

THE HR EDGE IN TECHNICAL STAFFING

A Primer on the Law

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INTRODUCTION

Do you manage employees or temporary workers? Do issues such as job assignment, job responsibilities, benefits, co-employees, or the environment and culture get in the way of moving forward with business? Do you feel paralyzed as to what you can do or say with contract employees? If so, you're not alone.

As an employment law attorney and owner of an IT staffing firm, I've listened to hundreds of managers vent their frustrations about what can be done. Having tried and litigated employment cases through arbitrations, bench trials, and jury trials, coupled with my experience as an IT staffing company owner who has sold staffing services to IT managers, I can offer some insights that will help IT managers and HR specialists work through human resource issues relating to their temporary work force.

The Microsoft case of the late 1990s, where Microsoft was liable for retroactive benefits to contractors previously classified as employees by the federal government, ushered in a new era of case law analyzing the relatively new three-part relationships that exist between client managers, staffing firms, and the temporary workers. Based on my field experience selling staffing services, very few managers are aware of the laws affecting their relationships with these temporary workers and what they can do to minimize exposing themselves and their companies to lawsuits.

Whether it's wage and hour issues, discrimination problems, harassment claims, safe work environment agendas, union organization, or other employment related laws, every manager must have a solid grasp of legal principles impacting the relationship between the company and temporary employees – regardless of their classification as 1099 contractors, w-2 employees of the staffing firm on contract, or w-2 employees of the staffing firm on a contract-for-hire assignment. Armed with up-to-date legal information, managers and human resource professionals can feel confident about making decisions on their teams in order to achieve their ultimate business objective.

One final note, this guide is an overview of the laws I perceive as being the most applicable. There are certainly a host of other employment legal principles not discussed in this book (ie, breach of implied contract, torts such as fraud, and intentional interference with business expectancy) but they haven't dramatically affected the issues most central to the development of the three-part relationship between clients, contract employees, and staffing firms. For more in depth analysis on a case-by-case basis, your best defense is to contact a competent employment law attorney.

Let's get started.

DEFINITIONS

Temporary staffing, employee leasing, contracting, and a host of other names have been used to describe the temporary staffing market. For the purposes of this book, I will simply refer to the agency as the staffing firm.

Likewise, there are numerous names for the contract employees, such as contractors, temps, free-lancers, employees, contract employees, leasing agents, and the like. The manner in which an employee is classified has significant tax and non-tax consequences. For the purposes of this book, I shall refer to the staffing firm's w-2'd contractors assigned to client sites as contract employees. Where there's a need to differentiate between contract employees and 1099 independent contractors, I will make those notations evident.

I. WHO'S THE EMPLOYER?

There is a significant body of employment law - all of which affects your contract employees. The sheer scope can be intimidating. On several occasions, managers have voiced their frustrations to me about the law's impact on their ability to make decisions. While it's true the laws can be intrusive, it doesn't mean they can't be filtered in such a way that allows you to effectively handle human resource issues.

A. CO-EMPLOYMENT CONCEPT

"Co-employment" is the legal term of art used by former employees, turned plaintiffs, arguing the courts should invoke "joint and several liability"¹ against both the client and the staffing firm. Typically the term is applied in cases where the court has determined the client has exercised sufficient control over the contract employee such that it should be recognized as a joint employer with the staffing firm. Once this happens, numerous legal implications arise, ranging from paying employer taxes, offering health and disability benefits, to exposure for lost stock options and other employee benefits.

Accordingly, you want to do everything in your power to ensure the contract employees are not "employees" of the client. To do this, you must have an understanding of the current state of the law so you can take appropriate action.

Various federal agencies have invoked policies to help determine who's the employer. These include the Internal Revenue Service (IRS), the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and the Occupational Safety and Health Administration (OSHA). The maze of varying tests can be reconciled by one common denominator: who controls the work environment such that the federal agency and/or the contract employees can determine on whom to pin certain responsibilities.

B. CO-EMPLOYMENT/AGENCY LAW

Courts have traditionally applied the objective test from the common law of agency to determine employment relationships. Under common law standards, a worker is generally an employee of the firm that exercises the most control over the worker's job. Community for Creative Non-Violence v. Reid, 490 U.S. 736, 751-52 (1989). This

¹ "Joint and several" means both the client and the staffing firm are independently liable for the full amount of any damage award. For example, If one company is bankrupt, then the other is left to pay the entire amount.

typically means a firm that simply issues a paycheck is **not** the employer. Professional and Executive Leasing, Inc. v. CIR, 862 F. 2nd 751 (9th Cir. 1988).

The United States Supreme Court said in Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992), “since the common – law test contains no shorthand formula or magic phrase that can be applied to find the answer . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Importantly, the IRS was cited in the Darden case, saying “*the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the detail and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which their services are performed; it is sufficient if the employer **has the right** to do so.*” IRS Revenue Ruling 87-41 (1987-1 Cum. Bil. At 298)(italics and emphasis added).

As one might imagine, this language can be read two ways: one favors an argument against co-employment (ie, the staffing firm has the *right* to control the contract employee) and the other favors co-employment (ie, the client controls the day-to-day affairs of the employment).

Since the courts regularly look to the Internal Revenue Service (IRS) and the Department of Labor (DOL) for guidance, let’s see how these agencies view the issue.

C. CONTROL DETERMINATION

1. IRS STYLE

At the outset, you need to understand the IRS typically won’t get involved in the three-part relationship as long as someone is paying the employer taxes – an obligation normally absorbed by the staffing firm by contract. But when 1099 independent contractors are used, the IRS may scrutinize their work function in an effort to see if they should be reclassified as employees, thus subjecting the employing entity to employer taxes. Although a short contractual indemnification provision protects you, the client, it’s still advisable to be familiar with the IRS control criteria: behavior control, financial control, and type of relationship. The more control, the more likely that entity or several will be considered employers under the co-employment doctrine.

Behavior Control

Who controls the person’s behavior? The more control, the more likely that entity will be determined to be the employer. Issues such as control over how the tasks are performed, how the results are achieved, who instructs, and what training is involved all provide relevant clues to the control question.

Financial Control

What financial items are paid by the boss, whoever that might be, and what’s paid by the worker? Relevant factors include reimbursement of expenses, the worker’s investment in tools, is the worker available on other jobs, how is the worker paid, can the worker realize profit since an employee cannot?

Type of Relationship

The IRS will look at any contracts, benefits accrual, insurance, vacation pay, sick pay, pension plans, expectations of full-time employment and the like. How long a worker plans to work at the site is very indicative of the worker’s status. The more

important the worker's function is to the business, the more likely the worker will be perceived as an employee.²

2. DOL STYLE

The DOL's wage and hour division, which has prosecutorial jurisdiction over the Fair Labor Standards Act (FLSA), has issued regulations related to "joint employment" relationships. 29 C.F.R. section 791. It says a joint employment relationship may exist where (1) there is an arrangement between the employers to share the employee's services; (2) one employer is acting in the interest of another employer in relations to the employee; or (3) the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee. 29C.F.R. section 791.2

If the joint employment relationship is found, then both the client and staffing firm are "jointly and severally" liable for all wage and hour laws under the FLSA, which ordinarily means an issue regarding overtime. The wage and hour division has issued an opinion letter, which although it doesn't have the force of law, is instructive of its position. It says "employees of a temporary help agency working on assignment in various business establishments are joint employees of both the agency and the business establishment in which they are employed." Wage-Hour Administrative Ruling No. 781 [Transfer Binder] Lab.L.Rep. (CCH) ¶. 30, 778 (1968). The employer could be exposed, not just to wage obligations, but also to penalties, fines up to \$10,000 and imprisonment for willful violations.

The FLSA's six factors are as follows:

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

² The IRS's twenty factors, listed below, will likely always be considered whether in the behavioral analysis above or standing alone. Here they are:

1. Instructions. Is the individual subject to another person's instructions as to when, where, and how the work is to be performed?
2. Training. Is the individual required to work with an experienced worker to attend meetings, and to perform services in a particular manner?
3. Integration. Are the individual's services integrated into business operations?
4. Services rendered personally. Must the services rendered by the individual be rendered personally?
5. Hiring, supervising, and paying assistants. Does the individual have this responsibility?
6. Continuing relationship. Are the individual's services of a temporary or permanent nature?
7. Set hours of work. Does the organization set the work hours of the individual?
8. Full time required. Must the individual work substantially full time for the organization?
9. Doing work on employer's premises. Who controls the place of work?
10. Order or sequence set. Must the individual perform services in the order or sequence set by the organization?
11. Oral or written reports. Is the individual required to submit regular reports?
12. Method of payment. Is the individual paid by the hour or week, by the job, or by straight commission?
13. Expenses. Are business and travel expenses paid by the individual or the organization?
14. Furnishing of tools and materials. Who furnishes the tools, materials, and equipment?
15. Significant investment. Who makes the investment in facilities used by the individual?
16. Realization of profit or loss. Can the individual realize a profit or suffer a loss as a result of the work performed?
17. More than one organization. Does the individual perform more than de minimis services for more than one unrelated organization at the same time?
18. General public. Are the individual's services available to the general public on a regular and consistent basis?
19. Right to discharge. Does the organization have the right to fire the individual?
20. Right to terminate. Can the individual terminate the relationship without incurring liability?

- (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer's business.

Other statutes like the NLRA, FMLA, ADEA, and ADA, though seen to a lesser extent than FLSA, Title VII and ERISA, are nonetheless important to keep in mind. Again, the courts have used a variance of the control methods laid out in the case law that mirrors the law set forth above.³

D. FORGET CONTROL, LOOK AT "INTENT OF THE PARTIES"

By now, it appears the use of contingent labor forces clients to concede their status as a co-employer for legal purposes. Not so. Unquestionably, the IRS and DOL analyses, as used and supported by most of the courts, are clearly in the "control" camp. But these analyses are outdated and contain features of employment analysis that have little to do with the parties' right to contract. This is where the shift is occurring in the minority of the courts.

By way of example, using the IRS language, supported by case law, you can argue the staffing firm has the *right* to control the environment. Dunn, supra. This factor, coupled with several judges' noteworthy reliance on the expansion of common law principles recognizing the need to evaluate the parties' intent, provides you with a legal basis to disassociate the client from "employer" status relative to contract employees. After all, we are not dealing with the same old dualistic employer and independent contractor paradigm that existed when the old law was written. Instead, in the case of worker leasing, the three-sided labor relationship is created and, ***"control is relatively insignificant because the purpose of the labor relationship is to separate control from other terms of employment."*** Metropolitan Water District of Southern California v Superior Court, 9 Cal. Rptr. 3d 857, 20 IER Cases 1769, 32 Employee Benefits Cas. 1327, 4 Cal. Daily Op. Serv. 1658, 2004 Daily Journal D.A.R. 2469 (Sup.Ct. Ca. 2004)(J. Brown concurring and dissenting)(italics and emphasis added) In fact, the Restatement of Agency, the law the "control" courts rely on, says it's relevant to see "whether or not the parties believe they are creating the relation of master and

³ **NLRA** The National Labor Relations Act (NLRA) is federal legislation that guarantees employees' right in the private sector to form unions. Since 1099 contractors are not employees, the National Labor Relations Board (NLRB) has issued it's own test to determine who is an employee and who is the employer. Like the IRS, it uses the right to control test to see who's protected under the NLRA. It's instructive because each agency's test controls only those laws over which it has jurisdiction. (ie, FLSA – wage and hour; EEOC – discrimination; NLRA – union organization).

In Capitol EMI Music, Inc., 311 N.L.R.B. No. 103 (pages 997-1021, 143 L.R.R. M. (BNA) 1331 (1993), the Board listened to evidence that convinced it the staffing firm and the client were joint employers, even though only one of the two committed unfair labor practices. The staffing firm had no written agreement with the client, no ownership in the client, and no financial control. It only established wage rates and benefits, along with some terms and conditions of employment.

The court affirmed the lower administrative ruling, saying "joint employers are businesses that are entirely separate legal entities except that they both take part in determining essential terms and conditions of a group of employees." It stated the following rule: "we will find both joint employers liable for unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it."

servant.” (Rest. § 220 subd. (2)(i)). This clearly opens the door for evaluating the relationship based on the parties’ intent, not who controls the workplace.

Arriving at this change in jurisprudence may be easier in some jurisdictions than others. Even so, later in the primer, I’ll make some suggestions to work within the “control” camp to help you break that entrenched mode of co-employment for contract employees.

II. SPECIFIC STATUTES

A. ERISA

Employee benefits is one of the most prolific areas of law affecting temporary staffing today. The reason being “contract employees,” as the key ingredient in this era of the three-part employment relationship, may want to reap the rewards of clients’ stock options and benefit plans.

The Employee Retirement Income Security Act (ERISA) is the primary law affecting employee benefits. A determination of whether a person is an employee or not, and thus covered by an employer’s welfare or pension plan subject to the ERISA laws is of great importance.

1. ELEMENTS/ FACTORS

To assert a claim under ERISA, the plaintiff must be either a “participant” or a “beneficiary” of an ERISA plan. See 29 U.S.C. § 1132 (a)(1). The United States Supreme Court held in Darden, supra, that the term “employee” as used in ERISA refers to the common law analysis, which looks to fourteen factors. The courts consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to the inquiry are the skill required; the source of the instrumentalities and tools; the work location; the durations of the parties; relationship; whether the hiring party has the right to assign more projects to the hired party; the extent to which the hired party may decide when and how long to work; the payment method; the role of the hired party in hiring and paying assistants; whether the work is part of the hiring party’s regular business; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

2. CASE LAW

In the infamous Vizcaino v. United States Dist. Ct. for the Western Dist. Of Wash. 173 F3d 713 (9th Cir. 1999) case, the Ninth Circuit court considered whether leased employees (temporary agency employees) who provided services to Microsoft were employees for the purposes of participation in Microsoft’s employee stock purchase plan. Feeding into our argument that times have changed, the court recognized “that the assessment of the triangular relationship between worker, temporary employment agency and client is not wholly congruent with the two-party relationship involving independent contractors.” Nevertheless, since the leased workers were not specifically *excluded* from the benefit plan documents, they were to be included and thus, entitled to the stock option benefits. The same result occurred in Burrey v. Pacific Gas & Electric Co., 159 F.3d 388 (9th Cir. 1998).

Compare the Microsoft case with others reviewing the three-part relationship between contract employee, staffing firm, and client, concluding that if the plan document *excludes* leased employees from the plan, they cannot even make the claim for benefits. Wolf v. Coca-Cola Company, 200 F. 3rd 1337, 1340-1341 (11th Cir. 2000)(leased employees were not entitled to ERISA benefits because, under the client’s ERISA plan, leased employees were specifically excluded); Casey v. Atlantic Richfield

Co., 2000 WL 657397 (March 30, 2000); Abraham v. Exxon Corp., 85 F. 3d 1126 (5th Cir. 1996)(leased employees excluded from ERISA plan by definition); Bronk v. Moutain States Tel. & Te., Inc., 140 F.3d 1335 (10th Cir. 1998)(leased employees could not prevail despite their status as common law employees because the plan excluded them); MacLachlan v. Exxon Mobil Corp., No. 02-31240, 2003 WL 22508859 (5th Cir. Nov. 20, 2003)(assigned workers at Mobil were not considered regular employees of Mobil and therefore not eligible under Mobil’s ERISA plan); Edes v. Verizon Communications, Inc., No. Civ. A. 01-011742 – PBS, 2003 WL 22429705 (D.Mass. Jul. 25 2003)(ERISA does not prohibit discrimination in the provision of benefits); Bogges v. Monsanto Co., No. Civ A. 2:01-1300, 2003 WL 715985 (S.D.W.Va. Feb. 10, 2003)(contractor excluded from benefit coverage under the terms of the pension and medical benefit plans).

The lesson here is that, had Microsoft drafted plan language that excluded the leased employees from coverage under their ERISA plan, they would not have been exposed to the enormous stock option liability.

B. TITLE VII
1. AGGREGATION

Before employees can file a Title VII discrimination claim, they have to show the employer has more than fifteen employees.⁴ Creative employees look for ways to “aggregate” the staffing firm’s employees with the client’s employees if there’s ever a question about the number of employees necessary to satisfy this initial jurisdictional requirement.

Courts generally look to a joint employer test. Bristol v. Bd. Of County Comm’rs, 312 F.3d 1213, 1218 (10th Cir. 2002); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 123 S. Ct. 1673, 155 L.Ed.2d 615 (2003)(common law element of control is the principal guidepost governing employer-employee status).

Under the joint employer test, it is acknowledged that the staffing firm and the client are separate entities, but the claim is made that they both control essential terms and conditions of employment, such that both should be jointly and severally liable. See Blagg v. The Technology Group, Inc. 303 F.Supp. 1181 (D. Colo. 2004)(technical recruiter could not aggregate two companies payrolls to meet threshold number of employees to sustain a Title VII claim).⁵ Relevant factors include the commonality of hiring, firing, discipline, pay, insurance records, and supervision. Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350 (11th Cir. 1994).

One line of cases argues for the aggregation under the joint employer test based on liberal construction of the term “employer.” Virgo, supra (court construed term “employer” liberally and held two companies employees aggregated to satisfy the fifteen person prong to continue the lawsuit); March v. Tech. Employment Servs, Inc., No. Civ. 98-636-M, 2000 WL 1480371 (D.N.H. March 3, 2000)(temporary staffing agency

⁴ Under the ADEA (Age Discrimination) it’s twenty employees, under the Family and Medical Leave Act it’s fifty employees.

⁵ In the staffing industry, courts look to substance (the client companies control over employment conditions and terms) versus form (printed employment agreements and payment of wages by third party payroll company). In Atchley v. Nordam Group, Inc., 180 F.3d 1143 (10th Cir. 1999), the plaintiff sued Nordam Group as her employer, but Nordam brought Design Support Services (DSS) into the case claiming DSS was the true employer because DSS agreed to provide the personnel to Nordam and handle all the payment of wages, compensation, hiring and firing. Nordam, however, controlled every other aspect of the plaintiff’s actual work, including her work schedule, leave, and ultimate discharge. The court allowed DSS out of the case and it went to trial resulting in a jury verdict for the plaintiff against the client.

retained sufficient control over placed workers to be considered joint employer with clients who were responsible for the plaintiff's work conditions); Burdett v. Abrasive Eng'g & Tech., Inc., 989 F.Supp. 1107, 1111-12 (D.Kan. 1997)(following Virgo and applying joint employer test to conclude employees of temporary staffing agency used by client should not be aggregated because only six of the temp employees worked for the client).

Contrasting the foregoing, another line of case law resists allowing plaintiffs to use the joint employer doctrine to aggregate employees of small businesses to meet the fifteen employee threshold to maintain a Title VII claim, arguing such a measure would thwart the legislative purposes of Title VII. Prunella v. Carlshire Tenants, Inc., 94 F.Supp.2d 512 (S.D.N.Y.2000); Serrano v. 900 5th Ave. Corp., 4 F.Supp.2d 315 (S.D.N.Y. 1998)(no aggregation, discussing legislative purpose of mitigating litigation costs and the burdens of Title VII compliance on small businesses); Lauren v. Pokoik, No. 02 Civ. 1938 (LMM), 2004 WL 513999, S.D.N.Y. March, 15, 2004).

Aggregation, or lack thereof, can save a small client from being sued for Title VII violations. Although it shouldn't keep you up at night, it's an important jurisdictional defense to keep in mind if you're a small employer.

2. TITLE VII LAW

Assuming you are subject to the law, Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to compensation, terms or conditions of employment because of a person's race, sex, color, religion, or national origin. In 1997, the EEOC issued "EEOC Policy Guidance on Contingent Workers," which describes the agencies perspective on the staffing firms and clients respective responsibilities related to Title VII, as well as the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), and Age Discrimination in Employment Act (ADEA). Generally speaking, the guidelines are not the law, but are important because the courts typically will look to the agency with oversight of particular areas of law.

As previously gleaned, the case law generally considers the client the "employer" along with the staffing firm for the purposes of Title VII litigation. Callicutt v. Pepsi Bottling Group, Inc. No. CIV 00-95DWFAJB 2002 WL 992757 (D.Minn. May 13, 2002)(since client controlled means and manner of assigned workers' jobs, court ruled against the staffing firm's client holding the client was the employer of assigned workers in Title VII discrimination case). Be careful though, because in some cases the courts have allowed staffing firms out of the case when it didn't know of the alleged problem. Coles v. Kelly Services (D.D.C. 2003)(staffing firm not liable for Title VII claim since they were never notified of the harassment); Neal v. Manpower International, Inc., No. 3:00-CV-277/LAC, 2001 WL 1923127 (N.D. Fla. Sep. 17, 2001)(staffing firm could not be held liable for sexual harassment by a client's employee since the firm was not informed about the harassment, but could be liable if it knew or should have known about the conduct and failed to take corrective action). The lesson here is to always keep the staffing firm abreast of what's going on with the contract employees, not to mention involving them in several other aspects of the employment which will be discussed later.

It's important to note that in some states, employers, whether they're the client, the staffing firm, or both, are "strictly liable" – meaning the courts will charge the employer with liability even if upper management didn't know of the alleged Title VII violations.

Despite the foregoing, there are actions you can take (discussed in next section) to minimize you and your company's exposure.

C. WORK RELATED PERSONAL INJURY CLAIMS AGAINST CLIENTS

Personal injury claims take on a different look when contract employees are involved. Questions arise as to who's the employer, and whether clients can use the workers compensation exclusive remedy rule to defend against personal injury cases brought by contract employees. The rule allows "employers" to cap any damages they might owe to an employee injured at the workplace who might otherwise make a bundle in a civil action not involving an employer. Hence, this is one instance where the client is happy to be classified as a "co-employer." See Poyner v. Georgia Pacific Corp., No. Civ. A 02-7937, 2004 WL 595265 (E.D.Pa. March. 1, 2004)(since client controlled duties of assigned workers, it was protected by the exclusive remedy rule of workers compensation statute); Cruickshank v. Dukes, No. 2002-1567 KC, 2003 WL 22765150 (N.Y. Sup. App. Ter, Oct. 16, 2003)(workers' compensation exclusive remedy rule protected client from personal injury suit brought by assigned worker); Wingfoot Enterprises v. Alvarado, No. 01-0825, 2002 WL 32126138 (Tex. Jul. 3, 2003)(Texas Supreme Court rules exclusive remedy rule can protect both staffing firm and its client from injury suits brought by assigned workers); Garza v. Excel Logistics, Inc., No. 01-00-00256-CV 2002 AWL 1041050 (Tex.App., May 23, 2002)(staffing firm client was protected by exclusive remedy rule from personal injury suit by an assigned employee since it had a right to control the employee's work). Ironic as it sounds, clients would not be able to avail themselves of this exclusive remedy unless they were considered the "employer" or "joint employer" of an assigned worker.

In sum, the exclusive remedy rule generally protects clients, but it comes at a price – they must be considered an employer.

D. WORK RELATED PERSONAL INJURY CLAIMS BETWEEN WORKERS

Usually the exclusive remedy rule also shields lawsuits *between* employees. For instance, the Virginia Supreme Court ruled a staffing firm was not liable for the actions of a contract employee because it was not foreseeable that the contract employee posed a threat to others. See Interim Personnel of Central Virginia, Inc. v. Messer, 559 S.E.2d 704 (Va. Mar. 1 2002). The court made its determination even though the employee had a history of driving while intoxicated, which he concealed from his staffing firm, but concluded the staffing firm's placement at the client was not the proximate cause of the plaintiff's injuries. See also, Accountemps v Shelton Laundry Co., No CV990363683S, 2002 WL 959909 (Conn. Super. Ct. Apr. 17, 2002)(staffing firm not liable for conduct of former employee who forged checks made payable to the client and used the client's accounts without permission).

A couple of courts have taken a different position. In SOS Staffing Services, V. Field, No. 01-932, 2002 WL 311 08081 (Wyo. Sep. 24, 2002), the court reviewed the facts of case where a vehicle driven by an assigned worker that was also carrying one of the client's employees was involved in an accident. Although as least ten states recognize clients as "special employers," and most state workers' compensation statues protect fellow employees from suing one another for work-related injuries, Wyoming was the exception here. The Wyoming Supreme Court ruled that the staffing firm's employee was not immune from suit since no employment relationship existed between the staffing firm employee and the client.

Likewise, in Butts v. Express Personnel Services, No. 24274, 2002 WL 465237 (Mo. Ct. App. Mar. 28, 2002), the Missouri Court of Appeals ruled that a staffing firm

was not immune from a lawsuit brought by an employee of another firm. The court noted workers compensation laws does not bar an individual from suing a third party with whom the employee does not have an employment relationship.

A word to the wise, hire responsible people, stay in constant contact, and review them frequently.⁶

III. WHAT CLIENTS CAN DO?

A. PRACTICAL TIPS

Since you don't want to find yourself in court, let's see what you can do on a day-to-day basis to mitigate you and your client's exposure.

Initially, I'd suggest finding particular activities you can safely hand off to the staffing firm. One obvious move would be to allow the staffing firm to execute the performance evaluations. Another would be the deliverance of any special recognitions. And without question, terminations should be carried out by the staffing firm. Even going so far as to require the contract employee to email a one to two sentence statement every day to the staffing firm contact describing the day's activity may be effective. These measures should not be overly intrusive and allow the staffing firm to have a firmer hand in the day-to-day activities.

Beyond the legal benefits of such actions are enhanced business communications. You're freed up to focus on the core business, leaving primarily human resource functions to the staffing firm. You can rest easier knowing even the smallest nuances associated with contract employee performance (ie, attitude, tardiness, performance) can be hemmed-in at the earliest opportunity when the short, daily information emails are required. This way, you only handle periodic directional issues relating to the contract employee's work. With the changes, it now appears the bulk of the "control" is with the staffing firm.

This shift in human resource activity also represents added value to you, the client. In a sense the staffing firm dually operates as an off-site human resource company that concurrently assumes enough responsibility that the "control" courts would be hard-pressed to label you a "co-employer."

B. ALWAYS HAVE CONTRACTUAL INDEMNIFICATION

If the practical tips mentioned above don't shield you from characterization as a "co-employer," do your company a favor and make sure legal counsel has included a contractual indemnification provision with your staffing firm.

An indemnification provision could read as follows:

Staffing firm will indemnify client and their respective directors, officers, agents, employees and customers from and against all claims, damages, losses, liabilities, costs, expenses and reasonable attorney's fees (collectively "damages") arising out of a claim against client resulting from or alleged to have resulted from any act or omission of staffing firm or any employee or agent of staffing firm (including any employee or agent

⁶ Most client/staffing firm contracts require the staffing firm to indemnify the client for any damaging acts caused by the worker. NVR Inc. v. Just Temps, No. 01-2029, 2002 WL 376882 (4th Cir. Mar. 11 2002)(staffing firm liable for assigned worker's negligence since it contractually agreed to indemnify client). Negligent hiring claims, however, may not be covered, depending on the contract language. In fact, there is case law that holds staffing firms are not liable for the unforeseen actions of contract employees. Lawthorne v. Hempstead Union Free School, N.Y.L.J., Nov. 18, 2003 (Nassau Cty. Sup. Ct.)(court ruled staffing firm did not have duty to conduct background investigation of assigned worker and was therefore not liable for his action when he assaulted a student).

provided by staffing firm to provide services for or on behalf of client) under or related to this Master Services Agreement or related to personnel compensation.

One cause for alarm, however, is even with the provision, you may still be left holding the bag as a “co-employer” if the staffing firm goes out of business or is insolvent. Do the following to protect yourself against this potential:

- demand adequate proof of the staffing firm’s insurance;
- demand to be added as an additional insured;
- demand a review of the company’s last five years of profit and loss statements (preferably audited);
- demand trade references;
- obtain a Dun & Bradstreet report;
- demand executive summaries of staffing firm executives;
- meet the team working on your account;
- review staffing firm’s retention program; and
- communicate about all issues affecting the contract employee.

Following these tips will provide you greater confidence when executing an agreement with the staffing firm.

C. THE LEGAL ARGUMENT

In the unfortunate event you find yourself in litigation, follow the line of reasoning discussed earlier. That is, argue the new shift in the case law that you and your company are not “co-employers” of contract employees because it was never the parties’ intent during the contract to be an employee of the client. With so much of today’s workforce being comprised of contingent labor, your company’s legal counsel will need to be familiar with this concept.

Saddling you and your company with the co-employer doctrine has tremendous ramifications on businesses trying to grow through the use of contact employees. You may even forgo organic growth, and thus halt expansion opportunities.

If you’re unable to persuade a court to adopt the analysis that values a review of the parties’ intent as the benchmark, there are nonetheless several actions I mentioned earlier you can point to under the “control” analysis that would give a court plenty of evidence to let you and your company off the hook, thus labeling the staffing firm as the sole employer.⁷

CONCLUSION

The central legal issue is co-employment and how to avoid it if you’re a client who has a contingent workforce. One can do it through: (1) implementing several day-to-day measures providing, in reality, the appearance the staffing firm is the employer; (2) obtaining a contractual indemnification after performing due diligence on the staffing firm’s solvency; and (3) if in litigation, arguing the minority of the case law which looks to the parties’ intent and not control.

These actions taken together can go a long way in preserving a quality relationship in this new three-part labor relationship that permeates much of American society today.

⁷ Really concerned clients can fill out IRS Form S-88 “Request for Determination of Worker Status for Employment Tax Purposes” asking the IRS to make the determination as to “co-employer,” which takes about 120 days.

Good luck and call with any questions.

ADDENDUM--- HIRING - WHAT CLIENTS CAN ASK

Disability

Pre Hire Lawful Inquiry: Do you know of any reason that you would be unable to perform the job for which you have applied? Can you perform the functions of this job with or without reasonable accommodation? Please describe/demonstrate how you would perform these functions. How well can you handle stress? Do you work better under pressure?

Can you meet the attendance requirements of this job? How many days were you absent last year? Did you have any unauthorized absences from your job last year?

Do you illegally use drugs? Have you used illegal drugs in the last two years?

Do you have the required licenses to perform this job?

Do you regularly eat three meals per day?

Pre Hire Unlawful Inquiry: Do you have a disability or handicap? Have you ever been hospitalized? Have you ever been treated by a psychiatrist or psychologist? Is there any health related reason you may not be able to perform the job for which you are applying? Have you had a major illness in the last 5 years? Do you have any physical defects which preclude you from performing certain kinds of work? Do you have any disabilities or impairments which may affect your performance in the position for which you have applied? Are you taking any prescription drugs? Have you ever been treated for drug addiction or alcoholism? Have you ever filed a claim for, or received benefits of worker's compensation? Do you have AIDS? Do you have asthma? How many days were you sick last year? Have you ever been injured on the job? How much alcohol do you drink each week?

Have you ever sought treatment for your inability to handle stress? Do you ever get ill from stress? Does stress affect your ability to be productive? Have you ever been unable to cope with work-related stress? Do you have open skin sores? Do you have boils? Do you have fever? Do you have dark urine? Do you have jaundice? How debilitating is your multiple sclerosis? Do you expect your condition to get worse? Can you walk? Would you need reasonable accommodation in this job? What effect does being in a wheelchair have on your daily activities? Do you ever expect to walk again?

Race or color

Lawful Inquiry: None

Unlawful Inquiry: Inquiry into complexion or color of skin. Coloring.

Religion or Creed

Lawful Inquiry: None

Unlawful Inquiry: Inquiry into applicant's religions denomination, religious affiliations, church, parish, pastor or religious holidays observed. Applicant may not be told "this is a (Catholic, Protestant or Jewish) organization."

Sex

Lawful Inquiry: None.

Unlawful Inquiry: Do you wish to be addressed as Mr., Mrs., Miss, or Ms.

Family

Lawful Inquiry: Can applicant meet schedules.

Unlawful Inquiry: Number of children, ages of children, child care arrangements.

Marital Status

Lawful Inquiry: None

Unlawful Inquiry: Are you married? Single? Divorced? Separated? Name or other information about spouse. Where does your spouse work? Spouses' salary? What are the ages of your children, if any?

Birth control

Lawful Inquiry: None

Unlawful Inquiry: Capacity or intent to reproduce, birth control, family planning.

Age

Lawful Inquiry: Are you over 18 years of age? If not, state your age.

Unlawful Inquiry: How old are you? What is your date of birth?

Arrest record

Lawful Inquiry: Have you ever been convicted of a crime?

Unlawful Inquiry: Have you ever been arrested?

Name

Lawful Inquiry: Have you ever worked for this company under a different name? Is any additional information relative to your name, use of an assumed name or nickname necessary to enable a check of your work record? If yes, explain.

Unlawful Inquiry: Maiden name of a married woman.

Photograph

Lawful Inquiry: After hire.

Unlawful Inquiry: Requirement or option that applicant affix a photograph to application form at any time before hiring.

Address Duration of Residence

Lawful Inquiry: Applicant's place of residence.

Unlawful Inquiry: Length of residence in this city or state?

Birthplace

Lawful Inquiry: None.

Unlawful Inquiry: Requirement that applicant produce proof of age.

Citizenship

Lawful Inquiry: Are you authorized to work in the United States?

Requirement that applicant produce documentation as set forth on the I-9 form.

Unlawful Inquiry: Of what country are you a citizen? Are applicant's parents or spouse naturalized, or native-born citizens of the United States; the date when such parents or spouse acquired citizenship.

Language

Lawful Inquiry: Not advisable. Inquiry into language applicant speaks and writes fluently, ONLY if directly related to the job requirements.

Unlawful Inquiry: What is your language?

Education

Lawful Inquiry: Inquiry into applicant's academic, vocation or professional education and schools attended.

Unlawful Inquiry: Requirement that applicant identify dates of high school or college attendance.

Experience

Lawful Inquiry: Inquiry into work experience

Relatives

Lawful Inquiry: Names of applicant's relatives, other than a spouse, already employed by this company. Only after hired – who to notify in case of emergency.

Unlawful Inquiry: Names, addresses, ages, number or other information concerning applicant's spouse, children or other relatives not employed by the company. Name and address of person to be notified in case of accident or emergency.

Military

Lawful Inquiry: Invitation to describe any experience, including military experience, that the applicant believes to be relevant to the job.

Unlawful Inquiry: Inquiry into applicant's general military experience or discharge. Repeat discharge papers.

Organization

Lawful Inquiry: Inquiry into applicant's membership in organizations which the applicant considers relevant to his or her ability to perform the job.

Unlawful Inquiry: Listing of clubs, societies, and lodges to which applicant belongs.

***BEST REGARDS,
ANDREW MARQUARDT***