

The Pitfalls of Contract Labor: Co-employment

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Many companies today are stuck between a rock and a hard place. They need staff to keep a business up-and-running, but many companies don't have the cash flow to support the staff they need. It's a vicious cycle that that can lead to a lot of unnecessary hiring and firing.



In this environment, the benefits of a flexible workforce are clear: a company can beef up or cut back staff immediately based on the amount of work, without the negative impact of hiring and firing. Additionally, companies can best allocate when to hire temporary or full time employees and manage costs associated with traditional 'employee benefits' such as health care and sick pay. In many cases, staffing with contract or temporary workers who have mastered a trade specific to the project at hand may make more sense than hiring a full time employee.

What many companies may not realize are the serious risks associated with not best managing contract labor.

Guidelines for Defining a Contract Worker

What exactly determines a contract worker? Is it the amount of hours he or she works each week? Is it the amount of time as a whole that they spend in the company? Or is it the type of employee benefits they receive that determines their status as a contract worker? Section 530 of the Revenue Act of 1978 gives the IRS 20 rules for determining whether an independent contractor is, in fact, an 'independent contractor.' The guidelines are 'fuzzy,' leaving corporate America to navigate the rocky shoals of co-employment law – with the IRS acting as both prosecutor and judge.

There are a growing number of cases that demonstrate that temporary contractors, and the IRS, mean business. Many large and global organizations have come under fire for "co-employment," the shaky ground companies walk on when they treat independent contractors and temp workers like employees. Several such companies have faced or are now facing lawsuits worth millions of dollars from disgruntled contractors that allege they were asked to work 12 hour days, but only bill 40 hours per week, when they're supposed to be paid by the hour. Then, of course, you have a few lawsuits where companies were forced to pay millions of dollars to long-term 'temps' who were denied benefits.

In fact, The Department of Labor estimates that temporary labor now represents 30 percent of the total workforce, and is rapidly growing. The co-employment guidelines are serious, and the penalty can be severe. Most large companies are still vulnerable, and don't have the proper processes in place that help mitigate such risks. Companies need to understand the rules, and ensure their company abides by them to stay out of the courtroom.

Avoiding Common Pitfalls of Co-Employment: Determining Who You Have On Staff

The biggest tip: Always keep in mind the 'real' employer of record, and let them deal with typical 'employee' activities like training, reviews, and general supervision.

The IRS has outlined 20 questions that can help you determine if your company is at risk of co-employment complications. For a complete listing, visit the IRS online at www.irs.gov. Here are five important ones:

1. Do you give raises?

You are not the employer. Leave the raises to his or her boss.

2. Do you review contractor performance directly with the contractor?

Again – it happens under the mistaken belief that this is fair to the contractor. But he or she does not work for you. You wouldn't appraise the performance of a business partner. It's imperative to remember that the contractor is an agent of another firm.

3. Do you give bonuses? Or reimburse travel expense to your office?

Remember to differentiate the routine from the extraordinary. Ordinary expenses should not be reimbursed, but traveling around the US in support of a product rollout generally is allowed.

4. Do you insist on seeing background checks or drug screen results?

This is a hot new area in light of increasing concerns for workplace safety. However, the best approach is to establish company guidelines that insist vendors only provide employees that meet your requirements. You can maintain the right to 'spot audit' temp workers, but you want to avoid having the same level of information that you would for an employee.

5. Do you have (and do you enforce) a policy that limits the amount of time a contractor can perform work for you?

This is absolutely crucial and can be the deciding factor if co-employment is in question. Many companies have had 'temporary' workers for three, five or even 10 years at the same place performing the same work. This is clearly a violation. Look around. It's likely there's at least one IT contractor who wrote a piece of code for your company some time ago, and now is the only person who can maintain the code. Set limits of consecutive time and set standards for how long he or she needs to have a break in service, to ensure your company is in compliance.

The risks of co-employment can dramatically outweigh the benefits of temporary workers, if the issues addressed above aren't closely monitored. The best approach is to put a process in place, whether it's outsourced or internal, that sets formal guidelines for how your company will handle temporary labor engagements. But establishing a process is really just the starting point. Communicating these guidelines internally, and to suppliers, and ensuring compliance across the company will help your company avoid the risk of entering the co-employment zone.

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Mr. Cruz brings 25 years of services expertise and technology marketing experience in developing winning business strategies and building strong brands for companies in the enterprise software and electronic commerce markets.

Most recently, Mr. Cruz held management positions at IQNavigator and Cascadeworks, where he was responsible for sales, services and strategic business development initiatives. He has also held sales and marketing positions at Documentum, Ingres, Motorola and Xerox.

Mr. Cruz graduated from Pace University where he earned a Bachelor of Arts degree in Social Sciences.