

# 2008 Employment Law Update

## Co-Employment Issues

Temporary agency clients sometimes believe that utilizing a temporary service insulates them from any and all employment-related liability. This is not always the case. Following is a summary of responsibilities of the temporary service and the client with respect to temporary employees.

### Areas Where the Temporary Agency is Primarily Responsible:

- Payment of wages/compliance with wage and hour laws
- Workers compensation
- Unemployment
- I-9 employment verification
- Employment Taxes withholding

### Joint Responsibility

#### Areas of Potential Joint Responsibility (Agency and Client):

• **Liability for unsafe working conditions.** OSHA and CAL/OSHA Guidelines for the Contingent Workforce provide that secondary employers (i.e., employers utilizing temporary labor) must provide temporary employees with a safe and healthful workplace, and they are responsible for violations to which these employees are exposed. Typically, the primary employer (i.e., temporary agency) is responsible for providing general safety training, and the secondary employer is responsible for providing training specific to the job site. Where personal protective equipment is required, the secondary employer is generally expected to provide such equipment for use by temporary employees, along with appropriate instruction on its use. The secondary employer should also provide temporary employees with information regarding the company's Illness and Injury Prevention program (IIPP), Emergency Action Plan/Fire Prevention and Hazardous Communication Program including MSDS's (Material Safety Data Sheets) if applicable. The secondary employer should allow the temporary agency to conduct an initial safety inspection of the work site to ensure the safety of temporary employees. In the event of an accident or injury, both primary and secondary employers should work together to conduct an accident investigation to determine the cause and to avoid future similar occurrences.

• **Discrimination.** Both state and federal legislation prohibit discrimination in employment on the basis of age, race, ethnicity, gender, disability or other protected status. This legislation has been found to apply to both the temporary staffing agency and its clients. The client bears responsibility because it generally controls the means and

manner of the temporary employee's performance, such as supervising the work, controlling the hours of employment, and retaining the right to discharge the temporary employee and request a replacement if the services are unsatisfactory. Therefore, a client may be liable for discriminatory actions with respect to the terms and conditions of a temporary employee's employment (such as calling off a temp for a discriminatory reason). Of course, the risk of an employee lawsuit is less with temporary employees than with full-time regular employees because of a reduced expectation of permanent employment. Likewise, monetary damages in the form of lost wages will be reduced where the temp agency is able to place the individual in another equivalent position without significant delays).

Under the Americans with Disabilities Act (ADA), the duty to reasonably accommodate a qualified individual with a disability is primarily that of the temp agency as employer. However, the client has a duty to accept a qualified individual with a reasonable accommodation (for example, a visually-impaired temporary employee with an adaptive device for a data entry position).

• **Sexual harassment.** The temporary agency as employer should have a sexual harassment policy, including appropriate complaint and investigation procedures. The client has a duty to provide a workplace free of sexual harassment. In the event of a sexual harassment complaint, the client should cooperate with the temp agency in conducting an investigation, including witness interviews. If the complaint is substantiated, the client should take appropriate prompt remedial measures to end the harassment. Of course, the client also has a duty not to retaliate against a temporary employee who has made a claim of sexual harassment (for example, by ending the assignment).

• **Wrongful discharge.** While employees are presumed to be at-will, which means that their employment may be terminated at any time for any (non-discriminatory) reason, exceptions exist for termination's in violation of public policy, for example, for reporting or threatening to report a violation of law.

• **Invasion of privacy.** Whether a certain action (for example, drug testing, surveillance, searches) will be found to violate an employee's right to privacy will often turn on the employee's legitimate expectation of privacy. Appropriate consent will often lead to a finding that there is no legitimate expectation of privacy. Therefore, if the client intends to conduct pre-employment drug testing, the testing should be coordinate through the temp agency and the appropriate consent forms should be signed by the temporary employee authorizing disclosure of the results to the temp agency and to the client. If the client has a policy of

post-accident or reasonable cause testing, this policy should be communicated to the temporary employees, and the temporary employees should acknowledge in writing that they are subject to that policy while on temporary assignment with the client. Likewise, if the client has a policy with respect to surveillance, searches, monitoring of E-mail or voice-mail, etc., the temporary employee should be made aware of these policies to reduce any expectation of privacy.

### **Areas of potential liability of temporary agencies for acts of the client:**

- **Discrimination.** Temporary agencies may be liable for a client's discriminatory actions where it knew or should have known that the client acted for unlawful reasons and the agency acquiesced in the action by failing to protest the action or, potentially, continued to do business with a client whom the agency knew to be discriminatory.

- **Safety.** The agency may be liable for worksite violations if the violation relates to its failure to provide an appropriate IIPP, general safety training, or to ensure that the temporary employees are provided with specific safety training or PPE's. The agency may also be liable if it knew of an imminent hazard and failed to protect the agency temporary employees, or if the agency did not take reasonable steps to abate a known violation (such as giving the client a reasonable deadline to correct the violation)

### **Will temporary agency employees "count" as employees of the client?**

Some legislation applies only to employers with a certain "threshold" number of employees. In some cases, temporary employees will be considered in determining whether a client employer meets this threshold.

- **Americans with Disabilities Act (ADA).**

Temporary employees will be considered in determining whether the client-employer meets the threshold of 15 employees, triggering the duty to reasonably accommodate qualified individuals with a disability. (See above for more information regarding clients' responsibilities with respect to disabled temporary employees).

- **Family and Medical Leave Act (FMLA).**

Temporary employees will be considered in determining whether the client-employer meets the threshold of 50 employees, triggering the duty to provide up to 12 weeks of unpaid leave for the birth or adoption of a child, or the serious health condition of the employee or a family member. However, with respect to temporary employees, notice responsibilities and the duty to provide leave are solely that of the temp agency as employer. On a long-term temporary assignment, the client may have duty to accept a temporary employee who wishes to return to the assignment following FMLA leave, if the position is still filled with a temporary employee.

- **Worker Adjustment and Retraining Notification (WARN).**

Temporary employees will be considered in determining whether the client-employer meets the threshold of 100 employees, triggering the duty to provide 60 calendar days advance notice of a plant closing or mass layoff. Part-time employees (including part-time

temps) may be excluded if, in the aggregate, they work less than 4,000 hours per week. The client is not required to notify temporary employees of an impending plant closing or layoff, however.

- **Pension plans/ERISA.** Temporary employees may be considered employees of the client for purposes of coverage requirements for qualified retirement plans and welfare benefit plans, where they have performed services of a type historically performed by employees on a substantially full-time basis for at least a year. While temporary employees meeting this criterion must be considered in determining whether the client meets certain requirements (such as the minimum participation requirements), the client is not required to provide coverage to temporary employees (in fact, the plan should be carefully drafted to exclude temporary employees). Clients are urged to contact appropriate tax professionals to evaluate the impact of temporary employees on the clients' ERISA-qualified plans.

## Reducing the Risk

### **Some Strategies for Clients to Reduce the Risk of Co-employment:**

- **Clearly distinguish between your own employees and temporary employees.** Do not have temporary employees sign the same forms (i.e., drug testing forms, confidentiality agreements, etc.) as your own employees. Rather, the temporary agency should assist in re-designing the forms to reflect the temporary service as employer. Use caution in inviting temporary employees to social functions provided for your own employees. Limit the authority of temporary employees to sign-off on purchase orders, control petty cash, have keys to the facility, etc.

- **Limit the expectation of full-time regular employment.** Train your supervisors not to represent to temporary employees that they will become your employees as long as they do a good job during a specified period on temporary assignment. Consider having the temporary employees sign an acknowledgment of at-will employment, including a disclaimer that there is no guarantee of full-time employment (the temp agency may include such language in its job application or other agreements with its temporary employees). If you do choose to hire a temporary employee onto your payroll, put them through the same screening process as your regular employees (i.e., application, drug test or background check, etc.).

- **Respect the temporary agency's status as employer.** Promptly communicate relevant information concerning absences, tardiness, performance issues, transfers/reassignment to another division or department, extension of the assignment, pay rate changes, or call-off to the temp agency. Let the temp agency communicate this information to the temporary employee.

- **Honor your responsibilities to provide a safe workplace, free of harassment or illegal discrimination.** Cooperate with the temp agency in investigating accidents or claims of sexual harassment, or responding to claims of discrimination.