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# Contingent Workers and Temporary Employees: Resource or Risk?

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Brought to you by Winston & Strawn LLP's Labor and Employee Relations  
& Employee Benefits and Executive Compensation Practice Groups

# Today's eLunch Presenter



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“Contingent workers have always served as the bookends to economic cycles: They’re the first to feel the brunt of job cutbacks in a recession and the first to be called back to work as business starts showing signs of renewed vigor.”

— Irwin Speizer, [www.workforce.com](http://www.workforce.com)

## Overview

- Use of contractors and temporary employees continues to increase
- While contingent workers may provide a greater return on investment than hiring new employees in some cases, this approach is not without risk
- Employers can adopt strategies to minimize risk through how contingent worker relationships are structured and documented

# Why Is Use of Contingent Workers Continuing to Increase?

- Proponents say:
  - Excellent way to staff for specific projects and needs
  - Minimizes recruitment and retention costs, and, in some cases, overhead and supervision costs
  - A chance to learn what people can do before hire
  - As workforce demographics change, this approach is attractive to talent

# Why Is Use of Contingent Workers Continuing to Increase?

- Opponents (including legislators at the state and federal level) say:
  - Save significant payroll taxes
  - Avoid workers' compensation and unemployment claims and taxes
  - Decrease wages

# Independent Contractors: Avoiding Misclassification

## ■ Risks

### ● Administrative audits and assessments on the rise

- ▶ August 2009 GAO recommendation to DOL and IRS to “enhance enforcement of worker classification, improve outreach to workers about classification and improve interagency coordination in addressing misclassification”
- ▶ President Obama’s FY 2010-11 “Misclassification Initiative”
  - \$25M to increase audits and enforce misclassification
- ▶ IRS Employment Tax National Research Project
  - 2,000 employees/year for three years
  - Collect data to “allow the IRS to understand the compliance characteristics of employment tax filers” to “help the IRS select and audit future employment tax returns with the greatest compliance risk”



# Independent Contractors: Avoiding Misclassification

## ■ Risks (contd.)

- Similar initiatives at the same level, including increased data sharing between state agencies and states and the federal government
- Civil litigation for overtime wages and benefits allegedly due

# Independent Contractors: Avoiding Misclassification

- The test:
  - Fact-specific analysis
  - Labels not determinative
  - Courts and different agencies apply different tests
    - IRS factors
    - “Control” v. “Entrepreneurial Opportunity”

# Independent Contractors: Avoiding Misclassification

- Written agreements
- Project vs. at-will
- Pay for performance vs. time worked
- Contractor should be invested
- No unnecessary restrictions on other opportunities

# Independent Contractors: Managing Unintended Consequences

- Review benefits plans and policies
- Carefully review agreements concerning proprietary information and assignment of intellectual property
- Obtain written representations regarding compliance with applicable laws, insurance and indemnity

## Staffing Agencies: Risks

- Use of staffing agencies may avoid or minimize some employment law risks, but it does not eliminate all risk
- Primary risk flows from joint employer status
- Joint employer risk varies by statute and jurisdiction

## Staffing Agencies: Risks

- As a user of labor supplied by a staffing agency, do you...

- Determine job qualifications?
- Schedule work?
- Supervise work?
- Retain authority to hire, fire, and discipline?
- Maintain employment records?
- Promulgate and enforce work rules?

...then you may be a joint employer for purposes of employment law compliance



## Staffing Agencies: Risks

- FLSA: Each employer may be jointly and independently liable
- FMLA: Supplier primarily responsible for compliance, but user also liable for some purposes and temporary employees are counted toward coverage concerning both employers
- Title VII and similar statutes: Potentially liable for discrimination, and interfering with employment with supplying agency

## Practical Tips: What do I do next?

- Review and revise service provider relationships
  - Clearly define service agency responsibilities
    - Lay out responsibilities for interviewing, testing, paying, establishing rules, monitoring, evaluating, disciplining, and terminating temporary employees
    - Consider limiting temporary employee involvement in regular employee functions
    - Consider a “managed services” approach
  - Clearly define service agency indemnification and claims handling responsibilities



## Practical Tips: What do I do next?

- Protect private and confidential information
  - Identify sensitive and confidential materials to be protected
  - Consider what access to be given to temporary employees or providers, including:
    - Establishment of physical and technological controls
    - Limiting of access to electronic information and systems: firewalls, password protection, etc.
    - Requiring work be saved on company servers
    - Forbidding copying electronic materials onto portable devices
    - Limiting physical access to locations where sensitive information is stored
    - Securing sensitive storage spaces and file cabinets with locks
    - Designating materials “confidential” when appropriate



# Practical Tips: What do I do next?

- **Maintain accountability**
  - Ensure service provider agreements contain provisions protecting confidential information
  - Consider periodic certifications from temporary service providers that they are in compliance



Questions?



Thank You.

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