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Reducing Risks Associated With Temporary Staffing Agencies

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Staffing agencies may provide the solution to a company's short-term staffing needs. However, clients should not assume they can avoid liability for workplace issues by using a staffing agency; indeed, in some cases, a client is exposed to liability as a result of using a staffing agency. Engaging a staffing agency provides no protection against employment liability and, in some circumstances, the temporary worker may seek to hold the client liable as if it had hired the temporary worker directly, under a "joint employer" theory.

Joint employer liability arises in a number of contexts, including wage and hour, harassment, discrimination, and retaliation. Tests for determining joint employment vary by statute and jurisdiction and are often in flux. Various federal agencies use differing tests, and even those are in play.

For example, the Trump Administration published its fall regulatory agenda indicating that, among other things, it intends to update the Department of Labor's policy on when staffing agencies and their clients, and franchisors and their franchisees, share legal responsibility for wage and hour violations with one another. Further, the National Labor Relations Board has published a Notice of Proposed Rulemaking that would narrow the existing joint-employer standard under the National Labor

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Relations Act. Under the Proposed Rule, "an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." Comments regarding the NLRB's proposed rule must be received by the Board on or before November 13, 2018.

State laws vary considerably as well, adding to the complexity for multi-state employers. For example, in New York, courts analyzing whether a joint employer relationship exists for purposes of *New York Human Rights Laws* have focused on whether the putative employer has "immediate control" over the putative employee, in this case—the temporary worker.

In California *in the wage and hour context*, the test for who is an "employer" is broad, and includes one who "employs or exercises control over the wages, hours, or working conditions of any person." That definition reaches situations in which multiple entities control different aspects of the employment relationship, such as when one entity, which hires and pays workers, places them with other entities that supervise the work. The language in California's wage orders was "specifically intended to include both temporary employment agencies and employers who contract with such agencies to obtain employees within the definition of 'employer,'' the California Supreme Court said. Other cases have clarified, though, that merely providing payroll services may not be enough to create joint employer liability. The California Supreme Court's recent decision in *Dynamex* caused tremors when it broadened the test for determining who is an employee in the independent contractor context (the "ABC" test). Employers and staffing agencies feared *Dynamex*'s expansive test might apply *in the joint-employer context*. However, at least one California Court of Appeals found that the *Dynamex* court did not intend "for the 'ABC' test

to be applied in joint employment cases." Although that Court did analyze the situation under *Dynamex*'s ABC test "out of an abundance of caution," it concluded that the test was not met. California businesses are hopeful that this employer-friendly interpretation sticks, but clients of staffing agencies must remain cognizant of this issue. Furthermore, even in a situation where the client is not deemed to be the "joint employer" of the temporary worker, California Law (Labor Code section 2810.3) holds certain companies (of 25 or more employees) jointly liable with staffing agencies for a staffing agency's violations of wage and hour laws or for its failure to maintain workers' compensation insurance. This means that a client could be liable to a temporary worker for his or her wages, even if the client fulfilled its obligation by paying the staffing agency for that temporary worker's wages.

Clients who want to use staffing agencies should consider taking the following steps to limit their risk:

1. Review the Contracts. The contract between the agency and the client should provide that the agency will defend and indemnify the client for losses, penalties and attorney's fees in connection with the staffing agency's employees, including wage-related claims. Further, the contracts should contain representations and warranties by the staffing agency assuring the client that agency will completely perform its duties to its employees, including the individuals the agency sends to the client's premises, and comply with all applicable laws in relation to those employees.

2. Exercise Due Diligence. Clients should research staffing agencies before engaging their services, including the location of their business operations, the number of clients they service, and how long they have been in business. Clients should also request references, and speak to current staffing agency clients. It also may be prudent to conduct a

litigation search to determine whether the staffing agency has a history of litigation.

3. Require Proof of Insurance. Clients should require proof of workers' compensation insurance coverage before engaging a staffing agency, and require verification on frequent intervals. Ideally, the staffing agency will maintain Employment Practices Liability Insurance (EPLI), naming the client as an additional insured.

While the client may want to exercise some oversight of the staffing agency's compliance with applicable law, such involvement is a double-edged sword. By becoming more involved in the day-to-day practices, the client makes it more likely that it will be deemed a "joint employer" of the temporary workers retained through the agency.

Staffing agencies must take caution, as well. Agencies are often named as defendants in harassment and discrimination lawsuits for alleged wrongful conduct that occurred on the client's premises. Staffing agencies, among other things, should ensure that their clients have compliant anti-discrimination and harassment policies and practices in place, and act promptly to address and correct any improper activity of which agencies are made aware.

Akerman attorneys are available to provide guidance to employers and staffing agencies wishing to reduce legal exposure.