

THE GREAT RESIGNATION: **FILLING OPEN POSITIONS WITH NON-EMPLOYEE WORKERS**

I. Why Companies Turn to Non-Employee Workers

A. Staffing Shortages Due to COVID-19

1. What are employers experiencing now that pandemic unemployment benefits have expired?

- a. Major corporations - “select group of CFOs of major U.S. corporations” CNBC survey¹
 - i. 95% said it was harder to find workers for open positions (up from 18% who said it was harder in first quarter of the year).
 - ii. Roughly 90% of CFOs responding to survey said they were increasing in wages.
- b. Small businesses – NFIB survey²
 - i. 27% of small employers are currently experiencing significant staffing shortages; 18% are experiencing moderate staffing shortages.
 - ii. 49% of small employers are receiving fewer job applications for open positions.
 - iii. Incentives offered to attract employees to open positions:
 - (A) 77% increased wages;
 - (B) 17% increased PTO;
 - (C) 16% offered/enhanced hiring bonuses;
 - (D) 18% offered/enhanced referral bonuses; and
 - (E) 21% offered/enhanced insurance benefits.

c. Employees on leave

¹ <https://www.cnn.com/2021/09/01/unemployment-benefits-are-ending-job-market-hiring-worries-arent.html>

² <https://www.nfib.com/content/press-release/coronavirus/latest-nfib-covid-19-survey-half-of-small-employers-report-supply-chain-disruptions-are-significantly-impacting-their-businesses/>

- i. This happens in any job market, but is now more significant
 - (A) Parental leave
 - (B) Health related leave
 - (C) Leave of absence
- d. Employer unsure of permanent business need for regular employee
 - i. Maybe there is a one-off project that requires additional help.
 - ii. Possible expected influx of business that may not be permanent.

II. What is the Relationship? Independent Contractors, Temporary Workers, Outsourcing, Work to Hire, and PEOs

A. Independent Contractor or Employee?

1. When you are deliberating whether your business needs regular employees or independent contractors consider the type of work that is needed (is it central to your business or project based), the amount of control (you need to have over the work that is done, or do you only care about the final product), and the general relationship.
2. The designation of independent contractor versus employee directly relates to how the worker will be taxed. An independent contractor will be a 1099 worker responsible for their own payroll taxes and insurance. Employees will be a W-2 worker and the employer retains responsibility for payroll taxes and must provide certain insurances.
 - a. Misclassification is a huge issue and improper classification exposes a company to liability and penalties based on taxes, minimum wage, overtime, and benefits.
 - b. The IRS considers workers to be employees unless proved otherwise.
3. The IRS looks at three broad categories:
 - a. Behavioral Control – does the business have a right to direct and control what work is accomplished and how the work is done, through instructions, training, or other means.
 - b. Financial Control – does the business have a right to direct/control the financial and business aspects of the worker’s job. This includes:
 - i. Extent to which worker has reimbursed business expenses;
 - ii. Extent of worker’s investment in facilities or tools used in performing services;
 - iii. Extent to which worker makes services available to relevant market;

- iv. How business pays worker; and
 - v. Extent to which worker can realize profit/incur loss.
- c. Relationship of the Parties
- i. Written contracts describing the relationship parties intended to create;
 - ii. Whether business provides worker with employee-type benefits (e.g., insurance, pension plan, vacation pay, or sick pay);
 - iii. Permanency of relationship; and
 - iv. Extent to which services performed by worker are a key aspect of the regular business of the company.

B. Temporary Workers

1. The DOL defines a temporary or ‘temp’ employee as one who is hired to work for one year or less with a specific end date. This end date can be the day when the project the employee was hired to work on is complete, or when the regular employee they are substituting for returns from their leave.
2. Federal law also dictates that you cannot hire the same temp employee for more than two consecutive years. However, as an employer, you have some say in the exact length of a temp employee’s term of employment. Just be aware that keeping a temp employee for longer than a year may entitle them to benefits typically reserved for regular employees, so plan accordingly.
3. There is no specific limit to the number of hours an employee can work in a year and be considered temporary. But, be aware that if a temp employee works enough hours, they gain access to certain benefits.

C. Outsourcing

1. Outsourcing occurs when certain aspects of business operations are contracted out. Common outsourced operations are payroll and claims processing. Outsourcing is also commonly seen in call center support.
 - a. Non-core business functions, back office tasks
 - b. Outsourcing can reduce the cost of these functions, freeing up funds to increase business growth.
 - c. Outsourcing can help leadership free up time that would otherwise be spent on administrative tasks and focus more on strategic work.

2. Benefits to Outsourcing
 - a. Reduces and controls operating costs
 - i. Outsourcing is often cheaper than hiring a new employee, and it also takes away some level of uncertainty about costs. The contract will determine exactly what will get done and for what price.
 - b. Improves company focus on mission
 - i. By outsourcing less important tasks, you increase the company's focus on tasks that are deemed more vital.
 - c. Expands talent pool
 - i. Rather than relying on the talents among your employees, outsourcing allows you to draw from a virtually endless pool of potential talent that may have, in fact, even greater expertise in the specific outsourced task.
 - d. Shares risk with another company
 - i. The contractor or contracting company will share some of the responsibility for completing the tasks that are assigned to them.
3. Drawbacks to Outsourcing
 - a. Employees could feel threatened
 - i. If employees watch their coworkers get replaced by contractors, they could worry that they'll be replaced by outsourcing next. This could crush morale and productivity.
 - b. Standards could differ
 - i. When you outsource a task, you're trusting the contractor to live up to your idea of quality. If you and the contractor differ on standards, you could get a very different product or service than you had in mind. If you outsource to a different country, you need to ensure that you comply with the applicable regulatory standards in both countries.
 - c. Communication issues could arise
 - i. When you outsource work, checking in on the people performing that work becomes more difficult. You can't just walk across the office, you'll have to write an email or make a phone call and hope the contractor is available at that

moment. If you're outsourcing to another country, you may have to consider time differences and language barriers, as well.

d. Threats to security

- i. Having more people with access to a company's networks, data, and resources, increases the level of potential security threats. Adding any workers to your company comes with a risk, and when you use an outsourcing company, that entire company could have access to and potentially compromise sensitive information. You will want to control who has access to your information and what agreements they are signing to gain such access.

4. Outsourcing is popular when a business wants to only pay for the business functions and services when you needed them. This reduces the need to hire and train specialized staff.
5. This is often not intended to create a joint-employment relationship; however, to mitigate the risk of an unintended joint-employment relationship, businesses should ensure that the contract shifts as many of the control factors to the outsourcing agency as possible (*e.g.*, control of the individuals performing the outsourced work rests entirely with the service provider). These workers would likely not come to your worksite – although that is not always the case. If they come to your workplace, where you control their day-to-day operations, then this increases the likelihood of a joint employer relationship.
6. These workers are employees of the service-provider company with which your company would have a contract. Make sure that the contract delineates the responsibilities between the parties in terms of paying wages/taxes, obtaining insurance, indemnification, rights to work produced, etc.
7. Keep in mind these are usually not roles that are central to a business but important for its operation.

D. Professional Employer Organization (“PEO”)

1. PEOs are a popular option for businesses that need help managing the wide range of administrative details involved in overseeing a workforce.
2. Under a PEO arrangement the PEO actually becomes a joint employer of the businesses' employees. This allows the PEO to handle payroll administration. By becoming the "employer of record," the PEO can directly manage payroll, issue W-2s, and collect and pay employment taxes.
3. The biggest reason companies engage a PEO is to alleviate the burden of compliance risk on an organization.

4. MCL 338.3721³ et seq governs PEOS. The act defines PEOs as “any person engaged in the business of providing professional employer services.” § 3721(k). “Professional employer service” means “the service of entering into a co-employment relationship in which all or a majority of the employees providing services to a client or to a division or work unit of the client are covered employees.” A PEO enters into a joint-employment relationship with an employer by leasing employees to the employer. § 3721(l).

E. Work to Hire

1. Section 101 of the Copyright Act ⁴ (title 17 of the U.S. Code) defines a “work made for hire” in two parts:
 - a. Work prepared by an employee within the scope of his or her employment; or
 - b. Work specially ordered or commissioned for use.
2. Most people are under the assumption that they own the rights to any work they have paid for. Without a written Work for Hire Agreement in place, you may not necessarily own the rights to the work. Having an independent contractor enter into an agreement will ensure that you obtain the rights to the work.
3. This is part of the analysis in certain independent contractor work arrangements. Work to Hire is a contractual term that lays out the ownership terms of specific work that a contractor with ordering from an independent contractor.
4. Generally speaking, unless there is a special written agreement in place before any of the work begins, any person who contributes to the project can, theoretically, sell that exact same material to someone else without your permission.
5. Work created by independent contractors.
 - a. In this case, the work must be specially ordered, meaning that the contractor must be paid to create something new. Prior to creating the work, each party must enter into a signed and written agreement that the work will be considered a work for hire. The work must also fall under one of the nine statutory categories of commissioned works under the Copyright Act.
6. Work prepared by an employee that is within their scope of employment.

³ <https://legislature.mi.gov/documents/mcl/archive/2014/October/mcl-Act-370-of-2010.pdf>

⁴ <https://www.copyright.gov/circs/circ09.pdf>

- a. Any work created by an employee that is within their scope of employment is considered work for hire that belongs to the employer.

III. How to Choose the Appropriate Worker to Fill the Gap

A. Temporary Workers (“Temps”)

1. Temporary employees can aid the regular workers you already know and trust, by taking on smaller tasks to help lighten their workload. This helps your regular employees maintain the energy needed to focus on more arduous tasks.
2. An effective way to find candidates who might be an excellent fit for your company in the long-term. You can witness their expertise and skills firsthand and decide later if you’d like to hire them as a regular employee.
3. Even the hiring process itself is often easier when it comes to temporary employees. Temp agencies have plenty of resumes on hand and can help you find the best applicants in a short period of time.
4. Drawbacks to using temps:
 - a. It takes time for any employee to adjust to their new environment and become familiar with each workplace’s rules and regulations. However, a temp employee will not have much time to do so. This can result in more mistakes, miscommunication, and can negatively affect their relationships with regular employees. It can also increase the risk of on-site accidents. When hiring a temp employee, consider how quickly you can expect them to acclimate themselves into their new position.

B. Independent Contractors

1. An effective way to allow employers greater staffing flexibility in times when the employer has a fluctuating workload or a specific task/project after which the independent contractor is no longer needed.
2. Enables employers to fill short term or changing workplace needs without incurring employment liabilities, if classified properly.
3. Independent Contractors are typically highly skilled in a particular area; therefore, employers will see a return on profits by hiring an IC to get quality work performed faster. Typically, employers will not need to spend significant time and energy training an independent contractor who has expertise in a particular area or task.
4. Drawbacks to using independent contractors:
 - a. If misclassified, then companies can run significant risks related to payroll, taxes, and benefits. Also, independent contractors may submit claims for employment-related

benefits (such as unemployment), causing the company to protest such claims and produce evidence supporting such contractor relationship.

C. PEOs

1. PEOs typically offer a range of HR services relating to staffing and recruiting, employee benefits, compensation and retirement plans. They can be hired to assist companies navigate one or more of these areas.
2. Typically used by small employers that do not have HR expertise or system capabilities for functions such as payroll.
3. When using a PEO, the conglomerate of employees may provide access to enhanced benefits that could not be obtained for a smaller group of direct-hires.
4. Drawbacks to using PEOs
 - a. Outside company influences work culture;
 - b. Diminished value of internal HR department;
 - c. Lack of control and security over employee paperwork;
 - d. Loss of institutional knowledge;
 - e. Security issues with company systems; and
 - f. Resistance from employees.

D. Outsourcing

1. As companies transitioned to remote work during COVID-19, companies considered the various outsourcing models that could be adopted.
2. Terminating all employees in specific area of business to outsource job – e.g., accounting, HR, customer service. If taking this approach, ensure employees can be terminated at-will or that contractual obligations are met on both sides.
3. Companies may terminate employees but have outsourcing company hire them the same day so that there is no break in employment. This typically occurs when employees are vital to the continuation of specific company tasks.
4. Drawbacks to outsourcing:
 - a. If you transfer your employees to a separate entity, make sure that you report that transfer to the unemployment insurance agency to avoid a claim that you are engaging

in SUTA dumping (*i.e.*, using a lower tax rate and clean history when the old tax rate and history of credits/liabilities should have been transferred to the acquiring entity).

IV. Legal Considerations to Protect the Company when Hiring a Non-Employee

A. Consequences for Improperly Classifying Employees

1. Tax – an employer may be liable for federal/state taxes that were required to be withheld for an improperly classified IC. Penalties for failing to pay these taxes may also be imposed.
 - a. Non-Employee Compensation – this type of compensation can include sales commissions, awards, prizes and payments made for independent contractors having completed tasks.
 - b. Unlike with wages paid to employees, you're generally not required to withhold taxes on nonemployee compensation because contractors pay these taxes themselves. It's important to properly classify your workers so you can determine whether their earnings are considered wages or nonemployment compensation.⁵
2. Employee Benefit Obligations – failure to provide benefits to misclassified employees can lead to lawsuits with claims for retroactive benefits.
3. Workers' Compensation – misclassification can result in employer held liable for on-the-job injuries outside the protections of the workers' compensation system.
4. Unemployment Compensation – a misclassified worker can be granted benefits by the unemployment agency; the organization may be liable for penalties and interest in addition to unpaid unemployment insurance premiums.
5. Wage and Hour Liability – widespread use of misclassified IC invites scrutiny; could lead to class-action suit for unpaid overtime or minimum wages violations under FLSA.
6. Vicarious Liability – employer could incur liability for wrongful acts of misclassified independent contractors.

B. Responsibilities Under OSHA

1. The extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case.
2. Staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA's training,

⁵ <https://www.indeed.com/hire/c/info/what-is-nonemployee-compensation?hl=en&co=US>

hazard communication, and recordkeeping requirements are fulfilled. Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and health.

3. Most employers provide specific training tailored to the particular equipment and hazards in their workplace.
 - a. The key is *communication* between the agency and the host to ensure that the necessary protections are provided.
 - b. Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplaces. They must ensure that they are sending workers to a safe workplace.
 - i. Ignorance of hazards is not an excuse.
 - c. Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers.
 - d. The staffing agency has the duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.
4. Host employers *must treat temporary workers like any other workers* in terms of training and safety and health protections.

C. EEOC Compliance

1. Temporary workers are entitled to the same protections against sexual harassment as regular employees.
2. Reasonable accommodations must be given to all eligible part-time, full-time, regular, temporary, or probationary employees.
 - a. In many cases, the staffing agency and your business could both be responsible for providing reasonable accommodations if you are acting as "joint employers" as defined under the ADA.
 - b. In the case of joint employers, you and the staffing agency are each independently liable for providing reasonable accommodations. The simplest way to handle accommodations in a joint employer situation is to work collaboratively with your staffing partners. Better yet, including terms on how to handle accommodations can be added to your staffing agency contracts.
 - c. The Pregnancy Discrimination Act within Title VII prohibits discrimination based on pregnancy, childbirth or any other related medical condition. Employers should not make

employment decisions based on assumptions about what pregnant employees can and cannot do.

- d. When an employee files a charge with the EEOC it is important to coordinate with the staffing company, PEO, or other entity involved because a separate charge based on the same facts may have been issued to them as well. Review your contract with that staffing, PEO, or other entity to understand any indemnification obligations and respective responsibilities.

D. Fair Labor Standards Act (FLSA)

1. A worker is entitled to minimum wage and overtime pay protections under FLSA when there is an employment relationship between the worker and the employee is covered under the FLSA.
2. FLSA can apply to independent contractors who should really be considered employees because they do not meet the test for independent contractors.
3. Temporary Workers – nothing prevents a temporary worker from being an exempt employee; however, employers should ensure the temporary worker meets all the requirements for exemption under FLSA (duties plus salary basis requirements).

E. Benefits Provided to Non-Employee Workers

1. Temp workers
 - a. 1,000 Hour Rule – the DOL’s 1000-hour rules for temporary employees states that an employee who works for 1000 hours or more in a single year is eligible to participate in your company’s retirement plan. On average, this would mean an employee is working approximately 20 hours per week or longer throughout the entire year.
 - b. Specific temporary employee laws and the particular benefits that must be made available to temporary employees, such as social security and certain types of insurance. Employer benefits plan language can, however, exclude temporary employees from vacation, holiday pay, and/or other fringe benefits.
 - c. Wages paid to temporary employees are treated the same as wages paid to a regular employee for purposes of unemployment benefits, minimum wage, and overtime.
 - d. To make a temporary position more appealing to applicants, you can offer additional benefits at your discretion, like vacation, incentive bonuses, or employee discounts. Note that if you wish to provide health insurance to a temp employee (which most companies do not do unless the Affordable Care Act requires it), you will need to discuss this with your insurance provider beforehand. In most cases, the employee must work for at least 30 hours a week to qualify.

F. Unemployment Tax Considerations and Employer Responsibilities

1. Eligibility Requirements for Unemployment Benefits – Not COVID Related

- a. You must be unemployed and able, available for, and actively seeking suitable full-time work
- b. UIA looks at standard base period to determine if your wages qualify you for unemployment. If you do not qualify based on your standard base period, the UA will consider your wages in the “alternate” base period.

2. Independent Contractors

- a. Except for Pandemic Unemployment Assistance benefits, which expired September 4, 2021 independent contractors are typically ineligible for unemployment benefits.

3. Temporary Employees

- a. Temp employees are employees of a temporary staffing agency. As such, the agency is responsible for paying unemployment taxes and responding to unemployment claims. In some circumstances, however, there are limitations to the benefits they can claim.
- b. Seasonal workers are different in that they are hired directly by a company, typically, for a specific period of time, such as a holiday season. In this case the company that hired the seasonal worker would be responsible for unemployment tax. Whether the worker qualifies for benefits is a different analysis.

4. PEOs

- a. One of the functions of a PEO is to provide payroll processing support – this includes processing unemployment taxes and responding to claims. Because the workers are also joint employees of the employing company, the company would still be responsible for the actual payment of the tax, just not the processing of it.

5. Outsourced Workers

- a. Workers providing services that have been outsourced are employees/workers of the service-providing company and the company providing the outsourced services would be responsible for paying those workers’ unemployment taxes.

G. Contracts

1. Independent Contractor Agreement may establish certain benefits, separate from but still comparable to some employees

- a. Work for Hire Agreement

- i. Whether this is necessary depends on the work in which the independent contractor is engaging.
 - ii. A Work for Hire Agreement (or provision within an Independent Contractor Agreement) may be used to ensure that a contractor doesn't retain any rights over the product or the work created. Without a formal agreement in place, rights may not be transferred to the client who purchased the work.
- 2. Temporary Workers
 - a. Typically, the worker will be retained by an agency and the agency will contract with the business to provide workers. This contract should establish the responsibilities and respective obligations of each party.
- 3. PEO
 - a. This is a joint employer situation so any employment agreement would also bind the PEO as well.
 - b. The company that engaged to PEO would have a separate contract with the PEO. This contract should establish the responsibilities and respective obligations of each party.