

# A Primer on Using Temporary or Seasonal Workers in Your Business

By

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## Introduction

Fortunately, there comes a time for successful businesses when demand outstrips supply. Most often we think of this phenomenon in terms of customer demand for product or services. However, it is important to also think of it in terms of human capital – your business is growing so fast, or is so busy, or is in the middle of change that you need more workers to make it through. If it is a long term or prolonged situation, then the business probably needs to hire permanent employees as part of its growth strategy. When the need is finite in duration, then many businesses turn to temporary or seasonal workers. This “Good Thing” is not without perils. This paper will discuss the use of temporary or seasonal workers, some of the legal issues arising from doing so, and discuss best practices. However, each situation and employer is unique, so it is best for businesses to consult with their attorneys, but hopefully, this will provide guidance on how to proceed and what questions to ask.

## Background

The Supreme Court has described the common law analysis for an employer-employee relationship as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)(quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). These factors are not exclusive and each relationship should be reviewed independently, though the

application of the *Darden* factors turn on variables within the employer's knowledge and categorical judgments can be made about the status of persons with similar job descriptions. *Darden*, 503 U.S. at 327.<sup>1</sup>

An employee may be full time, part time, permanent, temporary, or seasonal. The definition of these categories of employees is often a creature of statute or regulation, and reference should be made to your particular jurisdiction's definitions. Broadly speaking, however, an employee is either full time or part-time regardless of whether she is permanent, temporary or seasonal. "Temporary" employment is for a set period of time – *e.g.* days, weeks, months, life of a project, period of permanent employee's absence. Finally, "seasonal" employment is also for a set period of time but tied to annually recurring periods of work for the business

#### The Decision to Hire Temporary or Seasonal Workers

The American Staffing Association ([www.americanstaffing.net](http://www.americanstaffing.net)) regularly surveys its members on the reasons why businesses hire temporary workers. Its research reveals that 80% do so to cover for absent employees or temporary vacancies, 72% do are seeking to provide extra support during busy times or seasons, 68% are staffing short term projects, and 59% are trying to find good permanent employees. [http://www.americanstaffing.net/statistics/pdf/uses\\_of\\_staffing.pdf.pdf](http://www.americanstaffing.net/statistics/pdf/uses_of_staffing.pdf.pdf) (October 2008).

Focusing on the 72% of businesses that want to add extra support during busy times or seasons, the reason they do is economic survival. If companies cannot provide the service their customers or potential customers demand at their busiest times, then their reputation will suffer, they will lose revenue during their prime time

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<sup>1</sup> Of course there is the additional category "independent contractor." Since for the purposes of this paper, it is assumed that the business hiring a temporary or seasonal worker intends to exercise control over that person's time, manner and place of performance, discussion of independent contractor issues is left for another day.

which is necessary to carry the company during slow times, and potentially slow times may get even slower as a result of lost good will. Also, failure to provide necessary employee support may result in overworking permanent employees which could cause them to quit, make mistakes and/or incur overtime pay expenses that might exceed the cost of bringing in additional employees. Hiring additional “permanent” employees may also not be the answer because when the pendulum swings back to normal or to below normal, a business will be stuck with a bloated workforce and be forced to undertake layoffs with the attendant legal requirements (*e.g.* WARN Act notices, Unemployment Compensation obligations) and consequences (*e.g.* severance payments, reduced morale).

#### Finding and Hiring the Temporary Workforce

##### a. Flying Solo.

Some businesses may choose to locate and hire their temporary workforce on their own. The business may have been doing it for so long that they have a high comfort level that they can manage the process internally, or may be small enough that the need is not so great that professional assistance is warranted. Cost may also play a factor – businesses may believe that they can hire necessary workers at less cost than relying on an outside agency.

If a business elects to go this route, several important steps must be followed:

- The advertisement must clearly indicate that the position openings are temporary.
- The interview must clearly apprise the candidate of the temporary nature of the position and what she is NOT entitled to.
- The employment agreement must be clear and specific. (A sample agreement is included at the end of this paper)
- The temporary worker(s) must be trained in ALL of the business’s policies including policies on harassment and discrimination.

- The temporary worker(s) must be treated as temporary workers.
- The business's benefits documents must be carefully reviewed to ensure that they exclude temporary workers from coverage. See *Vizcaino v. Microsoft*, 97 F3d 1187 (9<sup>th</sup> Cir 1996)(*Vizcaino I*); *Vizcaino v. Microsoft*, 120 F3d 1006 (9<sup>th</sup> Cir 1997)(*Vizcaino II*); *Vizcaino v. U.S. Dist. Court for Western Dist. of Washington*, 173 F.3d 713 (9<sup>th</sup> Cir.1999) (*Vizcaino III*); *Wolf v. Coca-Cola Company*, 200 F.3d 1337 (11<sup>th</sup> Cir. 2000); *Montesano v. Xerox Corp.*, 117 F. Supp. 147 (D. Conn. 2000).

b. Finding an Experienced Co-Pilot.

Staffing companies exist for the express purpose of helping businesses through temporary periods when more employees are needed for the business to operate successfully. The American Staffing Association (ASA) claims 90% of client businesses say staffing companies give them flexibility to keep fully staffed during busy times. <http://www.americanstaffing.net/statistics/facts.cfm>. These staffing companies provide a ready, willing and able workforce that is prepared to be temporary. According to the ASA, 2.01 million people are employed by staffing companies every business day; and 8.6 million temporary and contract employees are hired by U.S. staffing firms over the course of a year. *Id.*

A business considering using a staffing company to help secure a temporary workforce should do its research to find a company that has experience in its industry. Remember, this staffing company is going to be your “partner” to help get you the resources to get you through your period of need. The company needs to be comfortable with what your business does and what your specific needs are. Those experienced companies will likely have other clients in similar industries and have a stable of employees that will require minimal on the job training once placed with your business.

Other benefits that a staffing company offers are:

- Makes clear that the Temp is an employee of staffing company, NOT your business
- Handles Human Resources responsibilities
- Disciplines employees for misconduct at your business
- Can reassign or terminate them from their assignment at your request and can limit the hours the individual workers are assigned to your business to be sure that the ERISA 1000 hour rule (26 USC §410(a)(3)(A)) is not triggered.
- Handles payroll, taxes, benefits (you pay the staffing company a per-worker fee)
- Provides Workers Compensation insurance in many instances<sup>2</sup>
- Undertakes general training of ITS employees on matters such as harassment, discrimination, workplace safety (You need to ensure that your Temp Firm is doing this)

Just because your staffing company is doing all this for your business, you are not absolved of any other obligations regarding that temporary worker. Just as if you had hired the temporary workers directly, you still need to train them on workplace expectations, rules and policies; you need to confirm their understanding of harassment and discrimination rules; you need to maintain a safe workplace for them; and you need to comply with all local, state and federal regulations that may impact them.

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<sup>2</sup> In most states, co-employers enjoy the benefit of the exclusive remedy of the worker's compensation bar, and thus your business would be protected by the staffing company providing worker's compensation to the temporary worker.

Using a staffing company does not prevent an employer-employee relationship from being created between you and the temporary worker assigned to your business. At common law, “a servant ... permitted by his master to perform services for another may become the servant of such other in performing the services.” Restatement (Second) of Agency § 227 (1958). “Starting with a relation of servant to one [employer], he can become the servant of another [employer] only if there are the same elements in his relation to the other as would constitute him a servant of the other were he not originally the servant of the first.” *Id.* § 227 cmt. a. In other words, in analyzing whether a person may be the employee of two different employers, you need to look at the common law factors outlined in the Restatement and in *Darden*. Case law appears clear that in staffing company situations, when applying the common law *Darden* test, a temporary worker can be the employee of both the agency and the business client. See *Vizcaino III*, 173 F.3d at 723-25; see also *Vizcaino I*; *Vizcaino II*; *Wolf*; *Montesano*.

Since the trend appears to be that temporary workers, despite a lot of your efforts, will still be deemed your “common law employee”, they may have a claim to benefits during their period of temporary employment and/or after their assignment ends. Careful attention needs to be paid to your benefit plan documents so that they limit who is eligible to participate and a thorough reading and understanding of the *Vizcaino I-III*, *Wolf*, and *Montesano* cases should occur.

Temporary workers can also make your business subject to state and federal employment and discrimination laws and regulation. For example, under Title VII, the ADEA, and the ADA, an employer is covered if it has an employment relationship with the requisite number of employees for the relevant number of weeks, regardless of the daily work schedules of the individual employees. See *Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 206 (1997); EEOC Compliance Manual, Volume II, Section II

Threshold Issues, §2-III (<http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1>).

The Compliance Manual specifically states:

To count employees, determine the number of employees on an employer's payroll; exclude individuals who are not employees, e.g., discharged/former employees or independent contractors. Add to that figure any other individuals who have an employment relationship with the employer, such as temporary or other staffing firm workers.

*Id.* Therefore, if a discriminatory act occurs to a temporary worker at your business, you AND the staffing company may be subject to liability. *Id.*; see also Commission's Enforcement Guidance on *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Questions 1-2, N:3319-21 (BNA) (1997)(<http://www.eeoc.gov/policy/docs/conting.html>).

#### A Few Best Practices for Using Temporary Workers

- Have clearly defined status for your temporary workers
  - Direct Contract with them
  - Through reputable staffing company
- Avoid creating a common law employee relationship (hard to do, see *Darden*; *Vizcaino I-III*; *EEOC manuals*)
  - Consider separate training
  - Do not include them in company-wide events
  - Deal with them through the staffing company
- Have clear agreements with the Staffing Company
  - Be sure their documents advise the worker that they are not a client employee
  - Be sure that they do basic training on harassment, discrimination
- Have your benefit documents clearly exclude temporary workers from the plan

**Sample Agreement**

**TEMPORARY WORKER AGREEMENT**

I understand and agree that I have been hired as a temporary worker at **XYZ LLC** for the purpose of [ ***Insert description of the job duties/project/position*** ]. I agree and accept that my employment begins on \_\_(Date)\_\_ and ends on \_\_(Date)\_\_. I further agree and accept that **XYZ LLC** may change the ending date of my temporary employment at its sole discretion without prior notice to me.

I acknowledge that as a temporary worker, I have no seniority over other permanent or temporary workers, nor do I have a guarantee of being called to help **XYZ LLC** in the future. I understand that I must comply with all company policies, and failure to do so can result in immediate termination of this agreement. I also understand that I am not eligible for the following benefits:

- 1) Health and Welfare Plan
- 2) Pension Plan, as long as my hours worked were less than 1,000 during the plan year
- 3) Vacations
- 4) Holidays
- 5) Paid Sick Time
- 6) Severance or other termination payments
- 7) Other (List)

\_\_\_\_\_  
Employee's Signature

\_\_\_\_\_  
Human Resource Manager's Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date