The Modern Workforce

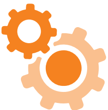
Assessing and Managing the Risks of Third-Party Labour Supply

What is the issue?

Modern workforce arrangements are on the rise, as are the risks.

In the past decade, North American employers have accelerated their move away from exclusively permanent long-term employment. Increasingly employers are utilizing a number of modern workforce arrangements including engaging third-party suppliers to provide on-site or off-site workers.

Many employers who engage third-party suppliers are now finding themselves liable for the legal entitlements of the suppliers' employees. Such arrangements can prove to be a minefield for the unwary and are a growing concern in all three North American jurisdictions



The legal challenges in North America

CANADA

Many employers in Canada right-sized to employ fewer "traditional" employees in the wake of the 2008 global recession. Outsourcing and insourcing arrangements are now increasingly prevalent.

Under many employment and labour relations statutes, two or more employers can be treated as one employer in certain circumstances. In addition, at common law, separate legal entities can be jointly and severally liable for common law obligations owing to an employee, including wrongful dismissal damages. A common or related employer determination will depend on the statute or common law test as well as the circumstances in which the issue arose.

The Ontario government has made it easier to establish related employers under the province's employment standards legislation. Separate legal entities may be treated as one employer if they simply carry on associated or related business activities. Previously, separate entities were only treated as one employer if they had also acted in a manner which had the intent or effect of defeating the purpose of the legislation.

UNITED STATES

US federal agencies and courts have been particularly aggressive in scrutinizing alternative workforce arrangements, and have broadened their definition of an "employer" to include many common business relationships. With more and more entities now considered to be the employer, there has been a substantial change to the risk paradigm for alternative worker arrangements.

Companies that utilize alternative worker arrangements are now increasingly at risk of being named a joint employer, and thus jointly liable in wage and hour, pension plan withdrawal liability as well as discrimination based employment lawsuits.

Compounding the financial risks, various government agencies have targeted alternative worker arrangements and are alleging that user companies are joint employers and imposing a duty to bargain with the subcontractor's employees' unions. Indeed, there are regular reports of decisions imposing liability on corporations for misconduct by business partners or their partners' employees, as well as liability for the business partners' normal business operations.

MEXICO

The Federal government is seeking amendments to the Mexican Federal Labor Law to make the outsourcing regime more protective of employees. Some employers are currently not in compliance and this can have a resulting negative impact on their investors.

To maintain compliance and reduce risk exposure, companies need to pay particular attention to the legal relationships they have with their service providers. Generally speaking, where a company engages a subcontractor and the subcontractor's employees do not perform activities related to the core business of the company, the company will not have a legal obligation to the subcontractor's employees. In any event, it is necessary to review the applicable contract to assess potential liability.

It is essential to train the company's representatives on how to appropriately respond to inquiries from the labour authorities in relation to complaints brought by employees of service providers. Failing to provide such training can result in liability and penalties in relation to the complaint that could have been avoided.

Third-Party Supplier Audit

Determining whether liability exists for a third-party supplier's employees is no easy task. A detailed examination of business operations as well as the contractual arrangements with the supplier allows the employer to assess and protect against liability before a claim is brought. Forewarning enables the employer to adjust its working relationships and the terms of its contracts with business partners or mitigate the risks through insurance or indemnification clauses.

The Third-Party Supplier Audit is an indispensible tool for evaluating potential risk arising from relationships with third-party suppliers of workers, including both employment law and labour relations aspects. The reality is that employers who engage in otherwise legitimate "contracting out" or "contracting in" with a third-party supplier may unwittingly step into the shoes of the employer for the subject workers despite the fact that the workers were retained by the supplier.

Our recommended approach:

STEP 1:
Fact find and gap analysis

We have prepared an easy to use audit based on the factors identified in decisions of courts and administrative agencies.

It can be completed online in a secure environment or downloaded and completed in hard copy. The risks assessed may relate to either:

- workers retained by a third-party supplier, including a contractor or subcontractor; or
- workers retained by a related entity, including a franchisee.

STEP 2:
Zero in on major risk areas and create action plan

Collate relevant documentation and prepare a plan of action appropriate to your risk appetite and resources.

We can help to determine whether existing arrangements should be changed to minimize risk, for example, by:

- hiring workers as direct employees;
- renegotiating service contracts, staffing agreements, or franchise agreements, for instance, to reduce day-to-day control and supervision over workers under these arrangements;
- ensuring adequate coverage under an indemnification clause for possible liability;
- moving services to an offshore vendor (however, offshore outsourcing can raise certain business and legal issues, which employers should fully consider before selecting this option); or
- reviewing due diligence methods when contracting with service providers.*

STEP 3:
Implement your plan, pilot and perfect

Test drive.

Carry out a test run of the policies and procedures you have put in place and make any changes needed to enable organizational continuity.

Keep up the good work.

Devise and implement a plan for ongoing review and compliance audit of our Third-Party Supplier risk mitigation action plan.

*All Step 2 bullets originally published by Thomson Reuters in *Practical Law The Journal*, GC Agenda, March 2016, Baker McKenzie noted as content contributor

Representative Matters

01 Assisted a **global technology leader** in the analysis of risks related to engaging independent contractor/third party agency workers through a third party payroll agency.

02 Represented an **agriculture** client in an employee receivables lawsuits filed by agency workers.

03 Advised a **biotechnology** company as to whether services performed to the client raise the risks of co-employment, workforce-lending.

04 Assisted a **transportation** company on the development of a joint employer policy.

05 Advised a **manufacturing company** on the joint employment liability that may arise when engaging the services of personnel employed by a third party.

06 Advised an **accounting firm** on VAT exemption in relation to use of joint employment contracts.

07 Advised a **global food and beverage company** regarding concerns surrounding the possible use of employees from a temporary agency as representatives for a limited period of time and related employer concerns.

08 Provided multi-jurisdictional advice to a **healthcare** company in relation to the lawfulness of personnel leasing structures.

09 Obtained, on a summary motion, the complete dismissal of a union's application for a declaration that our **university** client and an affiliate are related employers. The labour relations board ultimately issued a consent order that our client is not the employer of the affiliate's employees for the purpose of collective bargaining or for any other purpose. Our client was also removed as a responding party in the union's certification application for the employees in question.

10 Advised an **engineering services** company on employment risk arising from an inter-company service agreement.

11 Advised a major non union **health care provider** on the corporate structure and governance structures necessary to avoid the extension of picketing and strike activity at a co-managed union represented facility under a joint employer claim.

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