

## Don't treat that field employee like a full-time employee

*Legal issues can arise when you cross that line*

According to the American Staffing Association, agencies like Leddy Group employ 2.96 million people per day. As a result, supplemental (short-term) workers have jobs and employers have staff, without all the financial obligations associated with hiring a full-time employee. It's a no-brainer, win-win situation, right?

Well, almost. When business clients contract with a staffing agency, both parties become known as a "co-employer." This term applies when two businesses exert some control over an employee's work. There's nothing wrong with being a co-employer, but there are risks involved in not understanding your company's role and potentially exerting too much control of said employee.

"When our business clients find a valued, field employee who fits into their company culture and is perfect for the job role, it's a normal reaction for them to want to nurture that relationship," said Susannah Chance, vice president of human resources at Leddy Group. "However, it is imperative for our co-employers to understand that if certain lines are crossed, there could be costly legal repercussions."

When you work with agencies like Leddy Group, your role is to determine the length of the assignment, supervise the employee's daily work and control the work environment. The staffing service is the employer, and is responsible for hiring and firing, addressing employee disciplinary issues, paying the employee, providing workers' compensation and complying with employment laws.

However, it is not uncommon for companies to blur these lines by treating a worker from a staffing agency as an employee. Field employees often remain with the company longer when the scope of a project grows and, before you know it, those individuals start to blend with the full-time employees. In some cases, they may be given raises or bonuses, and it could seem normal for them to be invited to company functions. This is when the co-employer position gets risky and the field employee's role with the company can be deemed "misclassified."

One of the best documented cases of co-employment litigation occurred in 1996, when a class action lawsuit was brought against Microsoft Corp. by thousands of then-current and former employees. In *Vizcaino vs. Microsoft*, the U.S. Circuit Appeals Court for the Ninth Circuit found that the company had misclassified its long-term temporary workers, also known as "permatemps" by offering them Microsoft stock at an employee discount. Before the final ruling was issued — nearly 10 years later — Microsoft settled the case for \$100 million. The IRS had the same finding, and subsequently ruled that Microsoft owed millions of dollars in back payroll taxes.

While the Microsoft saga is well-known in the human resources industry, it might not strike a chord with many Leddy Group clients, since few have long-term assignments for supplemental workers and run the risk of falling victim to that kind of scenario. Regardless, it's important to be aware of the extreme cases of co-employment.

On a more generalized level, Chance said that red flags should be raised before the co-employer enters into any serious conversations with field employees that go above and beyond the assignment of daily duties in the office. For example, concerns about harassment, issues with co-workers, consideration for full-time employment and work-related travel should all be addressed with Leddy Group management before taking action. These discussions between the co-employers must occur to ensure that the proper procedures and processes are followed to avoid any confusion or legal action on behalf of the employee.

Chance said that while co-employment errors can lead to costly risks, it should not deter potential staffing agency clients from using field workers. Rather, she said, business clients should communicate freely with their local Leddy Group office team and contact them immediately with any questions or concerns.

Andrea Johnstone, Leddy Group counsel with the Manchester, NH-based firm Bernstein Shur, agreed, adding that field employees should also be aware of the co-employment issues so they can report their concerns through the proper channels.

“Employers who use contingent workers should be mindful to avoid interacting with these workers as they would their regular employees,” she said. “On the other hand, it is important that these workers are educated about workplace rules such as sexual and other unlawful harassment in the workplace, as well as the reporting procedures, so that these matters can be properly managed and responded to. In this kind of instance, failure to timely and properly respond by the host company can result in costly litigation and potential liability, despite that the worker was not the company’s ‘employee.’ Coordinating with your staffing company and legal counsel in these instances is advisable.”

Both women said business clients should always communicate with the staffing agency and, in order to best protect themselves, remember that the firm who placed the field worker is responsible for:

- Hiring and firing;
- Assigning and reassigning the worker to the job;
- Negotiating (with the business client) the nature of the job, work hours, benefits and pay rates;
- Addressing disciplinary issues;
- Evaluating performance

For more information about co-employment relationships, please contact **Susannah Chance at 866-LEDDY HR.**

*Editor’s note: This is part one of a two-part article about co-employment issues in the workplace. For additional information about the business clients’ responsibilities, watch for our May newsletter.*