

EMPLOYMENT LAW IN THE STAFFING WORLD

PART 1

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WEBINAR SERIES OVERVIEW

- Four-part series for staffing companies
- First two webinars will focus on the legal issues in the employment arena for staffing companies, which includes the complexities of the joint-employer relationship
- Third webinar will focus on immigration issues
- Final webinar will focus on staffing services agreement

AGENDA FOR TODAY

- Focus on the hiring process/background checks
- Employment taxes, workers' compensation, and employee benefits
- ADA compliance

STAFFING/TEMPORARY EMPLOYEES

- Employees who are hired for a specific job or for a limited period of time without expectation of long-term employment as a regular employee
- Usually provided to client companies by temporary staffing agencies
- Day-to-day activities are controlled by the worksite employer
- Often result in joint employment

LEASED EMPLOYEES

- Employees who are provided by an employment agency or professional employer organization (PEO) to a client company for a fee
- PEO manages all personnel matters, including payroll, benefits, human resources functions and compliance reporting
- Client company controls the day-to-day duties and direction of the employee
- Almost always jointly employed
- Not specifically focusing on these employees today

BACKGROUND CHECKS / EEOC

- EEOC is aggressively challenging background checks that involve an applicant's criminal history
- EEOC requires employers to engage in an individualized assessment
- Conviction must have some relationship to the job

BACKGROUND CHECKS / EEOC

- Eliminate policies or practices that automatically exclude individuals from employment based on any criminal record
- Develop a narrowly tailored written policy for screening applicants and employees for criminal conduct
- Identify essential job requirements and actual circumstances under which jobs are performed, along with specific criminal offenses that may demonstrate unfitness for particular jobs
- Limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity

BACKGROUND CHECKS / FCRA

- The FCRA generally applies when a “Consumer Report” or an “Investigative Consumer Report” is prepared at the staffing company’s request by a third party, usually for a fee
- Consumer Report
 - Written or oral report that bears on an individual’s character, general reputation, personal characteristics, or mode of living that is used or could be used to establish eligibility for employment
- Investigative Consumer Report
 - Information obtained through interviews with neighbors, friends, associates, or others

BACKGROUND CHECKS / FCRA

- The FCRA generally requires:
 - A disclosure to the applicant/employee that a consumer report or investigative consumer report will be obtained for employment purposes
 - Authorization by the applicant/employee for a consumer report or investigative consumer report to be obtained
 - Certifications to Consumer Reporting Agency
 - Pre-adverse action letter
 - Adverse action letter

EMPLOYMENT TAXES

- According to the Internal Revenue Code, the “employer” is the entity with “control of the payment ... of wages”
- Typically, the staffing agency is considered the employer because it pays wages
- Staffing agency is responsible for withholding taxes

EMPLOYEE BENEFITS

- Staffing company typically, if not always, provides the temporary employees with fringe benefits, including health insurance
- Generally, client companies are not required to provide health insurance benefits to temporary employees

EMPLOYEE BENEFITS

- Under Section 414(n) of the Internal Revenue Code, client companies are required to count “leased employees” for purposes of coverage tests
- “Leased employees” are individuals who:
 - Provide services pursuant to an agreement between the staffing company and client
 - Perform such services for the client on a substantially full-time basis for a period of at least 1 year, and
 - Perform such services under the primary direction or control of the client

EMPLOYEE BENEFITS

- Client companies can rely on the staffing company's records for determining hours worked by "leased employees"
- Section 414(n) does not require the employer to provide leased employees with benefits or allow them to participate in the employer's benefit plans

EMPLOYEE BENEFITS

- The “1000 Hour Rule”
 - ERISA requires employers to offer retirement benefits to employees after they accrue 1,000 hours in a 12-month period
 - The rule only applies to the employer’s own employees; not temporary employees

EMPLOYEE BENEFITS

- Golden Rule: Staffing services agreement and the client's plan documents should be drafted to state that "leased employees," which could include temporary employees, are excluded from the client's benefit plans

EMPLOYEE BENEFITS

- Patient Protection and Affordable Care Act
- Beginning in January 2014, employers with 50+ full-time employees must provide minimum essential healthcare coverage
- The definitions of employer and employee are unclear, especially when staffing companies are involved
- IRS recently issued a Notice stating that it anticipates the common-law test for employers will apply

EMPLOYEE BENEFITS

- Staffing services agreement should state that:
 - The staffing company is the common law employer of the temporary employees
 - The staffing company will offer “minimum essential coverage” to the temporary employees (if required under ACA)
 - If temporary employees are deemed to be common law employees of the client, a reasonable amount of the hourly billing rate paid to the staffing company will be retroactively and prospectively re-designated as contributions for health coverage for the temporary employees enrolled in the staffing company’s health plan

FORM EEO-1

- Must be filed by:
 - Private employers with 100 or more employees; and
 - Federal government contractors with government contracts of \$50,000 or more and 50 or more employees

FORM EEO-1

- For purposes of the EEO-1 form, “employee” means any individual on the payroll of an employer who is an employee for purposes of the employer’s withholding of Social Security taxes
- Leased employees are included in the definition of “employee” and must be included in the employer’s EEO-1 report
- “Employee” does not include:
 - Persons who are hired on a casual basis for a specified time, or for the duration of a specified job
 - Persons temporarily employed in any industry other than construction, such as temporary office workers
 - Persons who are referred by a staffing agency for work to be performed on the premises of another employer under that employer’s direction and control
- Temporary employees should not be included on the client’s EEO-1

WORKERS' COMPENSATION

- If joint employment exists, both employers receive benefit of the exclusive remedy provisions of the workers' compensation statutes
- Employers must have "shared" control over the subject employee
- Generally, staffing agencies and their clients are both considered "employers" for workers' compensation purposes
- Not applicable to independent contractors

AMERICANS WITH DISABILITIES ACT (ADA)

- Staffing firms and client companies are liable for their own discrimination and discrimination by the other entity if it participates in the discrimination or knew or should have known of the discriminatory action and failed to take corrective action within its control

AMERICANS WITH DISABILITIES ACT (ADA)

- Medical Examinations
 - Staffing firms can conduct post-offer medical exams as long as they do so for all individuals entering the same job category
 - Staffing firms and/or client companies can revoke an assignment based on the results of a medical examination if the reason for doing so is job related and consistent with business necessity
 - Staffing firms can revoke an offer if the assignment begins before the medical examination results are obtained

AMERICANS WITH DISABILITIES ACT (ADA)

- Reasonable Accommodations
 - Client companies are not responsible for providing reasonable accommodations when the applicant applies directly to the staffing firm
 - However, client companies must provide reasonable accommodations if they send applicants to apply at a staffing firm
 - Once employed, the client company and staffing agency will both be responsible for ensuring that the employee is provided with a reasonable accommodation
 - Undue hardship may be claimed by the staffing agency or client company if, after engaging in good-faith efforts, the party attempting to provide the accommodation cannot obtain the other party's cooperation in providing the accommodation

QUESTIONS?



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THANK YOU

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