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Shattering the Myth of Co-employment

Presented by Randstad



The increased use of contingent employees in today's booming economy has created a measure of increased anxiety on the part of many companies. That anxiety has been caused by the perceived threat of "co-employment" that accompanies the use of a flexible workforce. This perceived threat of co-employment has caused many companies to forego the clear economic advantages that derive from using flexible workers.

Those companies that sacrifice their own economic advantages and flexibility out of co-employment concerns are responding to a threat that is largely mythical. While co-employment is a hot topic in employment circles, it is often a misunderstood concept. More importantly, the perceived risk from co-employment is not only inflated in many respects, it is also almost entirely controllable. The following bullet points attempt to separate the facts about co-employment[1] from the fictions.

Myth #1: If I use flexible workers, I'm opening myself up to a lawsuit. The concept of co-employment does not increase the risk of lawsuits any more than hiring additional employees increases that risk. In our society, access to the courts is a near absolute which means that anyone can sue anyone else for any reason. For corporations, avoiding lawsuits is close to impossible. The more important strategy is to avoid losing lawsuits. No company has ever lost a lawsuit solely because it was found to be a co-employer.

The key to winning lawsuits is to ensure that appropriate decision-making occurs regarding all workers. In any working relationship, e.g. employee, independent contractor, temporary worker, it is both required and good business to avoid decisions based upon illegal criteria. Even if a company is deemed to be a co-employer, if its decisions are demonstrably not illegal, then any lawsuits based on those decisions will likely not be meritorious.

Myth #2: If I use flexible workers, I automatically become a co-employer. Co-employment typically does not exist unless a company exercises control and supervision over the flexible worker, which means control over the worker's hours, tasks, etc. Where the client company delegates the supervision and control over that worker to the staffing company, it is unlikely that co-employment will be found to exist with respect to that worker. Even if co-employment is found to exist, where the company has not made the decision which the worker claims is discriminatory, it cannot be found to have violated any anti-discrimination statute. The bottom line is that the use of flexible workers through a staffing company that steps in as the supervisor of its flexible employees and acts as a buffer for its client is an effective way to control the risks of co-employment.

Myth #3: If I'm declared to be a co-employer, I automatically have damages. Whether or not co-employment exist, the staffing company and the client company should work together to ensure that all decisions regarding flexible workers are based upon legitimate and appropriate criteria. If the decisions are based upon legitimate and appropriate criteria, that is, are not illegal, then no damages will be owed. Co-employment by itself does not create any liability for damages on client companies.

Myth #4: If I only keep flexible workers for a limited time, (900, 1000, 1250, 1800 hours), I'll avoid co-employment issues. The number of hours worked in a single year, or within a certain time period, is a factor that might, under the right circumstances, support a conclusion that co-employment exists. If, however, the right to control and supervise the worker remains with the staffing company, rather than the client company, then co-employment does not exist and the number of hours worked by flexible workers in a given time period is irrelevant.

Myth 5: What happened to Microsoft can happen to me. The key to avoiding the problems encountered by Microsoft is recognizing the need to be proactive with respect to co-employment risks. There are several things that Microsoft could have done (some or which are discussed later) that would have allowed that company to avoid its well-publicized liability. A very important thing that Microsoft should have done is review its employee benefit plans to ensure that flexible workers assigned to Microsoft would not be eligible for benefits under the circumstances then in place. Had Microsoft (1) recognized how it was using flexible workers (or how it would use such workers) and (2) reviewed its benefit plans and made necessary changes to those plans, the result would probably have been different.

Randstad endeavors to ensure that its client avoid the risks associated with co-employment. In that regard, Randstad does the following:

- Aggressively establishes and maintains the employer relationship with its staffing employees and acts to the fullest extent possible in the supervisory role with respect to those staffing employees;
- Establishes on-site branch offices to further solidify the control and supervision of staffing employees, thereby insulating clients from those functions;
- Advises clients on co-employment risks and pitfalls, including training of client personnel;
- Assumes workers' compensation liability for all Randstad employees injured during the course of their assignment;
- Offers a benefits program that is far above the industry average and equivalent to many traditional "full-time" programs. These benefits help reinforce that Randstad is the employer and that our staffing employees should look to us for employment opportunities and associated amenities;
- Stresses to our staffing employees that they are Randstad employees and reinforces that position through materials and activities;
- Maintains that it is the true employer in any governmental investigation. Randstad has never claimed otherwise in any forum.
- Maintains appropriate records to satisfy IRS inquiries and allow our clients to rely upon our record-keeping.

[1] In its basic definition, co-employment means that an individual is employed simultaneously by more than one employer. That means that all of the laws governing employment relationships apply to both co-employers with respect to that employee. Co-employment by itself creates no more obligations than those that exist toward individuals employed by only one company.