Avoiding Contingent Workforce Legal Traps

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INTRODUCTION
Common Types of Workers

- **Employee**
  - Employer has direct supervision/control
  - W-2 withholdings
  - Employer liable for workers’ comp., unemployment insurance
  - Benefits
Common Types of Workers

- **Independent Contractor**
  - Contract directly with “client,” but as non-employee
  - IC determines method/manner completion, but not desired result/goal
  - 1099 worker, liable for own insurance, taxes
Common Types of Workers

- Temporary Employee
  - Contracts are with staffing agency
  - Typically W-2 employee of staffing agency
  - Staffing agency liable for workers’ comp., unemployment insurance
  - Benefits from staffing agency, if any
Common Types of Workers

- **Contract Employee**
  - Contract with “employer,” under direct supervision/control
  - Specific job/pay rate, finite period
  - W-2 employee, “employer” liable for workers’ comp., unemployment benefits
  - Benefits determined by contract
Is Company the Employer?

- Usually the question in an individual IC situation: self-employed v. employee?
- Determines whether company receiving IC services should have liability under employment-based laws.
- Legal tests usually incorporate some form of IRS 20 Factors
What is Co-Employment?

- The relationship among two or more entities that hold some degree of responsibility over, and potential liability for, a worker or group of workers.
- Legal term is “joint employer”
- Common with staffing firm/client relationship
The Minefield…
Common Risks/Liabilities from Misclassifying Employees

- Unpaid benefits under benefit plans
- Unpaid FICA, other employment taxes
- Workers’ comp./unemployment liability
- Wage/Hour, OT Liability
- EEO Liability
- Trigger coverage under minimum-employee statutes
- Ability to unionize
What is an “Employee”? The IRS 20-Factor Test

- Question of “control”: is this master/servant?

- Factors assess 3 categories of “control”
  - Behavioral Control: Has business retained right to control details of worker performance?
  - Financial Control: What is business’s right to control the business aspects of worker’s job?
  - Relationship Of Parties, as evidenced by:
    - Written contract
    - Benefits, e.g. paid vacation and health coverage
    - Permanency of the position
    - Are the services performed a key aspect of the regular business of the company
The IRS 20-Factor Test
The factors are...

- (1) Instructions
- (2) Training
- (3) Integration
- (4) Services rendered personally
- (5) Hiring, supervising and paying assistants
- (6) Continuing relationship
The IRS 20-Factor Test, cont.

- (7) Set hours of work
- (8) Full time required
- (9) Work done on premises
- (10) Order or sequence set
- (11) Oral or written reports
- (12) Payments by hour, week or month
The IRS 20-Factor Test, cont.

- (13) Payment of expenses
- (14) Furnishing of tools and materials
- (15) Significant investment
- (16) Profit or loss
- (17) Working for more than one firm at a time
- (18) Services available to general public
- (19) Right to discharge
- (20) Right to terminate
Independent Contractor Litigation
FedEx Ground Lawsuits

- Independent Contractor system
- Lawsuits from IC’s in dozens of states since ’05
  - wages, benefits, ability to unionize
- Changes in IC Requirements:
  - Multiple delivery routes, incorporate, individual drivers are employees of IC’s, workers comp. and unemployment coverage
Joint Employer Doctrine

- Relationship between two or more employers where each has actual or potential legal duties with respect to same employee
  - Typically seen in staffing firm/client company relationship; PEO arrangements

- Although agreements frequently list the staffing company as the sole employer of temporary workers, this is not determinative

- The doctrine is applied to determine legal obligations of the provider and client to the temporary worker

- Who is responsible for providing workers’ compensation, benefit plan obligations, ensuring civil rights compliance, etc.?

- Responsibility can vary based on benefit
  - Worker could be joint employee of entity for purposes of minimum wage law but not for purposes of federal employment taxes
Joint Employer Doctrine

- Core inquiry: share or co-determine the matters governing essential terms and conditions of employment?

- Joint employer inquiries are fact intensive based on the particular circumstances of the arrangement

- Court Tests:
  - Right to Control/“Common Law” test
    - E.g., benefits, union issues
  - Hybrid Common Law test – e.g., staffing agency context
    - Did the alleged joint employer
      - Control Hiring and firing?
      - Directly administer any disciplinary procedures?
      - Maintain records of hours, handled the payroll or provided insurance?; or
      - Directly supervise the employees?
  - “Economic Realities” test – wage and hour
CASE LAW

JOINT EMPLOYER CLAIMS
Joint Employer Liability Found

  - Court applied traditional common law principles of agency in Title VII discrimination case
  - Key factor: “right to control manner and means” of work
  - Reasonable inference that hired by temp agency to work for construction company following work at four sites over six month period of time
  - Claim can proceed
Joint Employer Liability Found

  - Employee that had signed seven temporary contracts with work site employer filed pregnancy discrimination and hostile work environment claims
  - Claim allowed to move past summary judgment because work site employer established daily working conditions, supervised and evaluated employee and generally exercised day to day control

- **Continental Winding Corp. v. NLRB, 305 NLRB 122 (1991)**
  - Union law case where union sought to include temporary workers as regular-part-time workers for negotiation purposes
  - In order to have joint employer relationship, the entities must be shown to “share or co-determine” the essential employment conditions
  - Found that work site employer was joint employer as their supervision over temporary employees was “essentially identical” to that of regular employees
No Joint Employer Liability

  - Based on sexual harassment claim by a sales rep of reseller (essentially staffing employer)
  - Two entities sold same goods of company
  - Court found that work site employer was not joint employer as it had no authority to “hire, fire … issue work assignments or issue any kind of rules of employment” to staffing employer’s employees.

  - Court applied five factor test to determine joint employer status but said that employer’s right of control was most important factor.
  - Since subcontractor provided work assignments, scheduling and attendance information, disciplinary notices, salary/benefits information and hired and fired employees, they were employer and other company did not exert sufficient control.
Navigating the Minefield

- Drafting and Managing the Staffing Agency Agreement
  - Contract should establish responsibilities/liabilities
    - Get Specific/Exhibit
  - What should the Agency handle?
    - Hiring
    - Assignments/Day-to-day supervision (where possible)
    - Paycheck disbursement/withholdings, insurance, benefits (ACA prevention)
      - Workers comp – “borrowed servant” doctrine
    - General and EEO training, policies
    - Performance evaluation, discipline
Navigating the Minefield

- Drafting and Managing the Staffing Agency Agreement
  - What Co. Cannot Legally Pass Off:
    - OSHA
    - FMLA/ADA
    - FLSA
    - Title VII/state discrimination
Navigating the Minefield

- **Indemnification Provisions**
  - Clear identification of claim responsibilities/liabilities
    - Including claims alleging “joint employer” liability
  - Inventory of staffing agreements ----→ master T’s and C’s
  - Enforce internal policies on contingents
    - Exceptions can swallow the rule
    - Business need determination
Navigating the Minefield

- To Churn or Not To Churn?
  - “Churning” doesn’t necessarily avoid liabilities, may be counterproductive to business
  - Consider on-site supervision, project managers from staffing agency
Navigating the Minefield

- Independent Contractors
  - Establish clear terms for relationship in writing
  - IC should be responsible for method/means of reaching goal
  - Do not allow project creep
  - Avoid as much control, hit as many of the 20-factors as possible
Navigating the Minefield

- Pay Particular Attention to Benefits Plans
  - Contracts/plan documents should explicitly exclude IC’s/temps from participation
  - Consider non-qualified plans that do not require inclusion of “employees” for tax benefits
Navigating the Minefield

- Seek an IRS Determination
  - Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

- Provide information about relationship with worker (or class of workers)

- Takes time, but may be useful if planning long-terms use of temps/IC’s
Navigating the Minefield

- And, finally, the Golden Rule…

- Consult Legal Counsel
QUESTIONS?
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