Co-Employment Issues in Staffing Arrangements

Employers have myriad legal obligations to their employees. Paying wages and benefits, paying and withholding employment taxes, providing workers’ compensation insurance, complying with civil rights and labor laws, and maintaining a safe work environment are just a few of them. In most staffing arrangements, a staffing firm and its client share employer obligations in what is often referred to as a “co-employment” relationship.

Staffing firms
- Verify employee work status under immigration laws
- Are the employer of record for wages and benefits
- Withhold and remit all payroll taxes (e.g., Social Security and Medicare)
- Provide workers’ compensation insurance coverage
- Have the right to hire and fire
- Hear and act on complaints from employees on working conditions and other work-related matters

Clients
- Generally supervise and direct employees’ day-to-day work
- Control working conditions at the work site
- Determine the length of employees’ assignments

Below is a brief review of staffing firm and client co-employment obligations—and how clients can minimize their potential liability.

Employee Benefits
To receive favorable tax treatment under IRS rules, employer retirement plans must satisfy “nondiscrimination” tests. In applying the tests, employers generally must include in their head count “leased employees”—i.e., workers who are not their employees, including workers supplied by staffing firms, who perform more than 1,500 hours of service in a year for the client. Such workers only must be counted—they are not entitled to participate in the client’s plan. However, if a client’s contacts with the workers are extensive and long term, the workers may be viewed as the client’s common-law employees and may have a right to participate in the client’s benefit plans unless they are expressly excluded from the plan.

Clients can mitigate their exposure by structuring 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.

Even if a client has sufficient contacts with workers to be considered their common-law employer, the client can still protect itself by excluding from its benefit plans temporary, contract, leased, and other employees. This can be done without jeopardizing its plans’ tax status, provided the plans continue to satisfy applicable discrimination tests when such employees are excluded.
Clients should review their plans with experienced benefits advisors to ensure that their plans contain appropriate exclusionary language and meet the discrimination tests.

**Affordable Care Act**
The ACA requires employers with 50 or more full-time and full-time equivalent employees in a calendar year to offer certain health coverage to their employees or be subject to penalties. “Employer” for ACA purposes means the common law employer and under benefits law there can only be one common law employer. Staffing firms generally should be viewed as the common law employer because they recruit, screen, and hire the employees; pay employees’ wages and benefits; withhold and pay employment taxes; have the right to terminate or reassign employees; and usually retain the right to control and direct how the employees perform their work. ACA regulations provide that clients do not have to count “leased employees” as their employees for ACA compliance unless the client is determined to be the common law employer.

**Equal Employment Opportunity**
Staffing arrangements do not shield clients from liability under the civil rights laws. If a staffing firm and its client both have the right to control the worker under a multifactor test spelled out in Equal Employment Opportunity Commission guidelines, and each has the statutory minimum number of employees, both can be held liable for unlawfully discriminating against a staffing firm’s employees under Title VII of the Civil Rights Act of 1964.

The EEOC also has issued guidelines confirming that staffing firm clients generally have joint employer obligations under the Americans With Disabilities Act. This may include sharing the cost of providing reasonable accommodations to temporary workers with disabilities. The guidance encourages staffing firms and their clients to engage in an “informal, interactive process” with workers to determine their needs. Experience shows that such accommodations do not involve significant expense in most cases.

**Collective Bargaining**
In 2015, the National Labor Relations Board expanded the definition of joint employment, holding that clients can be joint employers even if they are not directly involved in hiring, firing, disciplining, supervising, and directing the employees. A year later, the board reinstated its 2000 ruling holding that staffing firm temporary employees can be included in a client’s existing bargaining unit, without staffing firm or client consent, if 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. These rulings, which are being challenged, have had no discernible impact on the staffing industry given the small percentage of temporary employees assigned to clients with collective bargaining arrangements and a general lack of interest among temporary workers in joining unions.

Temporary employees, of course, always have had a right to engage in lawful union activity at a client’s work site, including forming their own bargaining unit. Temporary employees may be compelled under union security clauses to pay union dues even though they are not covered by a collective bargaining agreement.
Workplace Safety
The federal Occupational Safety and Health Act and state workplace safety laws require all employers to maintain a safe and healthy workplace. OSHA rules provide that because clients typically supervise temporary workers, control the work site, and control the work performed by the employees, clients must provide site-specific safety training and equipment, maintain records of illnesses and injuries of the temporary employees, and notify them of any hazardous substances in the workplace. Staffing firms have a 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 information to protect themselves from hazards they are likely to face on the job.

Workers’ Compensation
State workers’ compensation laws provide benefits, on a no-fault basis, to employees accidentally injured on the job. In such cases, workers’ compensation is the exclusive remedy and employees generally are barred from suing their employers for damages. Courts in every state except Massachusetts and Wyoming have expressly extended this immunity to staffing firm clients who qualify as “special employers.” (Massachusetts courts have granted similar protection in cases where employees have specifically agreed to release the client of liability beyond workers’ compensation.) Hence, clients that insulate themselves completely from an employer relationship with the workers assigned to them may relinquish whatever protection such status may confer under state law.