

LESS THAN MEETS THE EYE:

# Potential Liability When Using Temporary Workers

By Stephen C. Dwyer

Since the end of the Great Recession, the US staffing industry has created more jobs than any other single industry in America. According to the US Bureau of Labor Statistics, staffing firms added more than 786,000 jobs to their payrolls from June 2009 to July 2012, and industry growth has been more robust in the current economic recovery than it was in the years following the previous two recessions that ended in 2001 and 1991, respectively.<sup>1</sup>

There are many reasons for this growth. By using temporary help as needed, businesses can react quickly and efficiently to changing market conditions. Temporary help services provide flexibility and a way to avoid overstaffing. Companies use staffing firms to support or supplement their workforces; provide assistance in special work situations, such as employee absences, skill shortages and seasonal workloads; and perform special assignments or projects. Staffing firms provide businesses with temporary employees in every job category, including industrial labor, office support, information technology, health care, professional and managerial positions.

## 30-SECOND SUMMARY

The Internal Revenue Service and Department of Labor have cracked down on worker misclassification, the penalties for which can be severe. Staffing firms are a good option for companies because most workers assigned through a staffing arrangement can only be classified as employees. Staffing firms generally recruit and screen the workers, and verify their work status under immigration laws. Clients typically will be joint employers because, among other things, they supervise and direct the employees' day-to-day work. Given the employee status of most staffing firm workers, the potential liability clients face with respect to independent contractors is largely avoided.



With increased reliance on staffing firm temporary workers, businesses have begun to more closely examine their potential liability in connection with the use of contingent labor. In the employment law context, some legal pundits have cautioned against the “dangers” of using such labor, at times, suggesting that the use of staffing firm temporary workers is something to be avoided.

Such fear mongering does not serve the interests of the many businesses that benefit from the labor flexibility that staffing firms provide. This is because potential employment-related liability generally is less than potential liability arising from the use of independent contractors, and is no greater, and in some cases less, than exposure with regard to businesses’ internal employees.

### Temporary workers pose less risk than using independent contractors

By now, in-house counsel have become familiar with the myriad, fact-intensive legal tests used to determine whether a worker is properly classified as an independent contractor. This is because various federal and state agencies, including the Internal Revenue Service and Department of Labor, have cracked down on worker misclassification, the penalties for which can be severe. These penalties may include, among other things, income tax, social security, minimum wage, overtime and unemployment insurance liability.

In contrast, most workers assigned through a staffing arrangement can only be classified as employees. Both the staffing firm and the client exercise control over the employee. Staffing firms generally recruit and screen the workers and verify their work status under immigration laws; are the employer of record for wages and benefits; withhold and remit all payroll taxes (e.g., Social Security, Medicare and unemployment insurance); provide workers’

compensation insurance coverage; have the right to hire, fire and reassign the worker; and hear and act on complaints from employees regarding working conditions and other work-related matters. Clients generally supervise and direct the activities of the employee at the worksite.

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

### Liability for temporary workers

#### Employment taxes, unemployment insurance and Forms I-9

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 firm. As a result, staffing firm clients generally will be insulated from such liability for temporary workers.

Other employer obligations may be shared by the staffing firm 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 firm 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 firms are required to maintain workers’ compensation for their temporary employees and, thus, are protected by the exclusive remedy doctrine. Staffing firm 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.”<sup>2</sup>

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 firm’s client.



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*Portions of this article were adapted from ASA’s book, “Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements,” 7<sup>th</sup> Ed., by Edward A. Lenz. The Affordable Care Act discussion is adapted from Lenz and Bianchi, “Will Clients Have Employer Obligations for Staffing Firm Employees under the ACA?” (Staffing Today, June 3, 2013). This material is not intended to be, and should not be construed as, legal advice.*

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 firm's workers' compensation policy — meaning that injured temporary workers can recover under the staffing firm'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 firms. Courts have held that businesses cannot use contracts to try to avoid joint employer obligations and then seek exclusive remedy protection as a joint or special employer.<sup>3</sup> Therefore, businesses should carefully consider the wisdom of including such disclaimers in staffing contracts.

### Workplace safety

Pursuant to the Occupational Safety and Health Act, staffing firms and clients share responsibility for temporary worker safety. Staffing firms have a general duty to take reasonable steps to determine conditions at the work site, provide employees with generic safety information and advise them how to obtain more specific safety information.<sup>4</sup> Clients are primarily responsible for site-specific training and ensuring the safety of staffing firm employees when they control the work site and the work performed by the temporary employees.<sup>5</sup> Clients are also required to maintain records of illnesses and injuries of the temporary employees they supervise and direct, and notify them of any hazardous substances in the workplace.<sup>6</sup>

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

### Wage and hour obligations

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.<sup>7</sup>

In a 1968 opinion letter, DOL applied these regulations in a case involving temporary staffing, stating that staffing firms, not their clients, have primary responsibility for keeping records of hours worked and paying the proper amount of overtime.<sup>8</sup> At the



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## 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.

same time, however, DOL noted that temporary employees are “typically” employed jointly by the staffing firm and its clients — and clients may be held jointly responsible for overtime and minimum wage obligations.

In the case of overtime, a client will be jointly liable only if the temporary employee worked more than 40 hours in the week for that client. As a practical matter, however, the Department of Labor typically will first seek to recover unpaid overtime from the staffing firm since the firm, and not the client, is the party that controls wages and maintains time records.

### Equal employment opportunity

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.<sup>9</sup> 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 traits under federal and state civil rights laws. Clients can be liable if their internal employees subject temporary workers to unlawful harassment, such as a hostile work environment or quid pro quo sexual harassment.

Similarly, the EEOC has issued guidelines confirming that staffing firms and clients generally have joint employer obligations under the Americans with

Disabilities Act.<sup>10</sup> Both are obligated to provide a reasonable accommodation needed on the job, absent undue hardship. The EEOC includes the following illustration in its guidance:

“Just-jobs, a temporary employment agency, sends CP, who is deaf, to perform maintenance work for XYZ Corp. Both qualify as CP’s employer because Just-jobs hires CP and pays his wages, and XYZ supervises and directs CP’s work. CP informs Just-jobs that he will need a sign language interpreter for a one-hour safety orientation program that XYZ Corp. requires all employees to attend. Just-jobs lets XYZ know about CP’s need for an interpreter. Just-jobs and XYZ are both obligated to provide a reasonable accommodation.

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 he needs and to identify the appropriate reasonable accommodation.”

Where the resources of both the staffing firm and its client are insufficient to provide an accommodation without significant expense, both may have an undue hardship defense. A staffing firm 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.

Regardless of apportionment of cost, however, clients generally have the same accommodation obligations to temporary employees as they do to their internal employees, unless such an accommodation would constitute an undue hardship.

### Family and medical leave

Unlike EEO laws, clients have fewer obligations to temporary employees, under the Family and Medical Leave Act, 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.<sup>11</sup>

Finally, if a temporary employee takes FMLA leave, and if the client still is using the services of the temporary staffing firm for the same or equivalent position at the time the employee returns, the staffing firm 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.<sup>12</sup>

### Employee benefits

Employee benefits liability is perhaps of greatest concern to clients when using temporary employees, dating back to the Ninth Circuit's seminal decision in *Vizcaino v. Microsoft*. In the late 1980s, Microsoft used independent contractors to do the same kind of work performed by its direct employees. After the US Internal Revenue Service ordered the workers to be reclassified as employees, Microsoft hired many of them directly or engaged them through staffing firms.

The workers later sued Microsoft, claiming to be common law employees and thus entitled to the company's

benefits — retroactively. After years of litigation, the court concluded that they were common law employees of Microsoft and entitled to the company's benefits.<sup>13</sup> Microsoft eventually settled the case in 2000 for approximately \$97 million.

Since that time, clients have focused primarily on two issues pertaining to benefits — the extent to which temporary workers must be included in the client's headcount for nondiscrimination testing purposes, and the extent to which temporary employees will be 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. For example, retirement plans, including pension, profit-sharing and 401(k) plans, cannot discriminate in favor of highly compensated employees either in their coverage or their level of benefits.

In applying the nondiscrimination tests, staffing firm clients generally must include in their head count "leased employees" — temporary workers who work under the client's direction and control on a substantially full-time basis (generally 1,500 hours) for a period of at least one year.<sup>14</sup> Such workers only have to be counted, and they will not necessarily be entitled to participate in the client's plan.

However, if a client's contacts with the workers are extensive, the workers may be deemed to be the client's common law employees for benefits purposes and have a right to participate

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**The term “employer,” for purposes of the employer responsibility provisions of the Affordable Care Act, has the same meaning as under the Employee Retirement Income Security Act and, therefore, will be determined using the common law multifactor test.**

in the client's benefit plans. Fortunately, there are steps clients can take to insulate themselves from such liability.

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 firm.

In this regard, 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 not the sole or determining factor, however — it is but one of many factors under the common law control test. 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.<sup>15</sup>

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

### Pay-or-play obligations under the Affordable Care Act

In the context of the Affordable Care Act, the relevant question is whether and under what circumstances a staffing firm client might be required to offer health insurance coverage or pay penalties as an employer of temporary workers assigned by staffing firms.

The term “employer,” for purposes of the employer responsibility provisions of the Affordable Care Act, has the same meaning as under the Employee Retirement Income Security Act and, therefore, will be determined using the common law multifactor test.<sup>16</sup> In the typical staffing arrangement, staffing firms generally should meet this test and, therefore, should be responsible for ACA compliance with respect to temporary employees assigned to clients. Clients generally should not have ACA employer obligations with respect to those employees, but they may be viewed as the responsible employer if they use the staffing arrangement primarily for the purpose of avoiding their employer obligations under the ACA.

The government expressly recognizes that staffing firms can be common law employers under the ACA.

Proposed employer regulations, published by the US Treasury Department and the US Internal Revenue Service on Jan. 2, 2013, expressly invited comment on “how a special safe harbor or presumption should or could be developed with respect to the variable hour employee classification of the common law employees of temporary staffing agencies.” The proposed regulations cite a 1970 IRS revenue ruling as “an illustration of the facts and circumstances under which a temporary staffing agency (rather than its client) is the individual’s common law employer.” The ruling involved a service firm that provided on-site supervisors, which is not a requirement of common law employer status. More recent federal court rulings have upheld the common law employer status of staffing firms based on facts and circumstances that are typical of most

staffing arrangements and that did not involve on-site supervision.<sup>17</sup>

Of course, since common law employer status is based on specific facts and circumstances, it cannot simply be assumed that a staffing firm will be a common law employer in all cases. But staffing firms generally should satisfy the common law test because they are not only the employers of record for payment of wages and benefits, and for withholding and paying employment taxes, but they are also responsible for recruitment, screening and hiring of employees, establishing employment policies governing their job performance and conduct, terminating or reassigning employees, and retaining the right to control how they perform their work (which court rulings and IRS determinations make clear does not actually have to be exercised). Thus,

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staffing firms, not clients, generally should be responsible for the pay-or-play and other employer obligations under the ACA.

### Collective bargaining

In 2004, the National Labor Relations Board ruled that temporary workers cannot be forced into a collective bargaining unit with a client's regular employees without the consent of the staffing firm and the client.<sup>18</sup> Allowing such units to be formed without consent, the NLRB reasoned, would result in bifurcation of bargaining that would hamper negotiations between a union and an employer, and force the employers to negotiate with one another, as well as with the union.

Although temporary employees cannot be forced into client bargaining on a nonconsensual basis, they still have a right to engage in lawful union activity at a client's work site, and cannot be disciplined by the staffing firm or client for doing so. In this regard, they have the same rights as a staffing client's internal employees.

### 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 firm workers. **ACC**

#### NOTES

- 1 Department of Labor, Bureau of Labor Statistics, "Current Establishment Survey (National), Employee on Nonfarm Payrolls by Industry Sector and Selected Industry Detail," seasonally adjusted, Aug. 10, 2012.
- 2 See, e.g., *Robidoux v. Muholland*, No. 09-10020-JLT, 2010 WL 2990125, at \*3 (D. Mass. July 29, 2010); *Cyronis v. Mart Mgmt. Inc.*, No. 3:09-cv-38(CDL), 2010 WL 339798, at \*4 (M.D.Ga. Jan. 21, 2010); *Draper v. American Rice, Inc.*, No. 01-09-00239-CV, 2010 WL 2991094, at \*7 (Tex. App. July 29, 2010). See also Ala. Code § 25-14-9; Fla. Stat. Ann. § 440.11(2); Ga. Code Ann. § 34-9-11; Idaho Code § 72-103; Me. Rev. Stat. Ann. tit. 39-A §104.
- 3 See, e.g., *Gregory v. Pearson*, 736 S.E.2d 577 (N.C. Ct. of App. 2012); *Swanson v. White Consol. Indus., Inc.*, 77 F.3d 223, 225-26 (8<sup>th</sup> Cir. 1996); *Parson v. Procter & Gamble Mfg. Co.*, 514 N.W.2d 891, 893-95 (Iowa 1994).
- 4 See OSHA's Nov. 21, 2012, Interpretation Letter to Kathryn Bernard, available at [www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28598](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28598).
- 5 Id. See also OSHA's Field Operations Manual, Ch. 4, Violations, at 4-3 (Occupational Safety & Health Admin., U.S. Dep't of Labor, Nov. 9, 2009), available at [osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-148.pdf](http://osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf).
- 6 29 C.F.R. § 1904.31(b)(2).
- 7 29 C.F.R. § 791.2.
- 8 Department of Labor Opinion Letter No. 874, Oct. 1, 1968.
- 9 See "Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms," available at [www.eeoc.gov/policy/docs/conting.html](http://www.eeoc.gov/policy/docs/conting.html).
- 10 See Dec. 22, 2000, "Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms," available at [www.eeoc.gov/policy/docs/guidance-contingent.html](http://www.eeoc.gov/policy/docs/guidance-contingent.html).
- 11 See *Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997); Dep't of Labor Opinion FMLA-37, Jul. 7, 1994. See also 29 CFR 825.106.
- 12 29 C.F.R. § 825.106(e). See also *Grace v. USCAR*, 521 F.3d 655, 676 (6<sup>th</sup> Cir. 2008).
- 13 *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9<sup>th</sup> Cir. 1996).
- 14 See Internal Revenue Code section 414(n).
- 15 See, e.g., *Scruggs v. ExxonMobil Pension Plan*, No. 08-6145, 2009 WL 3720034 (10<sup>th</sup> Cir. Nov. 9, 2009); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1130-31 (5<sup>th</sup> Cir. 1996); *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435 (7<sup>th</sup> Cir. 1996). See also U.S. Internal Revenue Service "Technical Advice Memorandum" (Section 410 — Minimum Participation Standards) (Release Date: July 28, 1999) (Doc 2000-14434).
- 16 78 Fed. Reg. 218, 221 (Jan. 2, 2013).
- 17 See e.g., *Blue Lake Rancheria v. US*, 653 F.3d 1112 (9<sup>th</sup> Cir. 2011); *Burrey v. Pac. Gas & Elec. Co.*, 1999 U.S. Dist. LEXIS 22619 (N.D. Cal. May 12, 1999).
- 18 See H.S. Care LLC d/b/a Oakwood Care Center, 343 N.L.R.B. No. 76 (2004).