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From Start to Finish:
What Should Be In Your
Temporary Staffing Agreement?

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Roadmap

The Foundation:
The What and Why of Temporary Staffing Agreements

The "Control" Factor:
The Principles and Risks of Joint Employment

The Agreement:
The Provisions and Language from
Start to Finish

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Temporary Staffing Agreements

- An agreement between a company seeking to engage short-term workers (client company) and a company staffing temporary workers (staffing agency)

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Why temporary employees?

- Employers use temporary workers for several reasons, such as:
 - Covering employee absences (i.e. medical leave or vacations)
 - Staffing seasonal workloads
 - Staffing a special assignment or project
 - Perhaps most commonly, filling a professional skills shortage in the company

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Why temporary employees?

- Around **three million** temporary and contract employees work for America's staffing companies during an average week.
- During the course of a year, America's staffing companies hire **16 million** temporary and contract employees.

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Why temporary employees?

Nearly a quarter of hospitals are reporting a critical staff shortage as Omicron drives a rise in Covid-19 cases

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Labour shortages

Staffing shortages in America are a glimpse into its future

Even as the pandemic ebbs, the pool of potential workers may be permanently smaller than once assumed

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What kinds of temporary staffing solutions are available?

- Professional Employment Organizations (PEOs)
- Employee leasing arrangements
- Referral agencies
- Third-party payroll companies
- Third party staffing agencies

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Benefits v. Liabilities

- Cost Savings
- Flexibility
- Quick Access



- Agency fees
- Potential risks
- Employment liability

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Joint Employment Risks

- Joint employment means that more than one entity is considered a workers' employer
- Joint employment imposes legal liability for both entities, even where errors are made by just one company

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Joint Employment Risks

- How is joint employment determined?
 - Tests for determining joint employment vary by jurisdiction and by statute
 - Different federal and state agencies use different joint employer tests
- Generally, control over the employee is used as a guide post for determining "employer status"

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Joint Employment Risks

- For example, 2020 DOL Rule under FLSA (which has since been rescinded) focused on whether the purported employer:
 - had the power to hire and fire employees
 - supervised and controlled employee's work schedules or conditions of employment
 - determined the rate and method of payment; and
 - maintained employment records

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Joint Employment Risks

- For client companies, best practices to avoiding joint employment liability:
 - Do not set terms or conditions of employment (including compensation)
 - Do not discipline, suspend, or terminate temporary workers
 - Distinguish temporary workers from regular workers
 - Written acknowledgment from temporary worker

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The Agreement

- Division of duties
- Affordable Care Act ("ACA") health coverage
- Fees and payments
- Employment policies
- Confidentiality and Intellectual Property
- Insurance
- Indemnification
- Standard contract provisions

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Division of Duties

- Hiring processes (recruiting, screening, interviewing)
- Assignment of duties
- Job trainings
- Ensure workplace safety
- Supervise temporary employees
- Pay wages and taxes (workers' compensation and unemployment insurance)
- Performance management, discipline, and termination

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Division of Duties

Staffing Agency

- Hiring process
 - Recruiting, interviewing, and assigning employees
- Screenings
 - Work authorization (Form I-9 processes)
 - Health screens or drug testing
 - Industry-specific qualifications or licenses

Client Company

- Assignment of Duties
 - Communicating the work that the temporary workers should be performing
 - Be cautious with assigning supervisory duties

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Division of Duties

Staffing Agency

- Job Training
 - Required trainings under federal, state, or local laws

Client Company

- Job Training
 - Job-specific or location-specific trainings

Ultimately, both the staffing agency and the client company share some responsibility for ensuring workers receive appropriate safety training

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Division of Duties

Staffing Agency

- Pay wages
- Pay, withhold, and transmit taxes
 - Providing unemployment insurance and workers' compensation coverage
 - Sharing proof of workers compensation or other general liability insurance, if required

Client Company

- Workplace Safety
 - Ensuring proper safeguards and control of premises
 - E.g., operation of certain vehicles or equipment
 - Providing safe worksites as directed by OSHA

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Division of Duties

Staffing Agency

- Supervise temporary workers
 - Responsible for overall employment relationship
 - Should instigate any performance management, disciplinary, or termination actions

Client Company

- Supervise temporary workers
 - Responsible for day-to-day management and operations?
 - Communicate through the staffing agency?

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Division of Duties

Staffing Agency

- Performance management
- Disciplinary action
- Suspension or termination

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ACA Health Coverage

- Health Coverage
 - Under the ACA's large employer mandate, an "applicable large employer" is required to offer health care coverage to full-time employees and dependents
 - Common law employer of a temporary worker is responsible for coverage



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ACA Health Coverage

- Common Law Employer
 - No bright-line test
 - IRS established a 20-factor "right to control" test
 - Notably, the contract will not govern
 - Essentially, which employer controls the temporary employee's actions?

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ACA Health Coverage

- "Coverage on behalf of another entity"
 - Staffing agency may still offer health coverage on behalf the client company, even if the staffing agency is not the common law employer
 - Requires a proper enhanced fee
 - Fee for an employee enrolled in staffing agency's health plan that is higher than the fee paid for the same employee if that employee did not enroll in health coverage under the plan

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Fees and Payments

- Staffing Agency Fee
- Conversion Fee
- Process for Worker Payments
 - Tracking hours worked?
 - Invoicing client company for services?
 - Approving time sheets?
 - Reporting payroll errors?
 - Overtime pay for FLSA non-exempt workers?

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Employment Policies

- Generally, temporary workers will be bound by the staffing agency's employment policies
- Client company should make staffing agency and temporary workers aware of any applicable workplace policies or expectations

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Confidentiality & IP Protection

- If temporary workers have access to confidential information or create intellectual property, a client company may request protection provisions or require employees to separately sign an agreement

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Insurance

- Workers' Compensation
- General Liability Insurance
- Consider requesting:
 - Proof of insurance
 - Advance notice if policy is cancelled, reduced, or allowed to expire

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Indemnification and Limitation of Liability

- Language is key
 - Whose acts are being indemnified?
 - Company, employees, officers, agents, and/or third-parties?
 - What acts are being indemnified?
 - "any and all"
 - "alleged"
 - What nexus?
 - "arising solely out of"
 - "in connection with"

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Standard Contract Provisions

- Merger and integration clause
- Governing law, jurisdiction, and venue clauses
- Arbitration clause
- Conditions for termination of agreement

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Questions?

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