

STRAIGHT TALK on Co-Employment:



Issues, Benefits, and Responsibilities

Co-employment occurs when two or more employers have actual, or potential, legal rights and duties with respect to the same employee or group of employees. So, when you enter into an agreement with a staffing service to provide you with temporary workers, you can potentially become a co-employer.

Normally, you are responsible for supervising the employees' day to day work, controlling the working conditions at the work-site, and determining the length of the assignment. The staffing service is responsible for paying the employee and related payroll taxes, providing workers' compensation coverage, hiring and firing, and complying with many employment laws. However, the more control you exercise over your temporaries, the more likely it is you will be considered a co-employer.

To protect yourself, you should ensure the staffing company retains the right to do the following:

- 1** Final hiring, and firing, if required;
- 2** Assign the temporary to the job, and reassign if necessary;
- 3** Set pay rates and benefits;
- 4** Negotiate with you, not the temporary, regarding the nature and duration of work assignments, work hours and conditions, etc.;
- 5** Maintain disciplinary duties;
- 6** Evaluate performance and provide counseling when necessary.



Even by affording the staffing company all the rights listed above, there are still areas where you could be regarded as a co-employer. This article summarizes your rights and responsibilities with respect to temporary employees. Once you know the areas in which you may be liable, you can take steps to insure your compliance with the law and protect yourself against any legal actions from your temporary personnel. The following pages address key issues in any co-employment relationship.

LEGISLATION

ADEA—Age Discrimination in Employment Act of 1967.

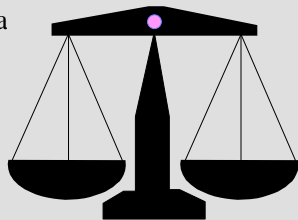
Protects workers aged forty and over from age discrimination/ harassment in all aspects of employment, especially in regard to hiring, firing, and benefits.

ADA—Americans with Disabilities Act of 1990.

Prohibits discrimination against any qualified individual with a disability. A person is considered disabled if: he has a physical or mental impairment which limits one or more major life activities; there is a record of the impairment; or he is generally regarded as having an impairment. The ADA requires employers to provide reasonable accommodation for the known disability if the employee requests it. When using temporary help—it is the staffing service's responsibility to advise you if a temporary being assigned to your company has any special needs.

Title VII of the Civil Rights Act of 1964. Protects workers from discrimination and harassment based on race, color, sex, religion, and national origin.

Sexual harassment includes Quid Pro Quo and Hostile Work Environment. In Quid Pro Quo, a supervisor makes unwelcome sexual advances, requests, or favors a condition of employment. In a Hostile Work Environment, harassment occurs when a sexual hostile, or offensive work atmosphere interferes with job



DISCRIMINATION and HARASSMENT

Discrimination in the workplace can take many forms—age, disability, and sex are a few of the most common. Using temporary help will keep you from having to worry about discrimination issues in regard to hiring, firing, and benefits administration. The onus is on the staffing service to insure compliance with these regulations.

Harassment is another form of discrimination. Harassment lawsuits have increased over 125% in the past eight years. While sexual harassment is the most predominate type, there are other forms of workplace harassment including religious, national origin, disability, and age. If harassment takes place at the work-site, you are responsible for protecting your temporary employees, as well as your permanent staff.

The Bottom Line...Discrimination

Staffing with temporaries can protect you from discrimination in hiring, firing, and benefits administration lawsuits.

However, you cannot use a staffing arrangement as protection from Civil Rights legislation. You are responsible for protecting your temporary employees from race, color, sex, religion, age, disability, or national origin discrimination in the workplace. This responsibility cannot be avoided since Title VII allows suits against people “who are neither actual nor potential direct employers of particular complainants.”

...Harassment

In a relationship with a temporary worker, you are responsible for maintaining a workplace free of harassment in all forms. The most effective way to protect your company is to institute a prevention program. First, define what constitutes harassment and establish a policy forbidding it—make sure you inform your temporary employees, too! If a temp does claim harassment, your prompt investigation and action may prevent a lawsuit. Temporary services cannot discriminate in assigning qualified personnel to your organization. Nor can you discriminate in your requesting of personnel to fill temporary assignments.

LEGISLATION

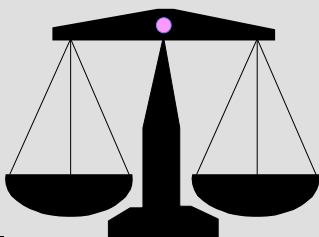
FLSA—Fair Labor Standards

Act. Prescribes wage and hour laws which establish minimum wage, overtime, equal pay, and child labor requirements.

FICA—Social Security taxes and FUTA—Federal Unemployment taxes, and other IRS laws require employers to withhold payroll taxes, compile tax reports, file, and pay taxes to the federal government.

IRCA—Immigration Reform and Control Act of 1986. Makes it illegal to hire any person not legally authorized to work in the United States. And, it requires employers to verify the employment status of all employees. They must be a legal resident of the United States or they must have the required paperwork—employment visa, green card, etc.—to work here.

FMLA—Family and Medical Leave Act. Grants all employees the right to take leaves of absence from employment. Valid reasons for a leave may range from attending children's school events, if new amendments are passed, to taking several weeks off due to the adoption of a child.



EMPLOYMENT LAW

This broad topic covers HR legislation which affords rights and benefits to employees—both contingent and permanent. Each year, Congress enacts more legislation granting additional rights to workers. You benefit under these laws because the staffing service is often responsible for compliance. Although, in some situations (overtime, for example), the joint employment relationship makes you both equally responsible.

The Bottom Line

A staffing service is responsible for complying with all of these laws when temporaries are used. In the case of employment taxes, staffing firms are held solely responsible even when the customer directs the employees' activities at the work-site. However, you may be held jointly liable in certain circumstances if a co-employment relationship is found to exist. For instance, under FMLA, as a co-employer, you both must count the employee in determining coverage and eligibility, and you cannot prevent an employee from taking leave. However, only the staffing service is responsible for giving notices to employees, providing the leave, maintaining health benefits, and insuring that an appropriate position is available upon the employee's return.

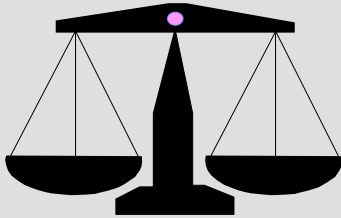
Co-employment can also exist if you direct the staffing service to pay a certain hourly wage rate to the temporary.

Determination of wages is solely the responsibility of the staffing service. You may determine the qualifications that a temp must have for any assignment, and you may provide the staffing service with a guideline of the wages your permanent employees receive for such work. But, you may not dictate pay rates for the temporary help without opening the door to co-employment. Additionally, you may be held jointly liable for the payment of benefits to temporaries as a co-employer if a court finds you and the staffing service equally liable.

LEGISLATION

OSHA—Occupational Safety and Health Administration. Regulates workplace safety and health conditions. Safety standards include regulations covering hazards (like unsafe staircases or electrical outlets), vehicle and machine operation and maintenance, and workplace violence, etc. A general duty clause requires employers to provide a place of employment free from recognized hazards that may cause serious harm to employees.

Workers' compensation is state regulated. It provides benefits, on a no-fault basis, to employees accidentally injured on the job. In return for the protection, employees are usually barred from suing their employers to collect damages.



SAFETY

Workplace safety encompasses both the maintenance of a safe working environment and issues of workers' compensation. You are responsible for maintaining a safe work environment for your temporary employees. However, you are generally not responsible for workers' compensation claims—the staffing company is, and they administer all claims.

The Bottom Line

You are responsible for the actions of temporary employees on the job. You must provide them with safe working conditions, just as you do for your permanent employees. If temporaries are subject to your supervision, you are obligated to maintain records of their illnesses and injuries, although your staffing service may keep the records for you.

Even though you are responsible for maintaining a safe working environment, using a staffing service shields you from workers' compensation claims. You are protected from tort liability if a temporary worker is injured on the job. Also, if you have a problem with a temporary employee causing unsafe conditions, you can have him or her removed from your workplace. This is another benefit of using temps, because if someone on your permanent staff is causing problems, it can be much more difficult to terminate that person.

Reduce Your Risk

If you use temporary help, you need to be aware of the ways in which employment laws affect you. You can reduce the risks you take in hiring and firing employees, workers' compensation, and in benefits and payroll administration when you use temporaries. However you must comply with regulations affecting all of your employees—permanent and temporary—in regard to on-site issues such as safety, harassment and discrimination. Overall, using temporaries while avoiding a co-employment relationship can be a major benefit to you because you share risks, knowledge, and experience with your staffing provider.

RESEARCH SOURCES

Co-Employment: Employer Liability Issues in Staffing Services Arrangements by Edward Lenz, National Association of Temporary Services

Department of Labor Website

EEOC Website

Greble, Thomas C., *A Leading Roll for HR in Alternative Staffing*, HR Magazine, February 1997