



Lowenstein Sandler's Executive Compensation and Employee Benefits Podcast: Just Compensation

**Episode 49:
Tips for Engaging Temporary Workers**

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Megan Monson: Welcome to the Lowenstein Sandler podcast series. Before we begin, please take a moment to subscribe to our podcast series at Lowenstein.com/Podcasts, or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud or YouTube. Now let's take a listen.

Jessica Kriegsfeld: Welcome to the latest episode of *Just Compensation*. My name is Jessica Kriegsfeld, and I'm an associate in Lowenstein Sandler's Executive Compensation, Employment and Benefits Practice Group. I'm joined today by two partners in my group, Megan and Julie.

Megan Monson: Hi, Megan Monson. Happy to be here.

Julie Werner: Hi, this is Julie Werner. Happy to be here as well.

Jessica Kriegsfeld: Today's discussion will center on temporary workers, including why a company might engage temporary workers and the benefits and risks associated with such engagement. Specifically, this episode will note key items to review in connection with performing diligence in an M&A transaction on a company that utilizes temporary workers.

As always, this is not intended to be an exhaustive discussion, so we encourage you to consult with your legal counsel if your company utilizes temporary workers or anticipates an M&A transaction.

Julie, to begin, what are temporary workers and how would a company engage them?

Julie Werner: Temporary workers typically refers to workers who are not regular workers, even the phrase permanent, which sometimes people use. As far as I'm concerned, nobody is ever permanent, right? Typically, most employees are at will, but they are not people who are expected to have

an ongoing relationship with a company. They're not regular full-time permanent workers.

Temporary workers typically can be engaged either through a professional employer organization, typically referred to as a PEO, or through a staffing agency. My understanding today we're going to focus our discussion on temporary workers who are engaged through staffing agencies. Typically, workers are engaged through staffing agencies to assist on tasks or projects that wouldn't be fitting for a regular employee of the company. For example, temps are often engaged to cover for employees who are on leaves of absence like vacations or extended medical or parental leave, or to staff a special limited assignment or a project, or sometimes to staff seasonable workloads.

Companies, typically, if they're going to engage temporary workers through a staffing agency, they have a staffing agreement that will detail the terms of the arrangement. Typically, common terms that we see in these staffing agreements include the company might pay a premium to use the temp workers, so the staff agency maintains a profit. Sometimes there's a clause that the company can't employ the temporary workers directly for some period of time. In general, the agreement will outline the obligations of the staffing agency and the company overall.

Jessica Kriegsfeld: What are the benefits of using temporary workers instead of hiring regular employees?

Megan Monson: Yeah, so that's a great question, Jessica.

I mean, sometimes it may be for some of the reasons that Julie mentioned. If it's being used for if somebody on a leave of absence or parental leave or vacation, it's really for a very short period of time, it doesn't make sense to go through the typical onboarding process for that individual.

Using temporary workers also gives the company a try-it-before-you-buy-it opportunity, where the company can try out the temporary worker and if they think they are a good fit, hire them on an ongoing basis.

Using temporary workers can also save the company administrative costs. Since the company is using a staffing agency to employ the temporary worker, the staffing agency is the one responsible for handling payroll costs, covering them under workers' compensation, and being responsible for the employment taxes. The company can also have savings on the employee benefit side of things since temporary workers are typically not going to be eligible for employee benefit plans offered by the company such as health and welfare plans or retirement plans. Again,

there could be a lot of cost benefits to hiring temporary workers, especially if they're being used for a very limited purpose.

Jessica Kriegsfeld: What are the risks of engaging workers through a temporary staffing agency?

Julie Werner: From a legal standpoint, the thing that we think about, and we become concerned with is this concept of what's referred to as a joint employment relationship. Typically, temporary workers are not employees or independent contractors of the company, but rather of the staffing agency. That's one of the main reasons the company would engage a staffing agency in the first place.

But if the two entities, that is the company and the staffing agency, are essentially functioning as one employer or the worker is perceiving them to be that way, they could be considered one employer under the law. There's various tests that have been considered and obviously remains to be seen in this new administration as things are unfolding in real time here. But historically, when factors that courts will look at or the NLRB or various agencies as to whether or not there is a joint employer relationship, typically the factors that are being looked at are the interrelation of the operations, whether there's common ownership and financial control, whether there's common management, and the degree to which there might be centralized labor relations and personnel.

The problem is if the company and the staffing agency are treated as a joint employer, they both then will have responsibility for things like payroll, I9 compliance, workers' compensation, employment taxes, and benefits. Again, the whole reason why a company is using a staffing agency, as Megan described, you may lose that whole benefit if the companies are too intertwined and they might be considered a joint employer. You're in fact then losing all those benefits that Megan had explained, and also each of them could potentially be liable for things like harassment or discrimination, wrongful termination, things like that.

To prevent being treated as a joint employer, which again is a very fact-specific determination, it's important that companies should be clarifying very clearly the difference between the roles of the company and the staffing agency. And so, for example, it should be the staffing agency that is setting the temp's compensation and other terms of employment. They should be the ones who are responsible for disciplining, suspending, or terminating the workers. They should be the ones discussing the opportunities for full-time employment at the company.

In other words, it's important that the temp worker doesn't leave with the impression that they are working for the company. All of their communication should be going through the staffing agency. The staffing

agency should be the one that is communicating. Even any HR issues or things like that, it should be the staffing agency that's doing it.

And so therefore companies, when they're thinking of these things, really want to, and I hate to say it in this way, but almost be treating these temps very definitively as—I'm going to use the phrase second-class citizens, and it's not meant to be derogatory, but really to just be treated differently than a regular level employee. They should be trained separately. They should not be included in employee-only meetings or social functions. Again, it's not to be rude and try to intentionally exclude them from the holiday party, for example, but you don't want to leave them with the impression that they're actually an employee of the company when they're not.

You want them, the temp, to sign something acknowledging that they're not an employee of the company. They shouldn't be receiving an employee handbook from the company. The staffing agency should be the one that's handling that. Indemnification language should be clearly established in the staffing agreement where the staffing agency ideally is indemnifying the company. Consider giving them a different email address. These are things that in general companies really want to do to differentiate so the temp knows that they're not an employee of the company, that they are very definitively associated with the staffing agency instead.

Megan Monson:

In addition to the points that Julie made regarding the joint employment potential concerns, there are also some other risks for a company that's utilizing temporary workers.

For example, a company's general liability insurance policy may not protect the company from a temporary worker's acts or omissions. And so, companies who are frequently engaging temporary workers may consider purchasing additional insurance to address coverage of any temporary worker-related gaps in their existing plans. If they also elect to retain a temporary worker as a regular employee after that trial period, the company may have a conversion fee from the temporary agency. Again, just something to be mindful of if the end goal is to hire someone as a full-time employee.

The company may not do its typical hiring process with respect to temps, such as background checks and drug tests, onboarding, review of the company, and review and acknowledgement of the company's handbook. Again, part of that is due to the reasons that you want to keep the employment relation bifurcated. But as a result, you may not have visibility into some of those areas. And so, you be mindful of that as you're utilizing the temporary worker.

- Julie Werner:** Although I guess I would say the company could, with the staffing agreement, could contract with the staffing agency and require the staffing agency to do those things.
- Megan Monson:** Yeah, that's a great point, Julie. I think that's something the companies should be mindful of and include in their staffing agreements.
- Julie Werner:** Yeah, that the staffing agency agrees only to provide people who have been vetted or those kinds of things.
- Jessica Kriegsfeld:** When conducting diligence for an M&A transaction, what types of things do you look for with regard to temporary workers?
- Megan Monson:** It's always important to look at the underlying terms of the staffing agreement or arrangement to one, just make sure whatever they're doing complies with the agreement. But two, also reviewing it for the various things that Julie mentioned to understand whether it creates the indicia of a joint employer relationship.
- It's also important to understand any termination provisions in the staffing agreement, whether you're expecting to continue using the temporary workers or using the staffing arrangement in its entirety, just to be aware of any costs that may be associated with terminating the agreement early or terminating the temporary worker.
- Another consideration for the company is whether or not they want to assume the temporary staffing arrangements that are in place, and if not, whether any of those temporary workers will be prohibited from working for the company on a go-forward basis. Again, some companies try to look at it that way to try to game having to pay any sort of conversion fees by hiring somebody directly, so it's important to be aware of any sort of limitations on that.
- Another, I would say, critical piece is ensuring that the company that is working in utilizing the temporary workers has not inadvertently created a joint employer relationship. Again, considering all of those various facts and circumstances and the factors that Julie mentioned, because if there was an inadvertent creation of a co-employment relationship, there's a number of considerations and risks for the company in addition to potentially being liable for any sort of violations of applicable law. There's also risk for improper withholding of taxes, providing workers' compensation, and one of the big ones is offering proper health coverage under the Affordable Care Act. And so again, it really stresses the onerous of making sure that there has not been an inadvertent creation of a joint employer relationship.

Another area of potential concern that you'd want to look at is whether these people are properly classified and treated as employees versus independent contractors.

Jessica Kriegsfeld: We talked about potential risks associated with a joint employment relationship. What type of liability would the company have if the temporary staffing agency did not properly classify workers as employees versus independent contractors?

Julie Werner: Jessica, if there were a joint employment relationship and workers were misclassified as independent contractors, for example, the company could potentially be liable for the same penalties as the temporary staffing agency, including the same penalties that we mentioned before, like failing to have proper wage withholding and failing to provide health insurance, things like that.

Another issue is if the workers were classified as independent contractors, so independent contractors, at least as of now, don't have to provide authorization. They don't have to provide documentation that they're authorized to work in the United States. And so, if a company were engaged in a number of independent contractors who should have been classified as employees, the company is running the risk that they're not in compliance with the immigration laws, which is obviously a hot topic right now.

Those are definitely things to be wary of.

Jessica Kriegsfeld: Are there any state-specific laws to be aware of with respect to classifying workers?

Julie Werner: At least New Jersey and Illinois so far are two states that have laws that more specifically regulate what companies can do regarding temporary workers and their rights. Both states, New Jersey and Illinois, require that temporary workers be paid essentially equal pay to the regular employees for roles if those require substantially similar skill, effort, and responsibility.

Part of the issue then becomes if you have a regular employee or you're paying somebody through a staffing agency and you're also paying that staffing agency an additional fee, it potentially becomes even more expensive for the company if they are required to be paying the temps and making sure that they are being paid essentially comparable pay to the regular-level employees.

In Illinois, that law only applies after the temporary worker has worked there for 90 days, and employment what's referred to of a clerical and professional nature is excluded. New Jersey has pretty substantial

penalties, and so companies in New Jersey that do not comply are at risk of penalties ranging from \$500 to \$5,000. In Illinois, the penalties range from \$100 to \$18,000 for the first employment audit and then \$250 to \$7,500 after that.

In addition to New Jersey and Illinois, other states like California, Massachusetts, and Washington State also have temporary worker bill of rights with transparency and workplace safety provisions. They don't have pay equity provisions right now like New Jersey and Illinois, but it definitely seems like an area. Often what we see is when a few states start to regulate, it prompts other states to start considering it as well. Even though this may not or is unlikely to happen at the federal level, I do expect in general that a lot of the states will be picking up on these areas if the federal government is not doing so.

Jessica Kriegsfeld: As you heard today, there are many considerations for a company that uses temporary workers. Companies should be careful to review any agreements with staffing agencies and to periodically review the company's relationship with temporary workers to ensure that the company is properly classifying workers and the nature of the relationship does not result in an unintended co-employment relationship.

This episode is intended to be a high-level overview but is by no means an exhaustive discussion. Thanks for joining us today. We look forward to having you back for our next episode of *Just Compensation*.

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