Harry Franzheim—an HR/OD Practitioner for over 30 years—has published this newsletter to bring you careful insight into reducing costs and unlocking employee potential.

newera HR
Keeping Costs Down and Productivity Up

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AT ISSUE

There is no way around it, co-employment exists between a staffing agency and the client. Companies should not frown on this, but embrace it as a way to better protect all their workers—temporary or otherwise.

Co-Employment: A Beneficial Partnership

HR Fact:

The Browning-Ferris Decision, What It Means For You

In 2015, the NLRB redefined the employee-employer relationship, granting new powers to workers.

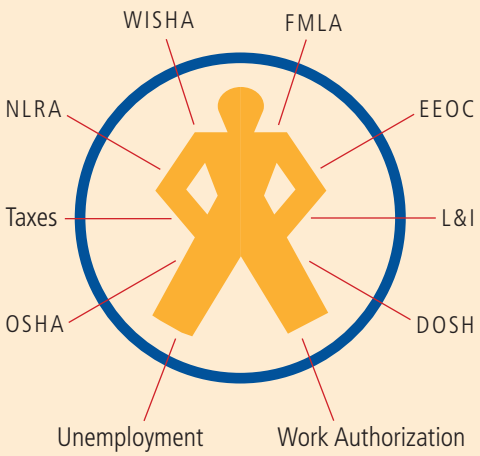
- Board adopted a more expansive definition of "joint employer."
- Board held that previous joint employer standard did not keep up with today's workplace changes.
- Decision prevents companies from claiming they are not employers when employee problems arise—no more pointing fingers when workers get hurt. Companies will now be held accountable.

New Era HR recently was awarded a significant piece of business, and all that was left to seal the deal was to sign their contract. But their contract was clearly one-sided and slanted not in our favor! There were several issues, but the one most relevant to this article was "co-employment," also known as "joint employers." Their contract wording specifically referred to New Era HR as an "independent contractor rather than joint employer." This bugged me but I wasn't exactly sure why. So I did some research and with the aid of the American Staffing Association (we have been members for over five years) I found out why.

My gut was telling me that it felt wrong to start a relationship (really a partnership) with a contract that felt like a stiff arm to the throat. But the research I did resolved this from a logical, business approach as well. First of all, government agencies and the courts that regulate employment law have been finding for years that staffing firms and their clients are "joint employers" regardless of what a contract or agreement stipulates. What that means is that the contract we were about to sign would not hold up in a hearing or in court and it gave the client zero protection from the "problems" of co-employment. In fact, what I learned is that their contract actually exposed the client to greater liability from workers' compensation (Labor & Industries) claims and a potential lawsuit from an injured temporary worker. Workers' compensation law considers the relationship between a staffing firm and the client as a "special arrangement" and accordingly acknowledges that the staffing agency is responsible for the injured temporary worker as the "exclusive remedy" for the injured worker. That would be the case unless it was found that the staffing agency and the client had an arrangement whereby they were not acting as joint employers!

Co-employment exists between a

Joint Responsibilities For Temp Employees Between Staffing Agency and Client



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staffing agency and the client and there is no way around it. Joint employment issues can be addressed by working with a knowledgeable and compliant staffing firm. What follows is a summary of the responsibilities and obligations between a staffing agency and the client for several of the employment laws affecting both.

Taxes, Unemployment, Authorization to Work in the US

The obligation to withhold and pay employment-related taxes is the sole responsibility of the staffing agency; so too is the management and payment of federal and state unemployment taxes (FUTA and SUTA). The staffing agency also has sole responsibility to verify authorization to work in the U.S. As a result, staffing firm clients generally will be insulated from such liability for temporary workers. But if the staffing agency is not doing this correctly it could be bad for the client! Accordingly, it would be a good idea to audit the practices of your staffing agency from time to time.

OSHA, WISHA, DOSH, and L&I

This topic has received a lot of attention recently since OSHA started the Temporary Worker Initiative in 2013. The TWI was started to protect the safety and health of the growing temporary workforce. In essence, the staffing client must provide the same level of safety and health protection to the temporary workers as they are obligated to provide for their regular employees. The logic is sound—staffing clients supervise, direct the temporary worker, and control the work environment. The staffing agency has the obligation to make placements of workers into an environment that is free from known and obvious hazards and to provide temporary employees with an orientation and basic safety training before starting hour number one of their assignment. Staffing clients are obligated to provide site-specific safety training and all additional requirements for safety and health as they do for their own employees. Injured temporary employees must be recorded on the client's OSHA 300 log.

EEOC

Staffing arrangements do not shield clients from liability under civil rights laws, and staffing clients can be held liable for unlawful discrimination under Title VII of the Civil Rights Act of 1964. This means that clients have the same obligation to temporary workers as for their regular workers—they cannot make employment-related decisions based on race, gender, age, national origin, religion or other traits under federal and state civil rights laws. Staffing clients can be found liable for subjecting temporary employees to a hostile work environment and sexual harassment. Staffing agencies can be too if they knew about such conduct and failed to take appropriate action.

A temporary employee is also protected under the Americans with Disabilities Act. Both the client and agency have obligations to work together in an interactive process with the employee in an attempt to make accommodations that are reasonable.

Family and Medical Leave Act (FMLA)

It is the staffing agency that carries the load when it comes to managing leaves of absence. There are requirements for providing notices, tracking, and offering employment after the leave. However, temporary employees must be counted by staffing clients as "head count" when determining size of the organization and its compliance requirements. Furthermore, if a client subsequently hires the temporary employee onto their payroll, the time as a "temp" must count toward the time for satisfying eligibility for FMLA. Finally, if the staffing agency and the client are still in a partnership at the time the employee is returning from leave, both will need to attempt to place the employee back into the original job or an equivalent position from which the person left.

National Labor Relations Act (NLRA)

The governing body of the NLRA is politically appointed so the direction that this regulation takes tends to lean in the direction of the prevailing political party at the time. Accordingly, the role of temporary employees as part of a bargaining unit has varied greatly. The most recent headline grabbing attention is the Browning-Ferris decision. The NLRA board decided that both agency and client will be joint employers where each is a common law employer and each directly or indirectly has the authority to control the terms and conditions of employment. The operational word here is "indirectly." This makes it easier for temporary employees to become part of the bargaining unit and they may be approached by the union without notifying the agency. Temporary employees have the right to engage in lawful union activity at a client's work site.

Partnerships Prevail

If you are using a temporary staffing agency, there simply is no getting around the co-employment and joint employer obligations. Clients cannot contract their obligations away. And they should not want to. Laws and regulations that protect workers (temporary or otherwise) are purposeful and meaningful and have improved lives and families for decades. It is in the best interests of clients, staffing agencies, and our employees to work together to understand the laws and the regulations and to jointly take responsibility to protect all workers' rights.

American Staffing Association

Much of the material for this article came from the American Staffing Association. The ASA is the voice of the U.S. staffing, recruiting, and workforce solutions industry. New Era HR is a proud member of the ASA. AmericanStaffing.net ne

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New Era HR can help you find, harness, and sustain the talent you need to grow your business. We offer training and development services and on-site coaching for leaders at all levels of the organization.

For more information about New Era, go to our website www.NewEraHRsolutions.com and click on our blog to learn even more.

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