Less than Meets the Eye: Potential Liability When Using Temporary Workers

Employment and Labor

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Liability risk of using temporary workers — Reality check

For almost eighty years, temporary staffing agencies have played an increasingly critical role in the nation's economy, employing millions of temporary and contract workers annually. Staffing agencies assign workers in every job category in every industry — including essential industries such as healthcare, information technology, manufacturing, logistics, food services, financial services, and pharmaceuticals.

Staffing agencies play a key role in economic recoveries by allowing businesses to test the workforce waters before committing to permanent hires. During the COVID-19 pandemic, they helped to ensure the continued flow of essential goods and services, producing and delivering food, pharmaceuticals, and critically needed health care personnel to hospitals and other facilities. Year in, year out, staffing agencies provide businesses with flexible just-in-time labor to handle skill shortages, employee absences, seasonal workloads, special projects, and fluctuating market conditions.

Despite the decades-long use of temporary help and its manifest economic benefits, some businesses still have concerns about their potential liability when using such services, often fueled by overwrought and sometimes ill-informed legal commentary. The concerns are misplaced. The fact is that the use of staffing agency workers poses no greater employment-related risk to businesses, and

sometimes less risk, than hiring workers directly — and far less risk than using workers who may be misclassified as “independent contractors.”

Temporary workers pose less risk than using independent contractors

The rise of so-called “gig” job platforms that classify workers as independent contractors instead of employees exposes businesses to significant potential liability.

Whether a worker is properly classified as an independent contractor is determined by myriad state and federal fact-intensive legal tests; and federal and state agencies, including the Internal Revenue Service and Department of Labor, have cracked down on misclassification. The penalties for misclassifying workers can be severe, including unpaid income and payroll taxes and overtime wages.

Those issues typically do not arise when using staffing agencies because the vast majority of temporary and contract workers assigned by agencies are classified as W-2 employees and, thus, are fully protected by the nation’s employment laws. While some “gig” platforms may legitimately claim that the workers placed through their systems are independent contractors with respect to the platform, the end users of the services generally cannot make the same claim because they exercise supervision and control over the work performed by the workers at the work site.

Given the employee status of most staffing agency workers, the potential liability clients face with respect to independent contractors is largely avoided.

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Liability for temporary workers

Employment taxes, unemployment insurance, and Forms I-9

While this article focuses largely on federal law, the conclusions regarding joint liability risks generally apply to state law issues as well.* Some employer obligations, such as employment taxes, unemployment insurance, and verification of employee identity and work authorization pursuant to the Immigration Control and Reform Act of 1986, generally are the sole legal responsibility of the staffing agency. As a result, staffing agency clients generally will be insulated from such liability for temporary workers.

Other employer obligations may be shared by the staffing agency and its client, because the parties typically will jointly employ assigned temporary workers. Clients typically will be joint employers because, among other things, they generally supervise and direct the employees’ day-to-day work; control working conditions at the work site; and determine the length of temporary assignments.

Joint employment, however, should not be of concern since any potential client liability should be no greater than that associated with internal employees and can be controlled and mitigated by the client. Moreover, in some cases, joint employer status can actually benefit clients, as in the context of workers’ compensation.

Workers' compensation

Joint employer status protects staffing agency clients when temporary workers are accidentally injured on the job.

State workers' compensation laws provide benefits, on a no-fault basis, to employees accidentally injured while working. In such cases, workers' compensation is the exclusive remedy, and employees generally are barred from suing their employers for damages — this is typically referred to as the "exclusive remedy doctrine."

Staffing agencies are required to maintain workers' compensation for their temporary employees and, thus, are protected by the exclusive remedy doctrine. Staffing agency clients generally are protected as well, as courts and legislatures in almost every state have expressly extended this immunity to clients that qualify as joint or "special employers."

Clients generally will qualify as special employers when:

1. They supervise the work of the temporary worker;

2. The temporary worker has consented to the staffing arrangement (such consent is inferred when the worker accepts the job assignment); and

3. The work being performed is essentially that of the staffing agency's client.

Because all three criteria generally will be met in the typical staffing arrangement, most clients will have immunity from workplace injury suits brought by temporary workers by virtue of the staffing agency's workers' compensation policy — meaning that injured temporary workers can recover under the staffing agency's policy, which will be their exclusive remedy.

Clients may not benefit from such protection, however, if they expressly disclaim employer or joint-employer status in their contracts with staffing agencies.

Workplace safety

Temporary workers are entitled to the same protections under the Occupational Safety and Health Act of 1970 (the OSH Act) as all other covered workers. Pursuant to the OSH Act, staffing agencies and clients share responsibility for temporary worker safety.

To ensure that there is a clear understanding of each party's role in protecting employees, OSHA recommends that the temporary staffing agency and the host employer set out their respective responsibilities for compliance with applicable OSHA standards in their contract. Including such terms

in a contract will ensure that each party complies with all relevant regulatory requirements, thereby avoiding confusion as to obligations. OSHA offers guidance in the form of bulletins and compliance directives on a wide range of temporary worker safety topics, including hazard communication, recordkeeping requirements, respiratory protection, lock out/tagout, and more.

Therefore, clients' workplace safety obligations for staffing agency employees generally are no different than those pertaining to their internal employees.

Wage and hour obligations

The US Department of Labor regulations impose joint employment obligations in specified circumstances. For example, if an employee is employed jointly by two or more employers during a workweek, all the employers are responsible for compliance with the wage and hour provisions applicable to the period worked for each employer.

Equal Employment Opportunity (EEO)

Staffing arrangements do not shield clients from liability under civil rights laws, and clients can be held liable for unlawful discrimination under Title VII of the Civil Rights Act of 1964. This means that clients generally have the same obligation to temporary workers as they do to their internal employees — they cannot unlawfully discriminate. Clients cannot reject temporary employees based on their race, gender, age, national origin, religion, or other protected characteristics under federal and state laws. Clients can be liable if their internal employees subject temporary workers to discrimination or unlawful harassment, such as a hostile work environment or quid pro quo sexual harassment.

Similarly, the EEOC has issued guidelines confirming that staffing agencies and clients generally have joint employer obligations under the Americans with Disabilities Act. Both are obligated to provide a reasonable accommodation needed on the job, absent undue hardship.

If it is not clear what accommodation should be provided, both entities should engage in an informal interactive process with the worker to clarify what s/he needs and to identify the appropriate reasonable accommodation."

Where the resources of both the staffing agency and its client are insufficient to provide an accommodation without significant expense, both may have an undue hardship defense. A staffing agency or client whose resources are insufficient to provide the accommodation also may have an undue hardship defense if it made good faith, but unsuccessful, efforts to have the other entity contribute to the accommodation's cost.

Family and Medical Leave Act (FMLA)

Unlike EEO laws, clients have fewer obligations to temporary employees, under the Family and

Medical Leave Act and state analogs, than they have with respect to their internal employees.

Pursuant to 29 CFR 825.106, *"[i]n joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the "primary" employer include authority/ responsibility to hire and fire, assign/ place the employee, make payroll, and provide employment benefits.* ***For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer****."* (Emphasis supplied.)

However, temporary employees may have to be counted by clients for FMLA headcount purposes. 29 CFR 825.106(d) provides, "[e]mployees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* §825.111(a)(3))."

Similarly, if the client is a joint employer of the temporary employee and later hires the employee directly onto its payroll, the client will have to count the time the employee spent as a temporary worker when calculating that person's FMLA eligibility.

Finally, if a temporary employee takes FMLA leave, and if the client still is using the services of the temporary staffing agency for the same or equivalent position at the time the employee returns, the staffing agency must reinstate the employee immediately, even if it means removing another employee from the job — and the client must accept the returning employee. However, if the client has stopped using temporary help or the particular services performed by the employee who took leave, the client is under no obligation to reinstate the employee.

Employee benefits

Client concerns with benefits liability stems from a decades-old Ninth Circuit decision in the case of *Vizcaino v. Microsoft Corp*.

The *Microsoft* case raised the specter that staffing agency employees may be considered a client's common-law employees under certain circumstances and thus become eligible for the client's benefit plans. The case involved unique and complicated facts and after lengthy litigation, the case was settled.

Since then, clients have focused primarily on two issues pertaining to benefits — whether temporary workers must be included in the client's headcount for nondiscrimination testing purposes, and whether they are entitled to participate in the client's benefits plans.

IRS rules allow certain benefit costs under a "tax-qualified" plan to be deducted by employers and excluded from income by employees. Some of these tax advantages are conditioned upon the plan's satisfying certain coverage and nondiscrimination rules. Clients can structure their staffing relationships to avoid contacts with assigned employees that could result in a common law employment relationship. Although day-to-day supervision may be unavoidable in most cases, functions such as recruitment, training, determination of wages and benefits, and the right to assign workers to other projects should, to the extent possible, be left exclusively to the staffing agency.

ACC Members: Download the **Employee Benefits Due Diligence Checklist**

Time limits and benefit plan exclusions

Some clients have arbitrarily limited the length of temporary workers' assignments in an effort to reduce the likelihood that temporary workers will be found to be the client's common law employees. Length of assignment is one of many factors under the common law control test but not the sole or determining factor. Assignment limits also may carry risk because they might be construed as an effort to deny benefits by preventing workers from reaching the hours needed for plan participation. Clients could thus face charges of violating ERISA, which protects employees from such action.

Even if a client is considered the common law employer, it can generally protect itself by explicitly excluding temporary employees from its benefit plans. Both the IRS and courts have long recognized the validity of and upheld such exclusionary language.

In-house counsel, therefore, should review their plans with experienced benefits advisors to ensure that the plans contain appropriate exclusionary language.

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Affordable Care Act (ACA)

Staffing agency clients should have no obligation to include staffing agency employees for purposes of ACA compliance unless the client is determined to be the common-law employer based on the facts and circumstances. Based on historical practice and legal precedent, staffing agencies generally should be viewed as the common-law employer, not the client.

Some clients, out of an abundance of caution, may ask the staffing agency to comply with a special ACA rule designed to protect the client in the unlikely event that the client is found to be the common-law employer. The rule allows the staffing agency to offer coverage on the client's behalf, thus protecting the client from potential penalty, but only if the client pays a "surcharge" for persons who enroll in the staffing agency's health coverage. The ACA regulations make clear that clients do not have to count "leased employees" as employees for purposes of compliance with the ACA employer shared responsibility rules.

Collective bargaining

The National Labor Relations Board has long held that temporary employees employed by staffing agencies may be included in client bargaining units where there is a sufficient "community of interest" between a staffing agency's employees and the client.

A key issue, however, is whether the staffing agency's employees can be forced into the client's bargaining unit without the consent of both employers. The issue has had an unsettled history with the NLRB taking different positions depending on the political party in power. Under a 2016 ruling

overturning prior precedent, the board ruled that staffing agency temporary employees can be included in a client's existing bargaining unit without staffing agency and client consent, provided the temporary workers are jointly employed by the client and share a community of interest with the client's employees regarding the terms and conditions of employment.

The ruling has not had a significant effect on staffing agency — client relationships for two reasons: historically, unions have shown little interest in separately organizing temporary workers and bargaining over their terms and conditions of employment; and temporary workers have shown little interest, given their short tenure, in joining unions and paying union dues.

Handled properly, temporary employees pose no significant employment risk

The use of temporary employees has become an indispensable part of many companies' growth strategies.

Such use neither makes companies susceptible to liability they otherwise may not have had with respect to their internal employees, nor poses significant risk that should make companies rethink or curtail their use of staffing agency workers.

Join ACC for more information on employment and labor risks.

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