

Breakfast Bites

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

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Overview

- What is the Relationship? Independent Contractors, Temporary Workers, Outsourcing, Work to Hire, and PEO's.
- How to Choose the Appropriate Worker to Fill the Gap.
- Legal Considerations to Protect the Company when Hiring a Non-Employee.



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WHY COMPANIES TURN TO NON-EMPLOYEE WORKERS

- What are companies experiencing now that pandemic unemployment benefits have expired?
 - Staffing shortage due to COVID-19
 - 27% of companies surveyed are currently experiencing significant staffing shortages; 18% are experiencing moderate staffing shortages.
 - 95% of major corporations surveyed said it's harder to find workers for open positions.
 - Employees on leave
 - Happens in any job market, but is now more significant
 - Employer unsure of permanent business need for regular employees

INCENTIVES OFFERED TO ATTRACT EMPLOYEES TO OPEN POSITIONS

- 77% increased wages
- 17% increased PTO
- 16% offered/enhanced hiring bonuses
- 18% offered/enhanced referral bonuses
- 21% offered/enhanced insurance benefits



**WHAT IS THE RELATIONSHIP?
INDEPENDENT CONTRACTORS,
TEMPORARY WORKERS,
OUTSOURCING, WORK TO HIRE,
AND PEO'S**

INDEPENDENT CONTRACTOR OR EMPLOYEE?

- Consider business needs, amount of control, and the fundamental relationship.
- The classification as independent contractor versus employee directly impacts who is responsible for taxes and insurance.
 - An independent contractor is a 1099 worker and is responsible for their own payroll taxes and insurance.
 - An employee is a W-2 worker and the employer retains responsibility for payroll taxes and must provide certain insurances.
 - The IRS considers workers to be employees unless proven otherwise.



INDEPENDENT CONTRACTOR OR EMPLOYEE?

- The IRS looks at three broad categories:
 - **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?
 - **Financial Control** – Does the business have a right to direct and control the financial and business aspects of the worker's job?
 - **Relationship of the Parties** – Does the business have contracts describing the relationship, provide benefits, or are the services performed a key aspect of the regular business of the company?

TEMPORARY WORKERS

- The DOL defines a temporary or 'temp' worker as one who is engaged to work for one year or less with a specific end date.
- Federal law also dictates that you cannot engage the same temp worker for more than two consecutive years.
 - Be aware that keeping a temp worker for longer than one year may entitle them to benefits typically reserved for regular employees.
- There is no specific limit to the number of hours an employee can work in a year and be considered temporary.



OUTSOURCING

- Outsourcing occurs when certain aspects of business operations are contracted out.
- Common outsourced operations include:
 - Payroll and claims processing.
 - Non-core business functions, back office tasks.
- Outsourcing can:
 - Reduce the cost of these functions, freeing up funds to increase business growth.
 - Help free up time of leadership that would otherwise be spent on administrative tasks and focus more on strategic work.



BENEFITS TO OUTSOURCING

- Reduces and controls operating costs
- Improves company focus on mission
- Expands talent pool
- Shares risk with another company



DRAWBACKS TO OUTSOURCING

- Employees could feel threatened
- Standards could differ
- Communication issues could arise
- Threats to security



OUTSOURCING

- Popular when a business wants to only pay for the business functions and services when you needed them.
- Not intended to create a joint-employment relationship.
- Workers are employees of the service-provider company with which your company would have a contract.
- Not usually in roles that are central to its business but important for its operation.



PROFESSIONAL EMPLOYER ORGANIZATION (“PEO”)

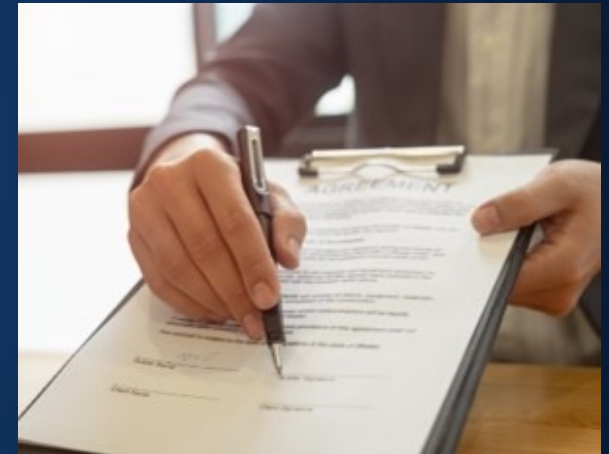
- PEOs are a popular option for businesses that need help managing the wide range of administrative details involved in overseeing a workforce.
- Under a PEO arrangement the PEO actually becomes a joint employer with a company.
- By becoming the "employer of record," the PEO can directly manage payroll, issue W-2's, and collect and pay employment taxes.
 - Alleviates the burden of compliance risk on an organization.

WORK TO HIRE

- Work created by independent contractors:
 - 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 is considered a work for hire.
 - Must also fall under one of the nine statutory categories of commissioned works under the Copyright Act.
- Work prepared by an employee that is within their scope of employment is considered work for hire that belongs to the employer.

WORK TO HIRE

- 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 (or work for hire provision in an Independent Contractor Agreement), you may not necessarily own the rights to the work.
- This is part of the analysis in certain independent contractor work arrangements.
- Generally without 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.



WORK TO HIRE

- Section 101 of the Copyright Act defines a “work made for hire” in two parts:
 - Work prepared by an employee within the scope of his or her employment; or
 - Work specially ordered or commissioned for use.



HOW TO CHOOSE THE APPROPRIATE WORKER TO FILL THE GAP

CHOOSING THE APPROPRIATE WORKER

- Temps
 - Temporary workers can aid the regular workers you already know and trust, by taking on smaller tasks to help lighten their workload.
 - An effective way to find and vet candidates who might be an excellent fit for your company in the long-term.
 - Hiring process may be easier using temp agencies.



CHOOSING THE APPROPRIATE WORKER

- Drawbacks to Using Temps
 - Adjustment period can lead to more mistakes.
 - Negative effects on regular employees.
 - Increased risk of on-site accidents.
- Consider how quickly you can expect them to acclimate themselves into their new position.



CHOOSING THE APPROPRIATE WORKER

- Independent Contractors
 - Allow employers greater staffing flexibility.
 - Enables employers to fill short term or changing workplace needs without incurring employment liabilities, if properly classified.
 - Independent contractors are typically highly skilled in a particular area.
- Drawbacks – if misclassified, the business can run significant risks related to payroll, taxes, and benefits.



CHOOSING THE APPROPRIATE WORKER

- PEOs
 - PEOs typically offer a range of HR services relating to staffing and recruiting, employee benefits, compensation and retirement plans.
 - Usually used by small businesses who don't have HR expertise or system capabilities for functions such as payroll.
 - 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.
- PEO Drawbacks
 - Outside company influences on work culture;
 - Diminished value of internal HR department;
 - Lack of control and security over employee paperwork;
 - Loss of institutional knowledge;
 - Security issues with company systems; and
 - Resistance from employees.




CHOOSING THE APPROPRIATE WORKER

- **Outsourcing**

- As companies transitioned to remote work during COVID-19, companies considered the various outsourcing models that could be adopted.
- Terminating all employees in specific area of business to outsource job – e.g., accounting, HR, customer service.
- 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.
- Drawbacks – If you transfer employees to a separate entity, you must report the transfer to the UIA to avoid SUTA dumping claims.





**LEGAL CONSIDERATIONS
TO PROTECT THE
COMPANY WHEN HIRING A
NON-EMPLOYEE**

CONSEQUENCES FOR IMPROPERLY CLASSIFYING EMPLOYEES

- Tax - an employer may be liable for federal/state taxes that were required to be withheld for an improperly classified independent contractor. Penalties for failing to pay these taxes may also be imposed.
- Non-Employee Compensation
 - Can include sales commissions, awards, prizes and payments made for completing tasks.
 - Unlike with wages paid to employees, you're generally not required to withhold taxes on nonemployee compensation because contractors pay these taxes themselves.

CONSEQUENCES FOR IMPROPERLY CLASSIFYING EMPLOYEES

- Employee Benefit Obligations
 - Failure to provide benefits to misclassified employees can lead to lawsuits with claims for retroactive benefits.
- Workers' Compensation
 - Misclassification can result in employer held liable for on-the-job injuries outside the protections of the workers' compensation system.



CONSEQUENCES FOR IMPROPERLY CLASSIFYING EMPLOYEES

- **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.
- **Wage and Hour Liability**
 - Widespread use of misclassified independent contractors invites scrutiny; could lead to class-action suit for unpaid overtime or minimum wages violations under FLSA.
- **Vicarious Liability**
 - Employer could incur liability for wrongful acts of misclassified independent contractors.



RESPONSIBILITIES UNDER OSHA

- Who is responsible?
 - The extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case.
 - Staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers.
 - Ignorance of hazards is not an excuse.



RESPONSIBILITIES UNDER OSHA

- Who is responsible?
- Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies.
- The staffing agency has the duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.
- Host employers *must treat temporary workers like any other workers* in terms of training and safety and health protections.



EEOC COMPLIANCE

- Temporary workers are entitled to the same protections against sexual harassment as regular employees.



EEOC COMPLIANCE

- Reasonable accommodations must be given to all eligible part-time, full-time, regular, temporary, or probationary employees.
- 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.
 - In the case of joint employers, you and the staffing agency are each independently liable for providing reasonable accommodations.
- When an employee files a charge with the EEOC it is important to coordinate with the staffing company, PEO, or other entity involved



FAIR LABOR STANDARDS ACT (FLSA)

- A worker is entitled to minimum wage and overtime pay protections under FLSA when there is an employment relationship between the worker and the employer is covered under FLSA.
- Can apply to independent contractors who should really be considered employees because they do not meet the test for an independent contractor.
- 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 base salary requirements).

EXEMPT

BENEFITS PROVIDED TO NON-EMPLOYEE WORKERS

- Temp Workers may assert claim to benefits
 - 1,000 Hour Rule
 - 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.
 - Employer benefits plan language can exclude temporary employees from vacation, holiday pay, and/or other fringe benefits.
 - However, to make temp positions appealing, consider offering benefits.



UNEMPLOYMENT TAX CONSIDERATIONS AND EMPLOYER RESPONSIBILITIES

- Eligibility for unemployment benefits
 - Independent Contractors
 - Temporary Employees
 - Seasonal workers
 - PEOs
 - Outsourced workers



CONTRACTS

- Independent Contractor Agreement
- Work for Hire Agreement – consider if necessary.
- Temporary Worker
 - Typically, the worker will be retained by an agency and the agency will contract with the business to provide workers.
- PEO
 - Joint employer
 - The company that engages the PEO should have a separate contract with the PEO. This contract should establish the responsibilities and respective obligations of each party.



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QUESTIONS



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