Breakout Sessions – Series 2

MADE TO ORDER

MANAGING THE MULTITUDE OF WORKING ARRANGEMENTS

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New technologies that enable temporary staffing candidates to find positions via applications that use algorithms to match people to positions are here. With names like tilr and Shiftgig, these apps use an alternative, temporary, or on-demand staffing model akin to that used by ride-sharing apps to connect passengers with drivers. More than one-third (36%) of US workers are a part of the gig economy, totaling to about 57 million people, according to Forbes. While the gig economy used to be a way to make ends meet in-between traditional jobs, workers are starting to morph the gig economy into full-time professions.

Traditionally, employers with temporary staffing needs have used outside staffing companies or professional employer organizations (PEOs) to provide temporary employees under negotiated staffing agreements. Typically, these staffing businesses must operate under state statutory and regulatory schemes. Because PEOs or staffing companies may be a co-employer or joint employer with the employer it serves, they must comply with applicable local, state, and federal employment laws and maintain any necessary documentation required by those laws. The same compliance considerations apply if a temporary worker is retained through an app-based matching process.

Employers looking to engage temporary workers may want to closely assess and proactively manage any new or traditional methods of engagement. As new gig economy options to engage employees emerge, here are seven areas of concern that employers may want to consider.

1. **Employee or independent contractor?**

   This question often looms when an employer classifies the workers as an independent contractor. If the individual is an employee rather than a contractor, the employer has certain obligations (including withholding taxes, which are covered below). Even if both parties agree to the characterization, it may not be legally valid under federal wage and hour laws. Misclassifying employees as contractors or vice versa can have serious consequences for employers and individual managers.

   Many companies assume that a worker who is engaged on a specific project or task for a limited period of time is an independent contractor. That is not necessarily true. The distinction between employee and independent contractor can be vitally important and is not always clear. Nevertheless the need for proper classification is critical. Employees must be paid minimum wage and overtime. They are eligible for unemployment and workers’ compensation. Contractors generally are not entitled to any of these legal protections.

   The worker’s intention to be classified as an independent contractor is not dispositive; a range of factors dictate what legal classification is correct. Furthermore, the legal analysis can vary by jurisdiction as well as by which type of law is being analyzed (e.g., taxes, wages, benefits). Moreover, courts have just begun to analyze how the available tests should be applied to gig workers, with inconsistent and sometimes surprising results.

   For example, in 2018, a California Supreme Court ruling established a three-part test that provides the criteria an organization must meet for a person to be considered an independent contractor and not an employee. In Dynamex Operations West, Inc. v. Superior Court of Los Angeles, 4 Cal. 5th 903 (2018), the Court adopted the “ABC” or “Dynamex” test, which laid out the following criteria to determine who may be classified as an independent contractor in cases involving minimum wage and overtime payments:
A. “that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

B. that the worker performs work that is outside the usual course of the hiring entity’s business; and

C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.”

Dynamex, 4 Cal.5th at 916-17. According to the ruling, if the worker does not meet all three criteria of the ABC test, then that worker is presumed to be an employee.

Other jurisdictions apply the “economic realities” test, which provides an expansive definition of “employee,” and favors liberal employee classification. Where a worker is highly dependent on the business that he or she serves, and derives a significant portion of his or her income from the company, then the economic realities test favors classification of the worker as an employee. The rationale is that it is important to compensate and protect those individuals who depend on their employer for financial security and well-being. Unlike an employee, a contractor does not depend solely on the company for his or her income; rather, the contractor can, and often must, seek additional work from other companies. Generally, the “economic realities” test analyzes the following factors: (1) the extent to which the work performed is an integral part of the employer’s business; (2) the worker’s opportunity for profit or loss, depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work completed requires special skills and initiative; (5) the permanency or duration of the relationship; and (6) the degree of control exercised by the employer.

Complicating matters further, it is not always clear who the gig worker works for. When properly classified, an independent contractor works for the business named in his or her contract. When a gig worker is misclassified, however, he or she may be employed by the entity named in the applicable contract—and he or she may also be employed by another company simultaneously. Under the concept of joint employment, several entities can be considered the workers’ employer for purposes of wage-and-hour law, labor law, anti-discrimination statutes, and other important issues. The company that contracts with another entity for services such as messaging or deliveries has a vested interest in its service provider properly classifying its gig workers.

2. **Withholding**

If a temporary worker is an employee, the employer must withhold federal, state, and local taxes; Federal Insurance Contributions Act (FICA) taxes; Federal Unemployment Tax Act (FUTA)/state unemployment tax acts (SUTA) taxes; and more. If the individual is misclassified as an independent contractor, potential corporate and individual liability exists. Which company is required to withhold taxes if a matching algorithm assigns the worker to a project? What happens if neither company withholds taxes and the Internal Revenue Service (IRS) shows up?

Employers must be vigilant in auditing contractors to ensure proper classification under the IRS standard. In the past, the IRS has applied a complex 20-factor test to determine whether a worker was an employee or independent contractor. In the past, the IRS used a 20
Factor Test to determine if an employee was an independent contractor. Since then, it has been compressed into three general categories:

A. **Behavioral Control**: Does the business have the right to direct and control how the worker does the task for which they were hired, through instructions, training or other means?

B. **Financial Control**: Does the business have a right to control the financial and business aspects of the worker’s job, including how the business pays the worker, how the worker makes their services available, and the extent to which the worker has unreimbursed business expenses?

C. **Relationship of the Parties**: Are there written contracts between the two parties, and does the business provide employee-type benefits like insurance, a pension plan, vacation pay or sick pay?

The consequences of getting it wrong can be severe, and the IRS makes a distinction between intentional and unintentional violations. For unintentional violations, the IRS may assess:

A. $50 for each W-2 that the employer failed to file;

B. Penalties of 1.5 percent of wages, 40 percent of FICA taxes not withheld from employee, and 100 percent of the employer FICA taxes; and

C. A ‘Failure to Pay Taxes’ penalty equal to 0.5 percent of the unpaid tax liability for each month, up to 25 percent of the total tax liability.

Intentional violations carry more severe consequences and include additional fines and penalties, such as:

A. Penalties of 20 percent of wages, 100 percent of FICA taxes not withheld from employee, and 100 percent of the employer FICA taxes;

B. Criminal penalties of up to $1,000 per each misclassified worker;

C. Possibility of one year in prison; and

D. Those responsible for withholding taxes could be personally liable for uncollected tax.

3. **Workers’ compensation**

State laws vary, but most states have strict rules requiring employers to provide workers’ compensation coverage. While some app-based temporary staffing models may suggest that workers’ compensation coverage is provided, it might be helpful to verify coverage. The fact that a hiring employer provides workers’ compensation benefits may appear to be an admission that the temporary worker is an employee of the business. Independent contractors are typically not covered by workers’ compensation.
4. **The Department of Labor, Occupational Safety and Health Administration (OSHA), and other agencies**

Some states and localities have special requirements and notice obligations with respect to temporary employees. Employers are required under the Fair Labor Standards Act (FLSA) and some state laws to record the time that nonexempt temporary employees have worked. In addition, if temporary employees sustain injuries, employers may need to record these injuries on the OSHA log.

In a more traditional staffing model, in which a staffing agency provides temporary workers for a host company, OSHA considers host employers and staffing agencies to be "joint employers" under its Temporary Worker Initiative (TWI). However, host employers frequently receive more citations and steeper fines for safety violations.

OSHA’s concern is that some employers use temps and gig workers to avoid meeting compliance obligations – providing safety training and personal protective equipment (PPE) for example. An analysis of data from workers’ comp claims in California, Florida, Massachusetts, Minnesota and Oregon during a five-year period found that the incidence of temporary worker workplace injuries was between 36 percent and 72 percent higher than that for non-temporary workers, according to a study by ProPublica.

Temporary workers also are disproportionately clustered in high-risk occupations, the research found. Temporary workers were 68 percent more likely than non-temporary workers to be working in the 20 percent of occupations with the highest injury rate as measured by the U.S. Bureau of Labor Statistics.

5. **Indemnification**

The traditional staffing model may offer some indemnification protection within the agreement between an employer and temporary staffing provider. In the absence of a contract with an app-based service, however, indemnification protection may not be available. Employers may want to seek clarification with regard to which entity will perform the background checks on temporary employees. Is the process compliant with the Fair Credit Reporting Act? Are all temporary employees subject to the employer’s drug free workplace policy? Does the employer maintain government contracts requiring employee drug testing?

6. **Anti-harassment**

Many jurisdictions require employers to provide anti-harassment training to employees and make proof of training available. Additionally, companies using temporary or gig workers can be liable for third-party harassment in some circumstances. Employers may want to ensure that temporary employees have access to the operative anti-harassment policy that applies to them. In the traditional model, the staffing company/PEO or hiring employer may provide the policy and employee handbook.

7. **Trade secrets and confidential information**

Temporary employees can take trade secrets and confidential information, even if they work just one day. Employers may thus want to require temporary employees to sign written agreements prohibiting the use and disclosure of trade secrets and other proprietary
information. If an employer complies with the federal Defend Trade Secrets Act, it may be able to enforce its agreement in federal court. Agreements with contractors might include:

A. Any limits on the contractor’s rights to access and use the Company’s confidential information and intellectual property, including in performing contracted services;

B. The Company’s rights to use work created by the contractor during the engagement, including in developing further works independently of the contractor; and

C. Limits or prohibitions on the contractor’s future use of work created during the engagement.

Key Takeaways

There are a number of considerations to be weighed in temporary staffing options, new and traditional. Regardless of the staffing model used, employers will want to ensure compliance with myriad employment laws.

Conducting an internal audit can provide you with an in-depth understanding of your current classification practices and whether or not they are compliant. Work with your HR team or hiring managers to develop a centralized program for engaging and managing your independent workers. A cross-functional team keeping an eye out for warning signs can save you a big headache down the road. If possible, include representatives from legal, compliance, HR, and procurement to provide insight and support from different perspectives. This team should be on the lookout for audit triggers such as independent workers filing for worker’s compensation, disability, or unemployment claims as well as ensure that contractor hiring and management processes stay compliant and up-to-date. If current contractor relations fail to satisfy the applicable tests or fall too close to the line for comfort, employers should work with their HR and legal teams to retool the working arrangements so they better align with a contractor relationship and in order to minimize the potential for future liability flowing from misclassification.
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Industry Background

- Traditional Staffing Model
  - Direct Hire
  - Temporary Staffing Agencies
  - PEOs (Professional Employer Organizations)
- Regulated, especially PEOs (employee leasing)
- Detailed written agreements specify duties and protections – including who is employer
Industry Background (cont.)

- Gig economy options emerging
- App-based algorithms
- “Connects hourly workers with sudden, real-time job openings”
- Tilr, Shiftgig, Snagajob, others emerging
- Narrower contract terms and protections for employers
- “Wild, Wild West”

(Contingent) Workplace

- 36% of U.S. workers are a part of the gig economy (57 million), according to Forbes
- Estimated to rise to 50% by 2020
- 94% of employee are open to non-traditional work arrangements according to HR Drive
- W-2 employees less available?
Blended Workforce

- W-2 Employees
- Temporary Employees
  - Traditional sources
  - Gig economy sources (demand sensitive businesses)
- Contractor’s Employees/Consultants
- Visa/Immigration Employees
- Independent Contractors (defensible)
- Vendor outsourced services

CAUTION!

- ALL employers should strategically examine staffing needs and sourcing options
- Scrutinize existing contracts (PEO, staffing vendor, app based)
- Same criteria no matter the provider
  - Are we adequately protected?
  - Are we compliant?
  - Is this a good business decision?
Employee versus Independent Contractor?

- Is the person classified correctly? For you? For app based vendor?
- Who has the classification obligation?
- What test do you use (IRS, NLRB, common law)?
- Consequences/protector for misclassification
  - Cascading non-compliance: IRS, I-9, wage and hour, etc.

Withholding Obligations

- Federal, State, FICA, Medicare, SUTA, FUTA, etc.
- Failure to Withhold = Severe Consequences
  - Individual criminal liability
  - Penalties, fines, retro payments, legal costs
- Who withholds?
- Is it done right?
Workers’ Compensation/Insurance

- Mandatory Workers’ Compensation Coverage
  - Get Proof of Coverage – update at least annually
  - Is your company a named insured under the policy?
- Penalties for non-compliance
  - Criminal and civil liability under state laws
  - Loss of contracts or ability to contract
- Insurer of last resort with no WC coverage
- Don’t forget liability coverage
  - How does your GL coverage work?
  - Does staffing vendor have GL?

Government Agencies/Compliance

- State and local requirements
- AA/EEO-1/Workforce statistics
- Time worked records (FLSA and state law)
- I-9
- OSHA injury log
Indemnification

- Contractual arrangement under state law
- Duty to defend/duty to indemnify
- Clarifies who is responsible to pay for and address claims and lawsuits
- Obligation usually part of broader contract sharing risks/responsibilities
- Typically one-sided toward staffing provider

Employer Policies/Practices

- Proof of presenting anti-harassment policy and training
- Policy and procedure acknowledgements
- At-will disclaimers
- Employee handbooks
- Background checks (FCRA)
- Drug free workplace
- EEO/AA reporting
Trade Secrets and Confidential Information

- ANYONE with access should sign agreement restricting use and disclosure
- Must show reasonable efforts to protect trade secrets
- Defend Trade Secrets Act (federal right)
- State law
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