A new way to navigate co-employment.
The U.S. contingent workforce: strength in numbers.

The U.S. job market consists of 939,000 accounting professionals; 812,000 people are employed by the publishing industry; another 1.2 million workers in the real estate sector; and just over 1 million professionals work in machinery manufacturing. All of these are examples of sizable, high impact industries within our economy.

However, none of these sectors matches the size and scale of the contingent workforce, a portion of the U.S. job market that currently employs almost 1.8 million professionals. As a leading indicator of the economy, the contingent workforce will be the first to expand as the economic picture gets brighter.

As companies continue to rely on contingent staff as an important part of their workforce strategy, employers need to be mindful of the intricacies that relate to using contingent labor. While many of the well-known aspects of using contingent staff — flexibility, lower risk, and cost effectiveness — are clearly understood, there are other aspects that have historically lacked clarity and resulted in some less-than-positive outcomes for employers. Perhaps the most significant of these aspects is co-employment.
What is co-employment?

Co-employment refers to a circumstance in which a worker has simultaneous employment relationships with two or more employers for one work situation. This dynamic typically comes into question with contingent workers as the staffing provider and on-site company both assume different portions of the responsibility for an individual’s employment situation.

Co-employment lessons learned from Microsoft.

Understanding why co-employment has become a hot topic for HR and legal professionals requires opening a window into one organization in particular: Microsoft. In the early 90s, the company was involved in a class action lawsuit — Vizcaino v. Microsoft Corp. — in which a group of contingent, contract and independent workers sued the company for access to employee benefits. Upon investigation by the courts, they eventually ruled in favor of the workers and expanded the initial group of plaintiffs from a few hundred to thousands of former staffers resulting in millions of dollars of fees. Although this ruling doesn’t apply to all employers who rely heavily on contingent and contract staff, it did bring to light many important missteps that companies need to avoid in order to stay in the clear around lawsuits and penalties.

One such misstep, which Microsoft was responsible for, was treating independent contractors as though they were part of the company’s permanent colleague base. By providing this same treatment, but not access to benefits, this became an unfair balance wavering against Microsoft’s case. Also, and almost more important, Microsoft did not clearly exclude contingent, contract or independent laborers from their employee stock purchase program. The exact wording of their program was written such that all “common law employees” would be eligible, excluding only those workers who put in less than five months a year. This generalization in their employee stock purchase program benefits package opened the window for the law to include the company’s contingent, contract and independent contractors.

What can employers do to protect themselves?

The Microsoft case caught the attention of employers across the United States, all of which were very concerned about learning from Microsoft’s mistakes and protecting themselves. One popular stance taken by companies in reaction to the ruling was to enlist assignment limits within their organizations to limit the amount of time a contingent worker could be with the company. This approach limits a contingent employee’s ability to make any claims for benefits as a result of a lack of any long-term employment within their contingent, contract or independent contractors. But, is this the right, strategic response or just a knee-jerk reaction?

The reality is that mandating assignment limits is not an effective way to avoid co-employment. The terms of the relationship between the organization and the contingent worker is the more important indicator in this scenario — not the amount of time the two parties have been working together. Since the Microsoft ruling, much has been learned about how to prevent penalties from co-employment.
Partnering with a co-employment expert.

Co-employment is clearly not something employers can afford to get wrong. While most staffing providers are experts on the co-employment subject, finding the right business partner to align with your contingent, contract and independent labor workers is not something to enter into lightly.

Here are some things to consider to help you avoid co-employment pitfalls:

Establish clear boundaries.
In a co-employment situation, in order for the staffing provider to be positioned as the primary employer responsible for the worker, there must be clearly outlined roles for each party. All employer responsibilities such as recruiting, pay negotiation, insurance coverage, HR issues, on boarding and termination must be handled solely by the staffing provider with the on-site company only taking responsibility for direction and supervision of day-to-day responsibilities. When either party goes beyond their role, it becomes unclear which party is the primary employer and will make determining employment more challenging. Employers must also be sure that contingent workers are identified differently in their organizations to further illustrate their role versus permanent staff at the organization — issuing separate ID badges, having their email addresses look different, etc. further differentiates the two parties and their place within the organization.

Create a clear and differentiated benefits plan.
A major issue in Microsoft’s case was their usage of the phrase “common law employees” in their employee stock purchase program, which only separated employees by length of service. This lack of clarity is what really opened the organization up for scrutiny and penalty. As organizations put together policies around their benefit offerings, it is important to be as detailed as possible outlining exactly which type of employees are eligible for benefits. Clearly detail whether or not contingent, contract and independent workers fall within the plans remit. This sort of clarity can help you avoid questions and litigation in the future. In addition, another effective strategy is having contingent workers sign a waiver that they will not claim access to benefits from their assignment company at any point.

Stay current.
Knowing the latest in labor laws and government regulations can be a tough task while keeping up with your contingent workers. It is critical to select a staffing provider that can offer expertise and guidance around co-employment and other labor laws that can affect your business — both positively and negatively — to help your organization mitigate risk.
In the current recession, employees who have survived recent rounds of mass layoffs have an increased workload — the demand to do “more with less” is more prevalent than ever. It is not uncommon for organizations that have a growing workload with a shrinking amount of people to “slip” and end up making a contractor feel like an employee. The delineation becomes blurry since contractors can begin to take on critical roles inside an organization. Has your organization crossed that line? How can you be sure?

As you engage with contingent, contract and independent workers, consider utilizing a staffing provider to minimize co-employment risk. Managing the co-employment framework is what these organizations do day-in and day-out, so they have a unique ability to provide the expertise, guidance and execution that will enable your company to avoid co-employment pitfalls.

Over the years since the Microsoft case, there has been much debate around the dynamics and implications of co-employment. At the same time, organizations have learned how to successfully engage and define their relationship with contingent, contract and independent labor workers. With the right guidance, organizations can avoid issues with co-employment simply by applying the appropriate processes, policies and programs. In the end, what is abundantly clear, especially in tough economic times, is that contingent, contract and independent labor workers are an essential part of any strategic organization’s workforce strategy. The key is to ensure you have the right strategy or program in place for managing these types of workers and the result is effective and cost-efficient.

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