

## Need a New Year's Resolution? How About: Take These Steps to Avoid Joint Employer Liability

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Remember those part-time and temporary workers that helped your business get you through the frantic holiday season? Sure, they were a big help, but are you prepared to respond to a lawsuit claiming you – and not just the staffing agency – are responsible for unemployment benefits and wrongful discharge damages?

The joint-employer issue is going to be one of the hot-button topics in 2019. In September, the National Labor Relations Board (NLRB) proposed a new rule regarding the joint-employer standard outlining who is responsible for labor violations when there is more than one potential employer (such as placement agencies, franchise scenarios, and independent contractors) in the picture. The final rule could be announced at any time after the comment period for the proposed new rule closes in January.

Regardless of how or when the new rule is implemented, the most effective means of reducing joint-employer exposure is still a well-drafted contract that clearly evidences your organization's intent not to employ the employees of the staffing agency, labor supplier, or professional employer organization whose services your organization has retained.

### What terms should the contract include?

- A clear statement that the parties do not intend to establish a co-employer relationship
- A detailed description of the duties the staffing agency or contractors are being hired to perform
- A clause articulating that the outside agency has control and direction over the terms and conditions of employment, including hiring and firing decisions, for their employees that are placed at your organization
- Clear boundaries identifying the scope of



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front-line oversight or a requirement that such oversight is to be provided on-site by the agency

- A clause reserving the right to remove any individual from the facility or jobsite, including employees of third-party vendors, for safety reasons or personal misconduct
- A provision requiring the third-party employer to comply with all applicable federal, state, and local employment laws and ensuring that the employer maintains workers compensation coverage and employment practices liability insurance
- An indemnification clause wherein the intended employer agrees to indemnify the potential joint employer for any damages or attorney's fees and costs incurred in defending against claims from employees of the intended employer
- Durational provisions identifying specific end terms (but allowing for the contract to be renewable)
- The right to revise the contract as needed to comply with any new laws, including the new rule proposed by the NLRB.

### What terms should the contract exclude?

- Specific wage requirements
- Overtime mandates
- Other terms of employment between the labor supplier and its employees

The aim is to identify the specific duties and responsibilities to be performed by the third-party provider under the contract – not to dictate the manner in which the provider's workforce will complete those functions.

### Consult with counsel

Ensure that your legal department or employment counsel reviews all staffing agreements with outside agencies to confirm the contracts are legally compliant and to protect your organization from potential exposure. Don't let the quick fix of seasonal or temporary workers wind up costing you more than you bargained for!

*If you have any questions or comments about this article, please contact Kevin Holden at (804) 212-2888 or by email at [kevin.holden@jacksonlewis.com](mailto:kevin.holden@jacksonlewis.com).*

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