



Employment Law in Staffing Arrangements

Employers have myriad legal obligations to their employees. Paying wages and benefits, paying and withholding employment taxes, providing workers' compensation insurance, complying with civil rights and labor laws, and maintaining a safe work environment are just a few of them.

Co-Employment

In most staffing arrangements, a staffing firm and its customer share employer obligations in what is often referred to as a "co-employment" relationship.

Staffing firms

- Verify employee work status under immigration laws
- Are the employer of record for wages and benefits
- Withhold and remit all payroll taxes (e.g., Social Security and Medicare)
- Provide workers' compensation insurance coverage
- Have the right to hire and fire
- Hear and act on complaints from employees on working conditions and other work-related matters

Customers

- Generally supervise and direct employees' day-to-day work
- Control working conditions at the work site
- Determine the length of employees' assignments

Staffing firm and customer co-employment obligations—and how customers can minimize their potential liability—are briefly reviewed below:

Employee Benefits

To receive favorable tax treatment under IRS rules, employer retirement plans must satisfy "nondiscrimination" tests. In applying the tests, employers generally must include in their head count workers who are not their employees—including workers supplied by staffing firms—who perform more than 1,500 hours of service in a year for the customer. Such workers only have to be counted—they are not entitled to participate in the customer's plan. However, if a customer's contacts with the workers are extensive and long term, they may be viewed as the customer's common-law employees and may have a right to participate in the customer's benefit plans.

Customers can mitigate their exposure by structuring their staffing relationships to avoid contacts with assigned employees that could result in a common-law employment relationship. Although day-to-day supervision may be unavoidable in most cases, functions such as recruitment, training, determination of wages and benefits, and the right to assign workers to other projects should, to the extent possible, be left exclusively to the staffing firm.

Even if a customer has sufficient contacts with workers to be considered their common-law employer, the customer has the legal right to exclude from its benefit plans temporary, contract, leased, and other employees, provided the plans continue to satisfy applicable discrimination tests. So customers should review their plans with experienced benefits counsel to ensure that their plans contain appropriate exclusionary language.

Equal Employment Opportunity

Staffing arrangements do not shield customers from liability under the civil rights laws. If a staffing firm and its customer both have the right to control the worker under a multifactor test spelled out in Equal Employment Opportunity Commission guidelines, and each has the statutory minimum number of employees, both can be held liable for unlawfully discriminating against a staffing firm's employees under Title VII of the Civil Rights Act of 1964.

The EEOC also has issued guidelines confirming that staffing firm customers generally have joint employer obligations under the Americans With Disabilities Act. This may include sharing the cost of providing reasonable accommodations to temporary workers with disabilities. The guidance encourages staffing firms and their customers to engage in an "informal, interactive process" with workers to determine their needs. Experience shows that such accommodations do not involve significant expense in most cases.

Collective Bargaining

In 2004, the National Labor Relations Board ruled that temporary workers cannot be forced into a collective bargaining unit with a customer's regular employees without the consent of the staffing firm and the customer. The National Labor Relations Act and prior board precedent allow multiemployer bargaining units only if all the employers consent. Allowing such units to be formed without consent, the majority said, results in a bifurcation of bargaining that hampers negotiations between a union and an employer, and forces the employers to negotiate with one another as well as with the union.

Although temporary employees cannot be forced into customer bargaining on a nonconsensual basis, they still have a right to engage in lawful union activity at a customer's work site, may seek to form their own bargaining unit, and may even be compelled under union security clauses to pay union dues even though they are not covered by the collective bargaining agreement.

Workplace Safety

The federal Occupational Safety and Health Act and state workplace safety laws require all employers to maintain a safe and healthy workplace. OSHA rules provide that customers are primarily responsible for ensuring the safety of staffing firm employees because the customer controls the work site and generally also controls the work performed by the employees. Customers also are required to maintain records of illnesses and injuries of the temporary employees they supervise and notify them of any hazardous substances in the workplace. Staffing firms have a duty to take reasonable steps to determine conditions at the work site, provide employees with generic safety information, and advise them how to obtain more specific information at the work site to protect themselves from hazards they are likely to face on the job.

Workers' Compensation

State workers' compensation laws provide benefits, on a no-fault basis, to employees accidentally injured on the job. In such cases, workers' compensation is the exclusive remedy and employees generally are barred from suing their employers for damages. Courts in every state except Massachusetts and Wyoming have expressly extended this immunity to staffing firm customers who qualify as "special employers." (Massachusetts courts have granted similar protection in cases where employees have specifically agreed to release the customer of liability beyond workers' compensation.) Hence, customers that insulate themselves completely from an employer relationship with the workers assigned to them may relinquish whatever protection such status may confer under state law.

More detailed information on these and other co-employment issues can be found in *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, by Edward A. Lenz (5th ed., 2003, 264 pages, ISBN 0-9714306-0-8), published by the American Staffing Association.