions issue, the court adopted the *Scottsdale I* prospective approach. The court concluded that the evidence supported a finding that the injured worker had been placed at Berman by Action Labor “for an indefinite period of time.” Like the court in *Scottsdale I*, it reasoned that it was of no moment whether the injury occurred three days, three months, or three years into the worker’s engagement with Berman because it was the understanding of the labor leasing company (Action Labor) and the client company (Berman) at the beginning of the worker’s term that determines whether a worker is furnished for short-term workload conditions. Because the court found that understanding to be that the worker was employed at Berman for an indefinite period of time, the court concluded that he was not a temporary worker. This

254. For a discussion of the facts of this case, see *supra* note 96 and accompanying text.
256. *Id*.
258. *Id.* at *36.
259. *Id*.
260. *Id.* at *37.
finding made it unnecessary for the court to decide the exact parameters of *short-term*.

The First Circuit in *Scottsdale II* found that its holding, vacating the district court judgment and remanding the case for further proceedings, was not inconsistent with the trial court decision in *Wausau*. This was because the trial in that case had provided the type of further factual development that the First Circuit believed was required on the issues of the client company’s “intent in using” the worker, “the nature of the company’s workflow[,] and how the worker’s placement fit within its ordinary course of business.” The First Circuit’s approval of *Wausau* also demonstrates it would not find short-term workload conditions to exist where there is an adequate record that the employment arrangement was for an indefinite period of time.

d. State Law and the Meaning of Short-Term Workload Conditions

*Wausau* raised but did not resolve the issue of whether state law can inform the meaning of the term *short-term workload conditions* in the CGL policy. Defendant in the case argued that the employer’s liability exclusion did not apply to the injured scrap metal worker because he was a temporary worker due to the fact that the Railcar Project was a “special project” under Florida law. Plaintiff maintained that the worker was injured when he was working on the “special project” of cutting up railcars. In support of this argument, plaintiff relied on § 468.520(4)(a) of the Florida Statutes, which defines *temporary help arrangement* as one in which an “organization hires its own employees and assigns them to a client to support or supplement the client’s workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects.”

Although the court concluded that it could resolve the meaning of the employer’s liability exclusion without “borrowing” from the Florida statute, it found that analysis of the statute was instructive because the parties’ arguments for and against the application of the statute provided insight into both the nature of the injured worker’s duties and his employment with Berman. In the end, the court concluded, based on the evidence at trial, that the cutting of railcars was not a special project because railcars served simply as another source of scrap metal for Berman as part of its

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261. *Id.* The court found as “not particularly pertinent” the testimony of two Wausau claim representatives who testified that there was no consensus within Wausau about the meaning of *short-term* in the Wausau policies. *Id.* at *30–31 & n.17.

262. *Scottsdale II*, 561 F. 3d 74, 80 & n.6 (1st Cir. 2009).


264. *Id.* at *21.
regular and ordinary course of business of cutting and processing scrap for sale. Accordingly, the Florida statute would not have provided a basis for finding the worker a temporary worker exempt from the employer’s liability exclusion.

Although the court of appeals did not address this issue in Scottsdale II, the district court did point to a Massachusetts regulation for concluding that someone hired to complete a specific project or to respond to an unexpected, temporary demand in goods or services could be said to be furnished to meet short-term workload conditions.

To date, no court has expressly relied on a state statute or regulation to inform the meaning of the phrase short-term workload conditions in the CGL policy. An insured may argue that such reliance would be inappropriate because the CGL policy does not refer to state law or incorporate the language of any state law on the issue. An insurer, however, should argue that the CGL policy is routinely interpreted in accordance with state law (thus, the different interpretation of the same CGL policy provisions by different state courts) and that an insured is presumed to know the law. This argument is consistent with the prospective approach and can avoid a court holding the term short-term workload conditions ambiguous because state law can supply meaning to the term short-term workload conditions.

e. Construction Company Problem

The opinion in General Agents did not directly analyze the short-term workload conditions issue and therefore did not take sides on the prospective/retrospective approaches. However, it stated that it “would be inclined to find that the Laborers were not ‘temporary workers’” because the “demolition job was the only job Mandrill had at the time and the Laborers had been on the job . . . for months.” Under these circumstances, the court reasoned that “[t]o hold that the Laborers were ‘temporary workers’ . . . would effectively hold that everyone on the Mandrill payroll was

265. Id. at *20–24.
266. See supra note 14.
267. See Master Mortgage Inv. Fund, Inc. v. Am. Nat'l Fire Ins. Co., 165 B.R. 453, 456 (Bankr. W.D. Mo. 1993) (court looks to relevant state statutes to determine the meaning of the term claim in an insurance contract); Vitti v. Allstate Ins. Co., 713 A.2d 1269, 1274 (Conn. 1998) (“in the absence of other statutory [or regulatory] guidance, we may appropriately look to the meaning of words as commonly expressed in law and in dictionaries”); Grant v. State Farm Fire & Cas. Co., 638 So. 2d 936, 938 (Fla. 1994) (where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become part of the contract); Bray v. Bray, 269 N.E.2d 452, 453–54 (Mass. 1971) (every person is presumed to know the law).
268. See 243 F. App’x 961 (6th Cir. 2007).
269. Id. at 968 n.3.
a ‘temporary worker’ and read the employer’s exclusion out of the CGL Policy.”

*General Agents* raises an interesting issue about the application of *short-term workload conditions* to construction companies, many of which have few, if any, regular employees until they land a project, at which time they staff the project. If state workers’ compensation statutes or regulations, such as those in Massachusetts and Florida, which define temporary help services or arrangements to include “special assignments and projects,” are relevant to determining whether an injured worker is a temporary worker, an issue is whether these job-specific workers are temporary workers because they are working on a special assignment or project.

To date, no court has directly addressed this issue, although *General Agents* comes the closest. The statutory or regulatory language should control. In the case of the Massachusetts regulation and the Florida statute, it would seem that a construction project that is part of the construction company’s regular and normal business would not be a special assignment or project. *General Agents* appears to be consistent with this approach.

Of course, a court may never need to face this issue if it concludes that the term *furnished to* requires the involvement of a third-party employment-type company and finds that the construction workers were not furnished by such a company to the construction company for the job in question.

**E. Seasonal Workload Conditions**

There is little authority on this issue, perhaps because the notion of what is seasonal is not controversial. In *Meeks*, the parties appear to have agreed that the injured worker was a seasonal employee. As previously explained, the case arose out of Meeks being “fatally injured in a[] [motor vehicle] accident while transporting agricultural products for Harrell,” where Harrell had contracted with Meeks to transport products on an as-needed basis during the upcoming harvest season. Similarly, in *Landscape Management*, a case arising out of an accident involving the insured’s vehicle in which the alleged temporary worker was injured, there was no dispute that

270. *Id.* (emphasis in original).
272. See also Pac. Employers Ins. Co. v. Wausau Bus. Ins. Co., 2007 No. 3:05-cv-850-J-32TEM, 2007 U.S. Dist LEXIS 73594, at *20–24 (M.D. Fla. Oct. 2, 2007) (the cutting of railcars was not a “special project” because railcars served simply as another source of scrap metal for Berman as part of its regular and ordinary course of business of cutting and processing scrap for sale.)
274. *See supra* note 129 and accompanying text.
the injured worker “was hired by [the insured] to fill a seasonal need for workers during the summer growing season.”275

Employing its prospective analysis to the issue of what constitutes seasonal workload conditions, the district court in Scottsdale I found that there was no evidence in the record that the worker was hired to meet seasonal workload conditions. Although the client company asserted that demand for its product changed regularly, the court found that there was no evidence that recycling is a seasonal business like farming or snow removal or subject to substantial seasonal increases such as the increases in retail sales prior to the Christmas holiday.276

The district court also reasoned that the worker’s “relatively stable” hours at the client company over the course of a year “strongly suggested that his workload was not ‘seasonal.’” On this point, the court observed that the worker worked at the client company for a total of 1,613.5 hours and that, “[o]ther than the week he was injured, he worked between 20 and 45 hours . . . for 47 weeks.” The district court also noted that the worker “spent 17 weeks working 40 or more hours, 22 weeks working between 30 and 39 hours, and 7 weeks working between 20 and 29 hours.”277

IV. LEASED WORKER ISSUES

A. What Is a Labor Leasing Firm?

The quintessential qualification of a leased worker is that the worker must be hired through a labor leasing firm.278 Because the CGL policy does not define labor leasing firm, courts have to grapple with the question of what is meant by that term.

There are a myriad of staffing-type firms interacting with the workplace. These would include the following:

• Temporary and long-term staffing firms recruit, train and test their employees and assign them to clients who supervise and control their work.

275. 963 So. 2d 361, 362 (Fla. Dist. Ct. App. 2007); see also Nick’s Brick Oven Pizza, Inc. v. Excelsior Ins. Co., 853 N.Y.S.2d 870, 873 (Sup. Ct. 2008) (college student hired to deliver pizza for only the busy summer months, after which he would return to college).


277. Scottsdale I, 460 F. Supp. 2d at 257 n.5.

278. For a case where there was no dispute that the injured worker was a leased worker, see American Safety Indemnity Co. v. Stollings Trucking Co., Inc., 450 F. Supp. 2d 639 (S.D. W.Va. 2006). See also Ayers v. C&D Gen. Contractors, 237 F. Supp. 2d 764, 768 n.7 (W.D. Ky. 2002) (parties agreed that Ayers was not a leased worker because he was hired through a newspaper
These staffing firms pay their workers wages and benefits and provide insurance and then bill the client company for the workers’ wages and benefits, unemployment and workers’ compensation insurance, administrative expenses and a profit.

- Professional Employer Organization (PEO) firms do not involve supplying labor but rather offer human resources outsourcing services in which the PEO assumes all the legal and administrative responsibilities for an employer for payroll, benefits and other employer-related functions on behalf of all or substantially all of another firm’s entire regular, full-time workforce. Unlike staffing firms, PEOs do not recruit workers from the labor market and assign them to their clients.

- Payrolling firms involve the client, not the staffing firm, recruiting the worker but asking the staffing firm to hire the worker and assign him to perform services for the client. An example is if the client has special needs and is in the best position to screen applicants for the required skills. Another example involves workers employed by the client whom the client places on the payroll of the staffing firm.

- Managed services are services provided by an organization that has expertise in operating a specific client function. The firm contracts with the customer not just to provide and supervise staff, but to take full operational responsibility for performing the function—generally peripheral to the client’s core business, on an ongoing basis.

- Placement services are services provided by employment agencies and executive recruiters that bring together, for a fee, potential employers (their customers) and job seekers for the purpose of establishing a regular full-time employment relationship with the customer.

- Temp-to-hire services combine the elements of both temporary staffing and placement services. Under these arrangements, the client asks the staffing firm to recruit individuals who may be interested in permanent employment and assign them to the client for a trial period during which both the client and the worker can evaluate the relationship. During the trial period, the staffing firm employs the worker and pays all wages, benefits and statutory insurance coverages. If the client and the worker eventually enter a full-time relationship, the worker’s relationship with the staffing firm is terminated.279

279. Edward A. Lenz, Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements 7–16 (5th ed. 2003); see also Infinet Mktg. Servs., Inc. v. Am. Motorist Ins. Co., 58 Cal. Rptr. 3d 92, 94 n.2 (Ct. App. 2007) (“Employee leasing companies (also sometimes called professional employer services) typically ‘contract [ ]’ with client companies to provide leased labor and labor-related services, i.e., payroll, safety and tax services and employment benefits, including workers’ compensation insurance [ ]’ for employees the client already has.”).
The question is which of these staffing-type companies constitute a labor leasing firm as contemplated by the CGL policy. Because the essence of a labor leasing firm is the existence of a labor lease, it would appear that all the above types of staffing firms, except PEOs and employment placement services, could qualify as labor leasing firms because these types of organizations could lease their workers to a client company. On the other hand, PEOs and employment placement services do not enter labor lease arrangements with the clients of customers. The former do not lease out their employees to clients, and the latter match a worker and an employer for a fee.

One example of a labor leasing firm was at issue in the case of Occidental Fire & Casualty Co. of North Carolina v. Reber Corp. The case arose out of a truck driver for the insured (Reber Corp.) named Mackle being killed by a metal manhole cover while he was unloading a truck. When Mackle’s wife contacted Reber to claim workers’ compensation benefits for her husband’s death, she learned that Reber was not his employer because Reber had transferred all of its employees to TTC Illinois, Inc. and subsequently leased the workers, including Mackle, back from TTC. At the time of Mackle’s death, Mackle was working on behalf of Reber, and Reber was partially insured by plaintiff under an automobile policy that provided coverage for Reber’s fleet of trucks. However, the policy contained an exclusion applicable to claims made by Reber employees for bodily injury or death that arose out of the employees’ employment with Reber or the employees performing duties related to the conduct of Reber’s business.

The policy defined employee to include any of Reber’s “leased workers.” It also contained essentially the same definition of leased worker as the CGL policy. The court found the unresolved issue of Mackle being either an employee or a leased worker immaterial to determining the insurer’s liability under the policy because both classifications were excluded from coverage under the terms of the employer’s liability exclusion. Nevertheless, the case provides an example of what can be considered a labor leasing firm.

An issue is whether the term labor leasing firm in the CGL policy also includes a staffing service that does not lease a client company’s workforce back to it, as was done in Reber, but leases its own employees, who never worked for the client company, to the client company. In Wausau, a witness

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281. Id. at *2.
282. Id.
283. Id. at *3.
284. Id. at *3–4.
285. Id. at *7–8.
for plaintiff, the party arguing that the injured worker was a temporary worker, maintained that the injured worker was a temporary employee at the client company because he was furnished to the client company by a temporary help firm, not an employee leasing company. The witness defined *employee leasing company* as a company, like the one in *Reber*, to which the client sends its workers and then leases them back such that the leasing company, not the client company, pays these workers and provides them with insurance. The witness also testified that Action Labor was a temporary help firm, not an employee leasing company because it provides temporary employees for short- or long-term assignments based on a day-to-day agreement.

The court rejected the distinction drawn by the witness because it appeared to be based on nothing more than his own subjective opinion. The court reasoned that what mattered was the definition of *leased worker* in the policy, not the subjective, unsupported belief of a single witness. For the same reason, the court, on this issue, refused to be guided by the distinction between *leased* and *temporary* in the Florida workers’ compensation statute, a distinction that requires a company to obtain a license prior to engaging in the employee leasing business. Presumably, Action Labor did not have such a license. The court found the relevant inquiry to be the type of business that Action Labor was in, within the meaning of the language in the Wausau policies, not the meaning of terms in the workers’ compensation statute.

The CGL policy definition of *leased worker* does not support a cramped reading of *labor leasing firm*, which would restrict its application to a *Reber*-type arrangement. Rather, the term *labor leasing firm* in the CGL policy appears to be expansive enough to include any staffing or employment service firm that leases one of its employees to a client company to perform duties related to the conduct of the client company’s business. The key is the existence of a lease arrangement between the labor leasing firm and the client company, not whether the leased worker worked for the client company before that company transferred all its employees to the labor leasing firm.

287. Id. at *24–25.
288. Id. at *25.
289. Id. at *26.
290. Id.
291. Id. at *29–30. The court’s refusal to rely on the state workers’ compensation statute on the issue of what constitutes a labor leasing firm may explain the court’s reluctance to rely on that statute when deciding the issue of whether the injured worker was furnished to Berman by Action Labor to meet short-term workload conditions.
B. Indicia of a Labor Lease

1. Substance over Form

The easy case involves a written lease agreement between the labor leasing firm and the client company regarding a worker. However, not all cases are so easy. For example, there are situations where there is no explicit lease arrangement and the staffing service denies that it leases its employees to client companies, but the reality of the arrangement is that it is a leasing agreement. This was the precise situation in Scottsdale. The district court and the court of appeals agreed that the relevant inquiry is the substance or reality of the arrangement, not its form, because there is no requirement under the policy that the agreement be memorialized in writing or labeled as a leasing agreement.

The district court also found that additional indicia of a labor lease would include the employment or staffing company determining the worker’s rate of pay; retaining the final authority to continue the worker’s employment; and incurring the burden and cost of having to handle payroll, payroll tax, insurance, workers’ compensation, and other administrative obligations in connection with the employment of the leased worker.

In Scottsdale II, the court of appeals agreed with the district court that it did not matter that the employment firm never used the term lease because it “fit the profile of a ‘labor leasing firm’ in that it retained the rights and obligations of an employer—including determining rate of pay, procuring workers’ compensation insurance and processing payroll.”

The case of Wausau adopted the Scottsdale definition of a lease, i.e., a company leases a worker to a client when it gives the client the right to use...
the worker’s services for a period of time in exchange for a fee, irrespective of whether the parties characterize their arrangement as a lease or whether the lease is in writing. Based on this definition, the court found that Hart was leased to Berman because it was undisputed that Action Labor was in the business of placing its employees at client companies for varying lengths of time in exchange for a fee. The court also found that these facts supported a finding that Action Labor was a labor leasing firm.

*In re South Louisiana Sugars Cooperative, Inc.* provides an example of the difficulty a court might have in determining whether a worker is a leased worker. South Louisiana Sugars Cooperative, Inc. (SLSC) was sued by Barnes, an employee of Acadia Labor Services, for personal injuries he sustained while on a barge owned by SLSC. SLSC sought coverage from the Audubon Insurance Group, but Audubon denied coverage based on, inter alia, the employer’s liability exclusion. The district court found that the exclusion applied and granted summary judgment for Audubon.

On appeal, the Fifth Circuit found the following material facts not to be in dispute:

- Acadia and SLSC had a verbal agreement under which Acadia agreed to supply labor workers to SLSC to provide stevedoring services.
- As a condition of the verbal agreement between SLSC and Acadia, Acadia was required to provide general liability coverage for at least $1,000,000 and maintain workers’ compensation insurance on its employees.
- Acadia decided which employees went to work for SLSC and also provided an on-site supervisor to oversee its employees at SLSC’s facilities.
- Acadia submitted weekly invoices to SLSC.
- Barnes was employed by Acadia at the time of the accident.
- Acadia retained all rights to hire or fire Barnes, paid Barnes’s salary, and maintained workers’ compensation insurance for Barnes.
- Pursuant to the policy issued to Acadia, Louisiana Workers Compensation paid benefits to Barnes in connection with his injuries sustained at SLSC’s facilities.

Although the district court found this evidence to be sufficient to determine that Acadia was a labor leasing firm and Barnes a leased worker, the Fifth Circuit without explanation found the evidence to be insufficient as

297. Id. at *29.
298. Id.
299. 485 F.3d 291 (5th Cir. 2007).
300. Id. at 292.
301. Id.
302. Id. at 293.
a matter of law to establish that Barnes was a leased worker as defined by the policy. The court did not say or hint at what evidence was lacking. It simply vacated the judgment and remanded the case for further proceedings and development of the facts on the leased worker issue.

Notwithstanding the unexplained shortcomings of the summary judgment record on the issue of whether the worker was a leased worker in *In re South Louisiana Sugars Cooperative*, the court in *Wausau* found that the summary judgment record in *Scottsdale I* on the leased worker issue was more fully developed and supported the judgment that the injured worker in that case was a leased worker. The court also noted that the record, after trial, in *Wausau* was sufficient to support its finding that the injured worker in the case was a leased worker.

2. Relevance of State Law

State statutory or regulatory law can also support the conclusion that the parties’ arrangement is in reality a labor lease even though there is no formal written lease. For example, in Missouri, temporary help arrangements are specifically excluded from the definition of *employee leasing arrangement*. Similarly, the Massachusetts Workers Compensation Act, and the regulations promulgated thereunder, define *employee leasing company* as a business consisting

largely of leasing employees to . . . client companies under contractual arrangements that retain for such employee leasing companies a substantial portion of personnel management functions, such as payroll, direction and control of workers and the right to hire and fire workers provided by the employee leasing company; provided however, that the leasing arrangement is long term and not an arrangement to provide the client company temporary help services during seasonal or unusual conditions, such as temporary skill shortages or temporary special assignments and projects.

Moreover, a Massachusetts regulation requires the employee leasing firm to purchase and maintain a workers’ compensation insurance policy for each client company. If the facts of a particular case fit the state statutory and regulatory definitions of *employee leasing arrangement* or demonstrate

303. *Id.*


that the staffing service company is meeting the obligations of a labor or employee leasing firm under state law, the arrangement should be viewed as a lease irrespective of whether there is a written lease. The Scottsdale court engaged in precisely this type of analysis.309

Although the court in Wausau refused to rely on the Florida workers’ compensation statute for the purpose of determining what constitutes a labor leasing firm, it does not appear that the court believed that it would be error to do so. Rather, it appears that the court thought it could resolve the issue based on the language of the policy at issue and that it therefore had no need to address the relevance of the statute.310

3. Relevance of Federal Law

Federal law may be relevant to determining whether an arrangement is a labor lease in circumstances where there is no written lease. For example, the Internal Revenue Code includes a section that, through coverage tests, seeks to ensure that employer-provided retirement plans do not discriminate in favor of higher-paid employees by requiring that retirement plans cover a minimum percentage of lower-paid employees.311 Plans that pass the tests and meet other requirements qualify for tax benefits.312 When applying the coverage tests, the tax code requires employers to include leased employees in their head count. Section 414(n)(2) of the Code defines leased employee as any person furnishing services to a recipient if the following conditions are met:

The person must perform services under an agreement between the recipient employer and the leasing organization.

The person must perform services on a substantially full-time basis for a one-year period. Under IRS Notice 84–11, 1984–2 CB 469, at “Q–7,” this test is met if during a twelve-month period one of the following conditions is met:

- The employee performs at least 1500 hours of service for the customer.
- The employee performs a number of hours of service for the customer that is equal to at least 75 percent of the average number of hours customarily worked by the customer’s own employees performing similar services.
- The person must perform services under the primary direction and control of the recipient.313

If the arrangement at issue in a particular case meets these criteria and this section of the Code applies to the client company at issue, the Code may be able to be used as additional support for the argument that the worker is a leased worker.

C. Does Leased Worker Not Include a Temporary Worker?

The definition of *leased worker* provides that it “does not include a ‘temporary worker.’” However, it would appear that, notwithstanding this definition, a leased worker also could be a temporary worker.\(^{314}\) For example, there appears to be no reason why a leased worker could not be “leased” to the client company by a labor leasing firm for a period of time that covers a permanent employee’s leave or seasonal or short-term workload conditions of the client company.\(^{315}\) Such a lease arrangement, whether in writing or not, would appear to satisfy the “furnished to you” requirement of the definition of *temporary worker*. Moreover, the fact that the leased worker would be substituting for a permanent employee on leave or to meet seasonal or short-term workload conditions would appear to meet the requirement of the definition of *leased worker* that the worker “perform duties related to the conduct of the [client company’s] business.”

If a particular worker meets the definition of both *leased worker* and *temporary worker*, the issue becomes whether the employer’s liability exclusion bars coverage for the claim. One might argue that the CGL policy is ambiguous in this respect and should be construed against the insurer so as to provide coverage (i.e., find that the temporary worker status is dispositive and trumps the leased worker status for the purposes of coverage). However, such an argument would be ill-founded because the long-term or short-term nature of the worker’s employment with the client company should dictate whether the worker is a leased worker or a temporary worker. Accordingly, in the final analysis, the theoretical possibility that a worker can fit under the definitions of both *leased worker* and *temporary worker* should yield to the reality of the worker’s employment situation. There is no ambiguity because the CGL policy definitions make plain that a person furnished to meet short-term workload conditions is a temporary worker, not a leased worker.

\(^{314}\) *See, e.g., Scottsdale I*, 460 F. Supp. 2d at 255; *see also* Gen. Agents Ins. Co. of Am., Inc. v. Mandrill Corp., Inc., 243 F. App’x 961, 967 n.2 (6th Cir. 2007) (“[T]emporary agencies may sometimes provide temporary employees as well as permanent or quasi-permanent employees.”).

\(^{315}\) *Scottsdale I*, 460 F. Supp. 2d. at 255.
V. MANAGING THE RISK: BUSINESS OPTIONS FOR CLIENT COMPANIES

Because client companies without insurance may be liable if the injured worker is found not to be a temporary worker, such companies face risk. Client companies can handle this risk in a number of fashions. In the first instance, they simply can take the chance that a court will find the injured worker a temporary worker. Employers may also decide that the chances of workers furnished to them by an employment-type agency sustaining a serious injury on the job are so remote that they are willing to accept the substantial economic and administrative benefits of using such workers in place of regular employees and run the risk that if one or more of these workers are injured on the job, the employer, not its CGL insurer, will be responsible for any judgment that may be entered against the company.

If the perceived risk of leased workers becoming seriously injured on the job is not trivial, the employer may decide to investigate the availability and cost of a CGL policy endorsement that covers leased workers. If the cost of such an endorsement is not prohibitive and does not exceed the economic and administrative benefits of the employee leasing arrangement, the purchase of such an endorsement could protect the employer against a large judgment entered against it as a result of a catastrophic injury to one of its leased workers.

Another business option for client company employers is to include a waiver clause in the leased worker’s contract with the employee leasing company, providing that the leased worker waives the right to bring a claim or suit against the client company for damages based upon injuries that are covered under the workers’ compensation statute. Courts have upheld such waivers. 316

VI. CONCLUSIONS

The current state of the law on leased workers and temporary workers under the CGL policy yields the following conclusions:

A. Temporary Worker Conclusions

The better-reasoned cases hold that to be a temporary worker, the worker must be furnished to the client company by an employment-type agency.

316. See, e.g., Edgin v. Entergy Operations, Inc., 961 S.W.2d 724 (Ark. 1998); Horner v. Boston Edison Co., 695 N.E.2d 1093 (Mass. App. Ct. 1998). But see Brown v. Soh, 909 A.2d 43 (Conn. 2006) (refusing to enforce exculpatory agreement between employer and employee where the exculpatory agreement at issue did not address insurance coverage and concluding that the issue of whether workers’ compensation insurance ultimately is provided (which it was) “is not a factor considered in analyzing the terms of the agreement presently before us”).
There is a line of cases holding that to be a temporary worker, the worker need not be furnished to the client company by an employment-type agency. These cases find the “furnished to” requirement of the definition of *temporary worker* satisfied if the worker is hired as a result of his response to a newspaper advertisement, a recommendation from a friend, or presenting herself personally or as a sole proprietorship to the employer looking for a worker. These cases are poorly decided because they do not appreciate that the difference between a leased worker considered to be an employee and a temporary worker considered to be a nonemployee is based on a distinction rooted in workers’ compensation law that comes into play when an employment-type agency provides or furnishes one of its employees to a client employer. These cases also blur the distinction between a regular employee, to whom the employer’s liability exclusion applies, and a temporary employee, to whom the exclusion does not apply.

The better-reasoned cases also conclude that the “furnished to” requirement of the definition of *temporary worker* applies not just to people substituting for a permanent employee on leave but also to people furnished to meet seasonal or short-term workload conditions. The “furnished to” requirement of the definition of *temporary worker* means that the worker must be provided by the employment-type agency directly to the client company. Accordingly, a temporary worker is not a worker provided by an employment-type agency to a contractor that provides services at the insured’s place of business.

To date, the courts have employed two distinct types of analysis to the issue of what constitutes short-term workload conditions. The retrospective approach looks back from the time of the worker’s injury to determine whether the worker had been working for a short term for the client company. One court using this approach has found the term *short-term workload conditions* to be ambiguous because there is no way to determine when the short term ends.

Other courts have used a prospective approach for determining whether the worker was furnished to meet short-term workload conditions. Under this approach, the test is the intent of the client company at the time it leased the worker. The courts employing the prospective approach have not found the term *short-term workload conditions* to be ambiguous.

Employers that intend to use workers provided by an employee leasing company in place of regular employees for an indefinite or substantial period of time in order to realize the economic and administrative benefits that these workers have over regular employees may find that they, not their insurance companies, are responsible for any judgment such workers obtain against them: the courts may find workers used in such a manner to be leased workers subject to the employer’s liability exclusion.
The term *seasonal workload conditions* in the definition of *temporary worker* normally refers to seasonal business, like farming or snow removal or increased sales during the holiday season. A worker’s relatively stable hours at a client company over a long period of time will undercut the argument that he was furnished to the client company to meet seasonal workload conditions.

B. *Leased Worker Conclusions*

A labor leasing firm includes any staffing service that leases its employees to a client company to perform duties related to the conduct of the client company’s business. It is not limited to a company that has a client company transfer to it all of its employees so that the labor leasing company can lease those people back to the client company.

A labor lease does not have to be in writing. What matters is the substance or reality of the relationship, not its form.

A labor lease exists when the labor leasing firm provides its client company with the right to use its workers’ services for a period of time in exchange for a fee.

Additional indicia of a labor lease include the following labor services: determining the worker’s rate of pay; retaining the final authority to continue the worker’s employment; and incurring the burden and cost of having to perform payroll, payroll tax, insurance, workers’ compensation, and other administrative obligations in connection with the employment of the leased worker.

Although it is theoretically possible that a leased worker could also be a temporary worker, notwithstanding the CGL policy language providing to the contrary, the long-term, short-term, or seasonal nature of the worker’s employment at the client company will dictate whether the courts treat the worker as a leased worker or a temporary worker.