



Part I: Pre-Employment Exposures

Introduction

He was on time for his appointment. He was immaculately dressed and carried himself with an air of sophistication and confidence. His resume read like a who's who in financial circles. He had an MBA from a large East Coast college, and had personal accomplishments worthy of his stature.

"Unfortunately, everything about him was a lie. The college had never heard of him and previous employers did not even know his name," said Bonnie Cox, Vice President of Select Personnel Services in Santa Barbara. "This candidate was savvy enough to do a lot of damage to an unsuspecting employer, had he been able to get a job offer."

"Our experience has been that when companies hire, they just don't know what they are getting until it is too late," noted Cox. "We were almost fooled by this candidate as well . but we have a policy of thoroughly checking references and that's how we found him out!" Many companies, however, are so desperate for people that they either don't take the time to investigate their candidates, or they hire them with the hopes that "somehow, it'll work out . and if it doesn't we'll just let them go." Unfortunately, undoing an employment offer can be fraught with potential legal problems. Cox went on to say, "that is why we offer the services we do. We tell our clients, "let us recruit and hire your staff . try them out for ninety days . if you like them and they perform well, then hire them . bur if they don't, then let us end the assignment and protect you from a potential wrongful termination suit."

"This type of protection is just one of the many advantages of being involved in a co-employment relationship," said Cox. "Many employers are cautious about using contingent workers - but we have found that we can give our clients more protections than they would have if they hire these candidates directly."

The legal concept is called "co-employment." Technically, co-employment is defined as a legal relationship between two or more employers whereby each has actual or potential legal rights and duties with respect to the same employee or group of employees. "In terms of working with us," Cox said, "Select assumes the role of the primary or general employer and the customer assumes the role of secondary or utilizer employer. Being in the secondary employer role offers substantially more legal protection than being in the primary employer role, and we are excited about showing our customers a way to reduce their exposure by using us."

Companies have potential legal exposure throughout the entire employment relationship. Those exposures can be grouped into three specific areas, as noted below.

- Pre-employment
- During employment
- Post-employment

Pre-Employment Exposures

Recruiting, Screening & Hiring

During the recruiting and screening process, employers have an obligation to comply with federal and state equal opportunity laws. "This would include everything from writing recruitment ads to going through the entire interview and hiring process," said Cox. Under the EEOC provisions, employers may not discriminate in employment, make employment related decisions, or ask pre-employment questions based on sex, race, color, religion, or national origin. In California, these protected categories also include sex, gender, race, age, color, religion, ancestry, national origin, pregnancy, childbirth, disability, marital status, sexual orientation, medical condition, veteran status, registered domestic partner status, or genetic characteristics. Cox added, "obviously, failure to comply could lead to a variety of discrimination suits." As a result, employers must have a written EEO policy and a published process by which employees can complain, or be exposed to legal remedies set forth under Title VII.

Other areas of exposure during the pre-employment process include Affirmative Action requirements for federal contractors and federally-assisted construction contractors and subcontractors, with 50 or more employees and \$10,000 or more in government contracts. According to Cox, "Failure to comply can result in sanctions against the employer, as well as loss of contracts, being debarred from receiving future government contracts, and giving relief in terms of back pay, job offers and seniority credit."



There are also state and federal equal pay acts that prohibit employers from paying different wages for equal work based on the individual's sex. Employers must comply with the Fair Labor Standards Act, California Labor Code, and IWC wage orders by paying all wages and taxes. Cox also noted that "individuals over 40 years of age are also protected against discrimination in employment simply because of their age."

When companies contract to use temporary employees, however, the service becomes the primary employer, and the company becomes the secondary employer. Obviously, this can provide the company with many additional protections during the pre-employment process. For example, the primary employer (service) then assumes responsibility for all the recruiting, interviewing, screening and hiring procedures. They also conduct the reference checks, background investigations, and determine all employment eligibility issues. If there is any resulting legal liability in these areas it is assumed by the service - and companies have shielded themselves from most of the liability by moving in the secondary-employer's role. (Note: Secondary employers can be held responsible for negligence, i.e., intentionally or recklessly discriminating against an employee.)

Immigration

After a job offer has been made, all employers are required to examine documents and ensure that the individual has the right-to-work in the US. "The hardest part of complying with this law is the gray line between making sure individuals have valid "right-to-work" documents while not discriminating because of national origin or citizenship status. In other words, employers may not refuse to honor documents which reasonably appear to be genuine and relate to the individual," noted Cox. She went on to say that, "employers are not required to be document experts, but they are also expected not to hire anyone who does not have valid documentation."

Furthermore, employers are required to track expiration dates of USCIS (US Citizenship and Immigration Services) documents. Finally, employers are required to maintain I-9 verification forms for three years after date of hire, or one year after dated of termination, whichever is longer. Cox said, "Failure to have valid verification forms can expose employers to fines and penalties ranging from a few hundred dollars to the thousands."

Again, when companies contract to use temporary or temp-to-hire employees, the service becomes the primary employer, and the company becomes the secondary employer. In terms of immigration paperwork, secondary-employer companies have no responsibility to determine right-to-work status, giving them additional protection from immigration-related litigation.

Summary

"In the past, many employers did not understand the benefits of the co-employment relationship," said Cox. "However, we have been able to show many of our clients that there are substantial advantages to using a service for this critical part of the employment process by shifting many of the responsibilities to the primary employer (service). "We have found our clients open and receptive to the concept of co-employment, since many of them have the sophistication and business acumen to appreciate the benefits it can offer."

Part II: Exposures During Employment

Discrimination Issues

Employers have a legal duty to provide a working environment free of discrimination. According to Cox, this can include anything from unequal treatment to unequal impact, when based on a person's age, race, sex, national origin, religion, marital status, pregnancy, disability, etc.

"Many employers have an especially difficult time with pregnancy-related leaves," said Cox. Since pregnancy is a disability, it is protected under both federal and state laws. For example, a disabled pregnant employee is immediately covered under CA's Pregnancy Disability Leave (PDL), which entitles her to an unpaid, job protected leave of up to four months. If she has been with the company for more than a year, she may also be entitled to a 12-week leave under the Federal Family & Medical Leave Act (FMLA). Although this is not an additional leave (it runs concurrent with PDL), there are additional benefits under FMLA. In CA, qualified new parents may take up to 12 weeks of "bonding time" leave under CA Family Rights Act (CFRA) to care for their newborn. (FMLA and CFRA applies only to employers with more than 50 employees in a 75-mile radius.)

Under all of these laws, employers may not discriminate against pregnant employees as it relates to leaves or medical benefits. "Furthermore, upon return to work, employees are entitled to be reinstated to their former job, or given a substantially similar job within the same distance, with the same benefits and pay. "We can



offer some relief to companies in several areas," noted Cox. "First, if the employee is a temporary, Select assumes responsibility for all leaves, notices, tracking, and record keeping. Secondly, when the employee is ready to return to work, we work with the client to see if there is a way for them to be reinstated to their former position." If there are legitimate business reasons why the position is no longer available, then Select will find a similar job at the same rate of pay. "This has been a tremendous help to our clients," noted Cox, "primarily because the record keeping and reinstatement provisions alone can be very burdensome."

Other potential areas of discrimination include ADA (Americans with Disabilities Act), Equal Pay Act, Age Discrimination in Employment Act (ADEA), etc. Although the duty to "reasonably accommodate" can fall with both the primary employer and the secondary employer, Select staff will work with our clients to find a solution. In addition, "Select's temp-to-hire program allows for a 90-working-day review after which the client can hire our employee." According to Cox, "this try-before-you-buy program is a very efficient and cost-effective way to recruit and hire staff."

Compensation

Primary employers also have a legal duty to comply with several wage-related state and federal statutes: Fair Labor Standards Act, California Labor Code and applicable IWC wage orders, as well as the obligation to pay and report all wages, and pay all associated taxes.

"This is another area where Select can offer some protection," said Cox. For example, by using a temporary service as the "primary employer," the client moves to the role of secondary employer, shielding them from many of legal requirements associated with compensation.

In other words, the primary employer (the staffing service), assumes full responsibility for all wages and taxes, all compensation decisions such as rates of pay and shifts, all compensation record keeping, all Labor claims for past wages, and any and all resulting fines or penalties for late payments. The secondary employer (the client) is shielded from all of these liabilities - unless, of course, the staffing service defaults on wages or taxes, then the client becomes liable. "That's why it is critical for companies to use reputable staffing services that are financially sound," noted Cox.

Health & Safety

Another critical area of potential liability is workplace safety. The laws and statutes that fall under the general safety area include: Chemical Hazards ("Right to Know Act"); Illness & Injury Prevention Program; Serious & Concealed Dangers ("Be a Manager-Go to Jail"); and other OSHA-related programs.

With regard to safety, all companies with more than five employees are required to develop, maintain, and operate a written Injury & Illness Prevention Program (IIPP). "Select offers a complimentary generic IIPP on disk to all of our preferred clients," noted Cox. "We'll even come out to their site and help them implement the Plan through additional instruction and training in the areas of workplace safety, forklift training and certification, hazardous materials training, and first aid," said Cox. Select also provides personal protective equipment, such as hard hats, gloves, safety goggles, etc. to their workers. "The only area where we cannot offer protection to our clients is in the area of OSHA violations," said Cox. In other words, the secondary employer remains liable for violations of OSHA regulations, such as serious and concealed dangers and/or hazardous substances in the workplace.

Companies are required to not only provide a safe work environment, but carry Workers' Compensation insurance for all employees as well. In addition, employers are required to report and manage all work-related injury claims - but may not discriminate against an injured worker in any way.

"This is another area where we can help out clients," said Cox. By assuming the primary employer role, Select assumes responsibility for all work-related injuries. "We personally pick up our injured workers, take them to the doctor, pay for their medical care, and make sure they have everything they need to make a speedy recovery," noted Cox. "We also make every effort to modify their job duties so they can continue working, either at the client company or on another assignment. We have found that individuals get well faster when they have an employer who cares about them, finds them modified work to do so they continue to earn money, and helps them in the recovery process." Cox also said that, "Select can always find a job for an employee to do while they are going through the healing process. We're proud of that!"

When using a staffing service as the primary employer, client companies avoid most of the reporting side of the equation. For example, Select assumes responsibility for: filing employer's report of injury or illness; reporting serious injuries to OSHA within 8 hours of the incident; investigating and obtaining witness statements for all injuries; coordinating all medical providers and doctor visits; administering all WC claims processing or litigation; responding to all potential 132(a) discrimination claims' and paying any resulting



increase in the "experience mod" rating for workers' compensation insurance. "The good news is, however, that our workers' compensation program is the sole and exclusive remedy for all work-related claims," said Cox, "except in instances where an employee's injury or death is caused by willful negligence on the part of the secondary employer." However, for companies who do not use staffing services, the firm automatically assumes one hundred percent of all liabilities. "At least we can offer some relief, and reduce that percentage considerably," noted Cox.

Sexual & Other Harassment

"We've really noticed that sexual harassment claims are on the rise," said Cox. Even EEOC statistics show no slowing in the number of claims they receive for work place related harassment. Why is this? According to Cox, "harassment claims are particularly problematic because they are based on perception - and what I may consider unwelcome or offensive may not be to the next person. So, trying to determine where that "reasonable person" standard of offensiveness point falls is ambiguous and difficult," said Cox.

As most employers know, they have a legal duty to provide a working environment that is free of verbal, physical, and visual sexual harassment. Employers are also required to provide employees with verbal and written information about discrimination and harassment, including how and where to report violations. Obviously, employees who bring charges of discrimination or harassment are protected against retaliation by both Title VII of the Civil Rights Act and CA Government Code Sections.

"We take responsibility for conducting investigations, with the cooperation of our client companies, of course, as well as taking disciplinary action as appropriate with our employees. We also respond to all formal complaints from the DFEH or EEOC, and ensure against retaliation of all claimants," said Cox. "Where we can play a positive role, however, is in the resolution of harassment-related charges." According to Cox, "employees want to be heard and have their complaints taken seriously. We do that. We take the time to hear their complaint, and then try to find a positive, collaborative resolution to the problem. Because of the extra preventative care we take up front, we have very few claims that actually materialize in a formal complaint." Again, where secondary (client) employers have been negligent, or do not take immediate action, they can have some legal exposure, against which the primary employer can offer no protection. However, "we've also found the most effective way to reduce risk in this area is through training and education!" said Cox. (In 2005, Cox conducted several trainings under the AB1825 requirements.)

As part of Select's extra-mile service to its clients, "we conduct several reasonably priced training sessions for our client's supervisory staff. We will come right on-site and educate supervisors and employees on how to deal with workplace relationships, as well as defining what constitutes appropriate workplace behavior." According to Cox, "many of our clients say this is a very cost-effective way to educate their managers. Education and training are the antidotes for workplace ignorance."

Part III: Post-Employment Exposures

Counseling & Disciplinary Actions

"As employers, we are constantly striving to have a great workforce that will help us meet our goals," said Cox. "Unfortunately, we don't always get what we want, so there must be a mechanism for employers to either counsel employees, resulting in a higher level of performance, or terminate people who do not perform up to expectations."

While most companies claim to be at-will employers, many also have progressive disciplinary policies. "We have found this to be problematic for many of our clients," said Cox, "because they may contain opposing concepts." A company may endorse "at-will" employment, but then find themselves in a wrongful termination suit because they violated the guidelines of their own [progressive discipline] policy. "We certainly endorse having good and fair employment practices, but we don't necessarily think they need to be committed to a written formula, such as a formal progressive disciplinary policy," said Cox.

"One of the major advantages we can offer our clients," noted Cox, "is in the area of employee relations." For example, good employment practices dictate that employees be given expectations of performance (through job descriptions and employee handbooks), told when they are not performing up to those expectations (through counseling), and then given an opportunity to improve. Counseling may be verbal or written, depending on the severity and frequency of the infraction. We have found that many companies are hesitant to put counseling statements in writing, however, and then pay the price when there is a claim of wrongful termination," said Cox. In a co-employment relationship, the primary employer (the staffing service) should always take responsibility for any and all counseling.



Garnishments, Deduction, Levies & Subpoenas

All employers are subject to meeting the requirements imposed by the Department of Labor in terms of satisfying garnishments and other wage-related orders. Earnings of an individual are required by court order to be withheld by an employer for the payment of a debt. Employers are prohibited from discharging an employee whose earnings have been subject to garnishment for any one debt. "If an employer fails to respond appropriately, they can be subject to several types of potential liability, including reinstatement of discharged employees, back pay and restoration of improperly garnished amounts, criminal prosecution, fines, and liens against the company for willful failure to withhold," noted Cox.

"Again, this is an area where we can help our clients," said Cox. "As the primary employer, we assume full responsibility for responding to all court orders for garnishments and/or subpoenas for records. This relieves our clients of the tedious record keeping and reporting requirements imposed by law."

Wrongful Termination

While California Labor Code §2922 establishes at-will employment provisions for California employers, employees may still file wrongful termination suits where there is a breach of written or implied contracts, public policies, covenant of good faith & fair dealing, or other tort issues (e.g., discrimination, whistleblowing, misrepresentation, defamation, etc.). "This is an area of particular concern to employers," noted Cox, "because employees can also sue for other types of wrongful termination actions such as constructive discharge, discrimination and retaliation."

"We feel our role is to provide an easy exit for our clients," said Cox. "Whenever possible, we recommend a 'try before you buy' approach over a 90 working day period, where the client has an opportunity to evaluate the person's skills, abilities, and match with their environment and culture." As Cox said, "if it is not a good match, we can end the assignment and find the employee another position." Generally, this shields the secondary employers from potential wrongful termination charges because the staffing service is in the primary employer role.

Unemployment Insurance Reserves

Because California statutory law establishes Unemployment Insurance as a 'no fault' plan, employers are required to manage, administer and pay all unemployment claims when an employee is unemployed through no fault of his/her own. "Obviously, for employers who have seasonal work, this can have a devastating effect on their UI reserve account," noted Cox. "When our clients use temporary employees for this type of work, however, Select assumes full responsibility for all unemployment costs. Fortunately, we generally have several other positions available for displaced workers, so we can keep them working during our client's down periods." Anytime unemployment costs can be offset to the primary employer, the secondary employer enjoys the benefits of lower reserves, potentially saving them thousands of dollars on future payroll costs.

Summary

"In the past, many employers did not understand the benefits of the co-employment relationship," said Cox. "However, we have been able to show many of our clients that there are substantial advantages to using a staffing service for all phases of the employment process by shifting many of the responsibilities to the primary employer (service). "We have found our clients open and receptive to the concept of co-employment, since many of them have the sophistication and business acumen to appreciate the benefits it can offer."

As part of Select's extra-mile service to its clients, "we will train and educate our clients on the most legally-sound way to establish a co-employment relationship that provides them with the most amount of protection," noted Cox. "Many of our clients have taken advantage of this service, and have changed their internal operating systems to maximize their protections, said Cox. "We have found that our clients make good, sound decisions, once they have all the facts. We just hate to see clients struggling in this area, when there are so many benefits we can offer!"