



In This Issue

- ◆ Minimizing Risks Associated With Using the 'Contingent Workforce'
- ◆ Need "In-House" HR or Legal Help?
- ◆ New State of MN Minimum Wage Rates
- ◆ Lawfax Update

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MINIMIZING RISKS ASSOCIATED WITH USING THE 'CONTINGENT WORKFORCE'

By Thomas R. Revnew

On July 28, 2005, the U.S. Department of Labor's Bureau of Labor Statistics announced that the number of employees working in contingent and alternative work arrangements had risen to almost 11% of the American workforce. Employees working in contingent and alternative work arrangements fall into one or more of the following categories: independent contractors, temporary help agency employees, on-call employees, contract company employees and leased employees. Employers have a variety of business reasons for using contingent employees, ranging from increased flexibility in hours, staffing levels and workloads and reduced labor costs to using temporary employment as a test period to review employee performance before making an offer of regular employment. Although businesses have traditionally used contingent workers (most often temporary help employees) to fill secretarial, clerical and other similar positions, contingent workers are increasingly used in almost every sector of the economy.

Many employers mistakenly believe that when they use contingent employees, they have no legal responsibilities to those individuals. Nevertheless, as employers increase their reliance on the contingent workforce, they expose themselves to potential liability under a variety of labor and employment laws. For instance, employers commonly retain staffing agencies to find, screen and then place potential candidates within their organization. If the staffing agency engages in discriminatory hiring practices, an employer may be held responsible for the staffing agency's actions. Based upon a recent study by the Discrimination Research Center (DRC) located in Berkeley, California, discriminatory hiring of certain nationalities may be prevalent in the staffing industry. In particular, the DRC found that job applicants with Arab- or South Asian-sounding names received significantly fewer responses from temporary staffing agencies in California than equally qualified applicants whose names were identifiably white, African American, Asian, or Hispanic.

In sum, if the business relationship with the contingent workforce is not properly structured, employers expose themselves to a variety of potential issues under labor and employment law. Employers may be held responsible for a contingent worker's unpaid employment taxes under federal and state laws such as: FICA, Social Security, and unemployment. Employers may also face potential exposure under workers compensation laws, the FMLA, OSHA, and wage and hour laws.

To avoid or minimize liability from the use of contingent workers, employers should follow a three-step process:

1. **Assess the Situation.** The first step in avoiding liability is to carefully assess the situation and identify those factors that may impact on the issue of liability. The temporary/leasing company and the employer should carefully consider the following factors in creating their contractual relationship:

- (a) The intent of each party in entering into the contractual relationship.
- (b) The terms of the business relationship.
- (c) The legal obligation over the workers, including issues such as wages and benefits, payment of wages, withholding taxes, providing worker's compensation insurance, providing a safe workplace, recordkeeping, complying with civil rights and labor laws, etc.

2. **Express Written Terms of the Contract.** At a minimum, among other things, the contract between the parties should be in writing and contain:

- (a) A clear and unambiguous statement of the terms of the business relationship and that the parties understand and intend this relationship.
- (b) A provision that indicates who employs the employees assigned to the employer. The contract should provide sufficient details to substantiate the nature of the employment relationship.
- (c) A provision that describes the method and terms of payment.
- (d) A provision that describes the terms of employment for the contracted employees -- who has the right to screen applicants, hire, fire, discipline and direct the day-to-day activities of employees.
- (e) A provision that indemnifies and holds the parties harmless for any alleged unlawful actions taken by the other.

3. **Monitor the Relationship.** While the terms of the contract are important to determining the issue of liability, equally important is the issue of day-to-day administration of the contract terms. While the contract may clearly describe a business relationship that recognizes that the temporary/leasing company is the responsible employer, the parties' actions in administering the contract may counteract the contract language.

We regularly advise and provide employers and staffing agencies with assistance in formalizing contractual relationships that minimize legal exposure under labor and employment laws. For more information about minimizing your risks with the use of the contingent workforce, please contact any Seaton, Beck, Peters, Bowen & Feuss attorney, at 952-896-1700.

Need "In-House" HR or Legal Help?

Could you use "in-house" human resources, labor relations or legal assistance? We have worked with experienced HR and LR consultants in several industries and are familiar with several business lawyers and labor/employment lawyers who are seeking to join a business as a part-time or full-time lawyer. If you would like help in these areas on a part-time temporary project or full-time basis, or would like to have a lawyer "in-house" for a few hours a week or a month, call Doug Seaton at 952-896-1700 and we'll be happy to discuss how we could help directly or with a referral.

REMINDER: STATE OF MINNESOTA NEW MINIMUM WAGE RATES

AS OF AUGUST 1, 2005, THE STATE OF MINNESOTA'S NEW MINIMUM WAGE RATES ARE NOW EFFECTIVE. FOR MORE INFORMATION, CONTACT ONE OF US AT 952-896-1700 OR GO TO STATE OF MINNESOTA WEBSITE WWW.DOLI.STATE.MN.US/MINWAGE.HTML

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