



Loss Control TIPS

Technical Information Paper Series

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Temporary Employee Liability

In most states, the issue of who is responsible for coverage is addressed by principles of common law, specifically the 'dual employer' doctrine whereby loaned, leased, or temporary workers are usually considered employees of both the labor service and the client company. If a worker is injured, workers' compensation coverage can be provided by either company, depending on their contractual agreement, which must comply with state law.¹

More Firms Are Using Temporary Employees

In today's business environment of re-engineering, downsizing, and organizational change, the use of temporary employees is becoming quite common. Employers attempt to fill needs that result from staff shortages or peak seasons by hiring through temporary employment agencies. Employers also use temporary employees in an attempt to free themselves from the responsibility and costs of providing workers' compensation and fringe benefits.

Depending on the jurisdiction, however, *this is not always the case*. The increase in the use of temporary employee services, and the failure of employers to *verify* that employment agencies have workers' compensation coverage, or have it in adequate limits, can expose the client employer to tort liability for the temporary employees under its supervision.

Who Provides Compensation for Temporary Employees?

Under *exclusive remedy*, both the client employer and the temporary agency are protected against tort action by the injured worker. The client employer attains the status of *special employer*. Two conditions must be met for this to occur:

- The client employer must supervise the worker, *and*
- The worker must consent to the arrangement.

In some states, an injured worker can sue beyond those benefits obtained from the workers' compensation system. In these situations, specific contractual indemnification clauses between the temporary agency and the client employer can protect the latter from this risk. This protection does depend on the ability of the temporary agency to pay the indemnification.

In other states, client employers cannot escape the strict application of common law, due to the fact that they control the work environment and are held directly responsible for the safety of *all workers* under their control. One recourse in these states is for the client company to verify that the temporary agency has a *temporary service contractor or alternate employer* endorsement on its workers' compensation



policy. This allows the temporary agency to *indemnify* the client employer, through its workers' compensation carrier, for any workplace injuries for which they are held liable.

Full Safety Training for Temporary Employees

With all the risk management techniques in place, the best method for either the temporary agency or the client employer to reduce the potential for loss is to ensure that the work environment is safe.

The temporary agency should take the position of inspecting a potential client's worksite if there is the slightest possibility that their employees will be put at unusual risk.

Similarly, the client employer should take "ownership" of temporary employees. Temporary employees should receive the same safety training as other regularly employed workers. Supervisors should be made aware of the potential liabilities that exist and of the need to ensure the safety of the temporary workers along with their regularly employed co-workers.

Organizations that decide to use temporary employment agencies should realize that they could very easily share the responsibility if a temporary employee is injured on the job. In light of this inherent responsibility, good risk management mandates that any temporary agency providing services provide proof, not only of workers' compensation coverage, but also of general liability insurance.

"David Stephenson, legislative analyst for the National Federation of Independent Business, said "The onus should fall mostly on the temp agency to carry comp insurance for its workers, but the NFIB recommends all employers carry comp coverage, even those smaller ones exempted by state law".²

Benefits vs. Cost

Retention and control and the right to hire and fire are considered significant indicators of *employer status*. When considering if expense savings are being realized, it is worth noting that temporary employment agencies adjust the hourly rate dependent on the hazards involved in the job, much as workers' compensation rates are adjusted dependent on the hazard code.

Is the additional liability worth the perceived cost savings when using temporary employees? In the short term, the answer may be yes; for the long term, it would be a good business decision to analyze the true benefits and costs, with consideration of the potential exposure to loss.

References

1. Donald Elisburg, Attorney & Union Co-chairman, American Bar Association's Occupational Safety and Health Law Committee
2. "Employers Need to Be More Cautious When Hiring Outside Help, Experts Say." *BNA Workers' Compensation Report*, 5(22): 685-687, October 24, 1994.

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