



A PRACTICAL GUIDE TO

MANAGING TEMPORARY WORKERS

PETER R. GARBER AND
JOSEPH MACK III



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ATD Press

1640 King Street
Alexandria, VA 22314 USA

Ordering information: Books published by ATD Press can be purchased by visiting ATD's website at www.td.org/books or by calling 800.628.2783 or 703.683.8100.

Library of Congress Control Number: 2018947174

ISBN-10: 1-947308-66-1
ISBN-13: 978-1-947308-66-4
e-ISBN: 978-1-947308-67-1

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Printed by Data Reproductions Corporation, Auburn Hills, MI

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Preface

WE HAVE WORKED FOR MORE THAN 40 years in the field of employment and labor relations, Peter as an HR professional at a Fortune 200 international manufacturing company with thousands of employees, and Joe as a legal adviser to a wide variety of large and small employers. While we have witnessed many significant HR developments over the years, one of the most important has been a transformation in the very notion of what it means to work for someone.

A growing number of workers aren't employed by the businesses using and benefiting from their services. Some work for companies whose business is to provide workers to other businesses. Others work as independent contractors rather than employees. In this book, we call such people *contingent workers*. While using contingent workers as "temps" has been common for a long time, the use of contingent workers has substantially broadened and deepened over the last several years. Contingent workers may be embedded within companies in ways that make it difficult to distinguish them from regular workers. Other contingent workers are hired as freelancers to handle a single project or task or even to fill an ongoing need. Some businesses like Uber and Lyft have based their entire business model on contingent workers, capitalizing on the growing gig economy.

The rising demand for alternative work arrangements has coincided with the growth of companies possessing the resources and expertise to address this need. Increasingly sophisticated web-based platforms and specialized online staffing solutions have made the hiring, management, and administration of a contingent workforce easier and more efficient. Indeed, technological solutions are playing an ever-expanding role in the field of contingent workforce management, from procurement to workforce analytics to supplier management. Any company using contingent workers must familiarize itself with such resources.

However, the focus of this book will be on the human resources side of contingent workforce management. It will discuss what it takes to make contingent workers engaged and effective, and how to avoid some of the pitfalls that can undermine the success of a contingent workforce program.

We have experienced firsthand, and assisted in implementing, large-scale contingent worker programs. But even in very sophisticated organizations, there may be little understanding of the practical realities of such an effort. The observations and recommendations in this book are the result of our involvement with establishing and managing a workforce that includes a significant percentage of contingent workers. The tips inside are designed to help you make the best decisions if you move forward with a contingent worker program.

Deciding to utilize contingent workers to supplement or even replace portions of your existing workforce can be a difficult choice, with many potentially far-reaching implications for your employees and your entire organization. If you are reading this book, it is likely that you are facing—or at least contemplating—this challenge.

In any case, it is important that you make the most informed decisions possible concerning the introduction of contingent workers into your organization. You will need the whole organization's support. Keeping everyone informed about these decisions is critically important and will make the process go much more successfully.

We hope this book will help you with your contingent worker initiatives both today and in the future.

Peter Garber and Joseph Mack III
September 2018

Introduction

SAY THAT YOU ARE THE CEO of a medium-sized company called Elasticity, which designs and manufactures springs used in countless applications from freight car suspension systems to delicate surgical instruments. You have five plants, all in the United States, at which you employ managers and administrative employees, production and maintenance workers, salespeople, IT workers, drafters, and engineers. You have seen your profits erode and your market share slide primarily as the result of domestic and foreign competitors with lower labor costs. You have done everything possible to cut costs, including wage freezes, layoffs, and supplier concessions, but it hasn't been enough. You are afraid that if you cut any deeper you will lose your best workers. What else can you do?

Your manufacturing director says that she can reduce labor costs by turning over many of the less-skilled tasks in the manufacturing process to a staffing agency using workers with significantly lower pay than your current workforce. Your engineering director wants to lessen his labor costs by converting some of the engineers to independent contractors paid at a fixed hourly rate and hiring a company to supply engineers and drafters as needed. Your IT director could reduce the department's budget by replacing full-time programmers with ones supplied by an IT staffing agency and by working with independent contractors to handle one-off projects. The combination of these actions would permit you to reduce your labor cost significantly, or at least it seems that way.

It all sounds appealing, but is it as easy and effective as it seems? What would be the actual savings? Would there be unintended consequences? What are the risks? How would you assure that the workforce would still be as productive? These are some of the questions this book will explore and help you think through as we continue to follow this story about Elasticity in the chapters ahead.

The Changing Traditional Employment Model

As illustrated in this hypothetical, the traditional employment model is changing because of current economic realities. No longer is it a certainty that someone

who provides services to an organization is on its payroll. There are any number of variations of the traditional employment model that are becoming commonplace. These alternative employment arrangements are intended to provide a more cost-effective and efficient model for organizations to address their human resource requirements. At the same time, these arrangements can meet workers' needs and desires by giving them income, experience, skills, an employment record, or perhaps just the flexibility to work when and where they want.

Even what we call someone hired to be a full-time employee with no anticipated termination date has changed. Traditionally, someone who fit into this category would be referred to as a permanent employee. Today, many organizations refer to this type of worker as a regular employee, reflective of the fact that organizations today no longer see themselves as unconditionally guaranteeing permanent employment to their workers. The traditional employment model was based on the paternalistic concept that employees who did their jobs well could expect their employer to provide them employment with rising wages and benefits, including benefits designed to see them through after they ceased working due to age or disability.

A variety of factors have rendered this model no longer feasible for many employers, such as:

- globalization and its demand for continuous cost-cutting and productivity gains to stay competitive
- the need for specialized talent to carry out critical but nonrecurring or temporary roles
- uncontrollable and unpredictable costs of providing retirement and healthcare benefits
- the necessity of retaining the flexibility to adapt to new and often disruptive competitors and technologies
- the increasingly nomadic and fickle nature of workers raised in a technological age.

Thus, today's employment relationship is based on a mutual benefit model in which the terms and duration are dictated by an ongoing assessment of its continuing benefit to each party.

The fact is that permanent employees are expensive. The rising cost of maintaining a workforce of permanent employees in competitive markets is

a major concern for employers. In addition to wages and benefits paid to workers while actively employed, permanent full-time employees may also create legacy or long-term costs such as workers' compensation liabilities or post-employment benefit and pension costs. Permanent workers also bring a variety of profit-eroding indirect costs for such things as unemployment compensation insurance, human resources and benefits administration, regulatory compliance, and employment-related legal claims.

Utilizing a mix of regular and contingent workers, or even outsourcing the entire workforce, is one way to help reduce these costs and has become a more attractive employment model for many organizations. The use of contingent workers has burgeoned, especially since the Great Recession, and the businesses providing access to such workers have become increasingly numerous and sophisticated.

What Is a Temporary or Contingent Worker?

The term *contingent worker* has many definitions. Traditionally, it referred primarily to low-skilled full- or part-time temps or seasonal workers hired directly or through an agency for temporary employment. Today the concept is far broader; it encompasses both skilled and nonskilled workers employed under nontraditional arrangements, including relatively permanent assignments. While contingent employment is often viewed as a stopgap for workers on their way to finding a more permanent situation, many of today's contingent workers end up staying in their contingent jobs at a single job site for years.

In simple terms, a contingent worker can be defined as anyone who performs work or services for a business but is not directly employed by that company or organization. The term can include independent contractors, consultants, and freelancers hired and paid directly by a company, as well as workers performing work for your business but paid by someone else. Contingent workers commonly serve in all types of roles, from manufacturing worker to programmer to CFO. They may supplement an existing workforce or even replace entire departments or functions.

The fact that the term *contingent worker* is so broadly used makes dealing with the subject of managing contingent workers challenging. The concerns and issues around managing IT consultants may be quite different from those around managing unskilled laborers. While there will be overlap on many

issues, there are a greater variety of human resource concerns arising from managing unskilled or semiskilled contingent workers, and those concerns occupy much of this book. We have attempted to specifically identify areas of overlap as we discuss different issues, but we thought it best to include a separate chapter on managing professional contingent workers.

As we will discuss, there may be any number of variations in the arrangement between an organization and a staffing provider in terms of apportioning responsibility for such functions as supervising, training, or evaluating the performance of contingent workers. However, the basic idea is that contingent workers are employed solely by a third party, by a third party and your organization, or as an independent contractor. Contingent employees may also be referred to as agency or contract employees or other similar terms, but for the purposes of this book these descriptors all refer to the same type of worker.

A contingent worker often (but not always) performs work or services for an organization with less pay, benefits, or job security than permanent employees. Consequently, contingent worker programs have the potential to save organizations a significant amount of money. For employers who provide traditional retirement benefits to their permanent workers, the use of contingent workers may greatly reduce future retirement costs. As will be discussed later in this book, contingent workers can also provide other benefits to your organization, such as reducing the time needed to onboard additional staff to meet fluctuating needs, as well as potentially creating a feeder pool for future permanent employment candidates.

The gains are not all one-sided for employers. Contingent employment can provide needed income and opportunities for workers who might otherwise be unemployed, lack training and skills they may pick up through contingent employment, or simply seek this type of working relationship as a matter of preference. The boom in contingent employment may just be a natural adaptation to the changing needs and desires of a Millennial workforce less interested in lifetime employment with a single employer than the flexibility this type of employment arrangement can offer.

However, contingent workers have unique needs that differ from those of permanent employees. When contingent workers were only temps hired for short-term job assignments, it may not have been too important to worry about their wants and needs. But as an organization's success becomes more

and more dependent on contingent workers, considering and addressing the needs of your contingent workers becomes vital. It is an aspect of this employment arrangement that is too often overlooked.

Objectives of Contingent Worker Programs

You need to think about the objectives you hope to achieve through using contingent workers in your organization. These objectives can be varied, and each is legitimate if it addresses a particular need or problem that the organization is trying to solve. Many of these objectives will be covered in more detail throughout this book. Look at the following list of possible contingent worker objectives, and consider how these might pertain to your organization:

- Supplement existing staffing needs.
- Provide lower-cost labor.
- Reduce time needed to bring in additional help.
- Reduce benefits costs.
- Create feeder pools to hire regular employees.
- Avoid production interruptions due to lack of workers.
- Have a more flexible workforce.
- Reduce potential legal costs associated with permanent employees, such as workers' compensation.
- Reduce legacy costs such as retirement or 401(k) benefits.
- Reduce cost of worker turnover.
- Become more responsive to business fluctuations.
- Reduce permanent employee headcount.
- Expand the pool of available workers at less cost.
- Become more competitive with lower-cost companies.
- Focus on developing and managing technology rather than people.

Although it seems clear that the contingent workforce is growing, getting a handle on just how much of the workforce is contingent can be difficult. Part of the problem is that people disagree on what constitutes contingent employment. For instance, if the growing number of people in short-term contracts or assignments or in freelance work are included in contingent worker percentages, the overall percentage of contingent workers in the workforce seems remarkable. In 2015, the Government Accountability Office (GAO) released a study entitled *Contingent Workforce: Size, Characteristics, Earnings and Benefits*.

The study found that depending on which definition you use, contingent workers comprise from as little as a 20th to more than a third of the workforce, and cites projections that up to 40 percent or more of all workers in the future will be contingent workers in some capacity.

In 2015, contingent workers made up about 18 percent of an average company's total workforce, with the flexible, on-demand workforce doubling over the prior seven years. The average total spend on procuring the services of contingent workers is estimated to be between \$1 billion and \$5 billion (Fournier 2015). The Bureau of Labor Statistics (2018) estimates that the temporary help service industry grew 9 percent between 2006 and 2016, and according to findings of economists Alan Krueger and Lawrence Katz (2016), between 2005 and 2015, 94 percent of net job growth has been in "alternative work arrangements" such as freelancing, independent contracting, and temping.

This phenomenon raises a variety of issues for our society and those who are responsible for creating public policy, particularly those who worry that the rise of contingent employment for workers in lower-skilled jobs is creating obstacles for such workers' entry into the middle class by driving down wages and benefits.

For today's employers, however, especially in some industries that have been adversely affected by globalization, the use of contingent workers may be the difference between success and failure, their only viable option. Without the potential labor cost savings contingent workers can create, many organizations simply will not be able to remain competitive with global labor workforces costing a fraction of theirs.

This book will help you gain a better understanding of the possible impact of contingent workers on your organization's future and how you can better prepare for this possibility and manage these workers more effectively. Each chapter provides a comprehensive review of an important aspect of managing contingent workers, and is filled with advice on how to deal with the many complexities of utilizing contingent workers. It will provide you with tips, strategies, and guidance on how to begin or improve contingent worker initiatives in your organization. Each chapter ends with a list of practical applications related to the topics presented in the chapter, as well as questions to think about as you relate this information to your organization's experiences.

Chapter Overview

With chapter 1, the book begins with a discussion of the various classifications of contingent workers, as well as legal liabilities an employer needs to understand in managing each one. Chapter 2 introduces the concept of developing a contingent worker strategy to help you focus on the overall goals and objectives of your contingent worker program. Chapter 3 provides a model for developing your own contingent worker guidelines, which clearly define the specific rules that should be followed not only by your organization but any staffing agency providing these workers to your organization.

Chapter 4 offers guidance on how to attract the best candidates for contingent employment. Chapter 5 will help you work more effectively with staffing agencies to help ensure that your organization receives the service and commitment necessary for this program to be successful.

Chapter 6 reviews the importance of educating your entire organization about contingent workers and setting expectations about their treatment in your workplace. Chapter 7 discusses the importance of ensuring that contingent workers are treated fairly and the consequences of mistreating these workers. Chapter 8 outlines the many training challenges for contingent workers and the importance of providing the training these workers need to be successful.

Chapter 9 provides a review and format for determining if your contingent worker programs are achieving your organization's financial objectives. Chapter 10 focuses on managing professional contingent workers and their unique needs. Lastly, chapter 11 challenges you to envision what your workforce of the future might look like and the extent you will be utilizing contingent workers at some point down the road.

Who Is a Contingent Worker?

In this chapter, you will learn:

- the differences in the various classifications of contingent workers
- how to manage different types of contingent workers
- how misclassifying different types of contingent workers can cause problems.

LET'S GET BACK TO YOUR SITUATION as CEO of the spring company Elasticity. Your managers have offered you a variety of options, involving several different contingent employment possibilities:

- using agency-supplied production and IT workers
- converting engineering employees to independent contractors
- directly engaging additional independent contractors
- using engineers and drafters supplied by a staffing agency.

Before accepting any of these recommendations, you need to educate yourself on several key issues.

Why Do Different Classifications of Contingent Workers Matter?

It is important that an organization understands not only certain terms relating to the classification of workers but also their applications. The following are examples of organizations making decisions concerning which types of contingent workers would best fit their present needs for additional staffing.

One company found that its permanent workforce could not keep up with the seasonal demand for its services. The leadership team met to review the options available to address this need. The vice president of the company had ordered that due to cost constraints, there should be no increases to the permanent workforce—so simply hiring more employees as they had done in the past was not an option. The human resources director presented the options for bringing in contingent workers to address staffing needs.

After listening to the presentation, the purchasing manager said, “I think the simplest solution would be to hire seasonal casual employees ourselves and then end their employment after our busy time of the year is over. It shouldn’t be a problem if everyone understands that these jobs are temporary and will end in a few months. I am not sure it is in our best interest to sign a contract with one of those staffing agencies.”

“I am not sure that I agree with you,” replied the operations manager. “We need these workers now, and what you are suggesting has taken a great deal of time to implement in the past. I also remember having to deal with several personnel issues with casual workers, which took up a lot of our time. Contracting this whole thing to someone who specializes in this type of contingent worker may be the best and most practical solution.”

The finance director chimed in next. “That’s a good point, but I am afraid that could cost a lot more than if we just hire these workers ourselves. Those agencies can charge high markups per hour for their contingent workers’ services. I know of several that charge nearly 40 percent or more. Given the number of workers we need this season, that could add up pretty fast. As everyone here knows, we are getting pressure from corporate to reduce costs. I’m not sure anyone sitting at this table would want to explain why our labor costs dramatically increased during the quarter, especially after they sent out that edict recently about containing costs. I know I don’t want to be the bearer of that bad news at the quarterly cost meeting next month!”

“If you remember,” the human resources manager added, “we had a casual employee get injured on the job, and we paid out a lot of money in workers’ compensation expenses. In fact, we’re still paying medical bills associated with that injury. It might just be a better financial decision to contract these services out when you look at all our costs, as well as liabilities of hiring casual employees ourselves.”

“We need to look at all the options we have before deciding on anything,” interjected the facility manager. “We don’t really know what the actual cost of contracting contingent workers might be both in direct and indirect costs. I would like to have HR get an estimate of the indirect costs we experienced when we hired casual workers ourselves last time, including unemployment benefits, workers’ compensation, training, absenteeism, and turnover. I would also like an estimate of the total costs of contracting out these jobs to a contingent worker staffing agency. Then we can compare these two options and select the best one. But, I must say that is also an excellent point about the additional liabilities we might incur by hiring these workers ourselves. Every time I talk to my boss about our ongoing costs, he asks me about the workers’ compensation charges that still appear on our balance sheet. I might be able to make a pretty good argument to him about contracting this need out, even though the up-front costs might be higher.”

As you can see in this story, many facets must be taken into consideration when determining if utilizing contingent workers is the right strategy for an organization.

* * *

Next, let’s look at another example of a company that decided to use contingent workers but unwittingly risked negating the advantages of the contingent worker arrangement and subjected itself to possible legal problems down the road.

A medium-sized electronics firm had made the decision to use contingent workers several years ago at its largest manufacturing facility in the Midwest. It had determined that this was an effective cost-cutting move after comparing the overall wage rates of its permanent employees with the expense of having a staffing agency furnish contingent workers. It began this initiative by blending these workers into existing crews in lower-skilled jobs under the supervision of the company’s own team leaders. The company understood that by retaining control over the responsibility for directing the contingent workers, it risked being held accountable as an employer if such employees claimed certain employment-related benefits or raised legal claims because of their treatment. However, at this point the firm didn’t believe that it had the volume of contingent workers at its facility to justify the added expense of having the contract staffing agency assume full responsibility for supervising these employees.

As its business significantly increased over the next several years, the company began to rethink this strategy. It performed a cost analysis of expanding the percentage of contingent plant workers in the plant and having the agency assume virtually full responsibility for them, including providing on-site supervision. Taking into consideration all potential costs and liabilities, the firm decided to shift those responsibilities to the agency. This initiative began with limited problems once everyone grew more comfortable with this new working arrangement.

However, the company neglected to properly educate their team leaders, who formerly were responsible for training and supervising these contingent workers. They didn't completely understand what their new role was to be concerning these contingent workers. They were constantly interjecting themselves into the training that the agency was providing new contingent workers because they didn't think it was consistent or on par with what they'd provided. They were also interfering with the staffing agency's supervisors by stepping in to correct the contingent workers' performance. In one instance, a team leader tried to fire a contingent worker on the spot for a violation of a company procedural work rule.

The team leaders' actions were seriously undermining the success of the new model and even jeopardizing the company's intention to not be considered an employer of these contingent workers, with all the liabilities that includes. This problem could have been avoided if the company had ensured at the beginning of this initiative that everyone in their organization, including the team leaders, understood their new roles and responsibilities.

* * *

There can be similar problems in using independent contractors. In another example, a small engineering firm hired a software engineer under an independent contractor agreement to develop a number of software programs for its design systems. At first, the firm simply accepted the software engineer's programs once completed, but as the project continued it became more involved in her work. It started requiring her physical presence at the office during normal work hours, including her attendance at staff meetings, and started asking for continual updates on the progress of her work, even requesting to see samples of the programs before they were completed. The managers at the firm started critiquing her work while it was still in process and making suggestions

concerning what they wanted in the final product she was to deliver; often, these suggestions conflicted with what was originally agreed upon.

This process continued over many months, frustrating the software engineer considerably. When she developed what she believed to be work-related carpal tunnel syndrome, the contractor filed a workers' compensation claim against the client, claiming that because the engineering firm was supervising and directing her work to such a great extent she was no longer functioning as an independent contractor but as an employee of the firm. She successfully claimed that they should provide her the same workers' compensation benefits other employees received.

* * *

As illustrated by these examples, many potential problems can be avoided by ensuring that everyone in your organization understands the requirements for establishing and preserving the type of contingent worker status you wish to use.

What Are the Different Classifications?

For the purposes of this book, a contingent employee is anyone who performs work or services for your organization but is not on your payroll. Contingent workers can be employed in any level in an organization. Often, contingent workers are provided by a third party such as a contingent employment service or staffing agency, also referred to as a managed service provider (MSP). The worker is technically an employee of that service or agency and is on its payroll. This can provide many benefits to a company or organization contracting with the service or agency for these workers' services, including not only financial advantages but also less burden and fewer potential liabilities on an employer in meeting their staffing needs.

However, using contingent workers, if not done properly, can lead to legal problems that might negate the very savings and benefits the arrangement was intended to achieve. These problems usually involve a finding that the company using the contingent workers, despite its intention to have another party bear the responsibilities and liabilities of employing them, is in fact either their sole employer or a co-employer. This finding can expose the company to liability for unpaid or underpaid wages, overtime and benefits, discrimination claims, workers' comp claims, union-related claims, or other employment-based complaints.

To avoid this situation, it is important to understand the following distinctions concerning these workers.

Joint Employer (Co-Employer)

Joint employer and *co-employer* are legal terms describing two or more businesses or organizations possessing or exerting sufficient control over the terms and working conditions of the same person to make them both that person's employer. As the use of contingent workers has dramatically increased, so has the attention devoted to this phenomenon by various public and private entities concerned with workers' fair treatment and legal rights. In particular, unions have sought to expand the concept of joint employment as a way of forcing employers using contingent workers to the bargaining table with those workers, along with the staffing agencies.

For example, in one recent case, a union sought to require a garbage management company that owns and operates a recycling facility to bargain with a group of employees provided to the facility by a temporary labor services company. Of 300 workers in the plant, the staffing agency employed 240 in lower-skilled jobs. The National Labor Relations Board found that the garbage management company was a joint employer—despite language in the services contract making the agency the sole employer—because the company still possessed enough authority to meaningfully affect the terms of the contingent workers' employment. The labor board rejected the analysis it had used in previous cases, which placed great weight on whether such authority was actually exercised.

It should be noted that the Equal Employment Opportunity Commission weighed in favor of the labor board's new standard, which would make it easier for employers to be held responsible in discrimination claims brought by contingent workers.

Although the legal battle over the definition of joint employer is far from over, it is safe to say that whether an employer-employee relationship exists does not necessarily turn on the intent of the company or the written terms of its contract with a staffing agency. Instead, it hinges on whether in practice its power over and behavior toward the workers—regarding the terms of their employment, pay, benefits, discipline, and so on—is that of an employer.

In setting up a contingent workforce arrangement with a staffing agency, a company must decide whether one of its goals is to avoid creating a joint

employer situation and thus insulate itself from the possible liabilities associated with being an employer of the contingent workers. If so, it will need to set up the arrangement to place as much responsibility as possible on the staffing agency for hiring, firing, compensating, supervising, and training these workers.

The goal of protecting the company from forming an employment relationship with its contingent workforce is not always in perfect alignment with the goal of effectively and efficiently running the business: It often imposes additional costs and inefficiencies. The practicalities may dictate that it is not feasible to totally prevent the company from becoming a joint employer, but that the use of contingent workers still makes sense. More important is to be aware of the issue and make informed decisions as to how you will proceed.

Let's consider a typical contingent worker situation that can give rise to a joint employment arrangement. A staffing agency contracts with an organization to provide workers for a defined purpose and time. The agency unilaterally recruits, screens, hires, and pays for these workers and assigns them to the hiring organization. The organization and the agency agree on the amount that is to be paid to the agency per hour for each contingent worker, but it is the sole decision of the agency how much the workers ultimately receive in compensation. The client company provides certain company policies to contingent workers, such as its workplace harassment policy, drug and alcohol policy, ethics policy, and use of electronic equipment policy. The client has the right to report contingent workers for poor work or rule infractions, but discipline is the responsibility of the agency. The client also requires that the agency establish and administer certain pre-employment processes such as background checks and drug screens. The client company then trains and supervises the contingent workers.

So, who is the employer? As you can see, the answer is not always clear-cut. In this example, the retention of the responsibility for training and supervising the workers, along with the ability to recommend discipline, arguably render the client a joint employer of the workers.

The advantage to the client of this arrangement is that it retains more control over contingent workers' direction, training, and work performance. However, there are also potential risks because a client may assume liabilities for its contingent workers much as it would for its permanent employees. For example, the contingent workers may be considered eligible to vote and be

represented by a labor union that's attempting to organize the company's facilities. In certain circumstances, contingent workers may become the organization's responsibility regarding other employment-related regulations such as the Family and Medical Leave Act (FMLA) or the Americans With Disabilities Act (ADA) and its latest amendments (ADAA), just to mention a few.

This may be more responsibility than the organization expected when it entered into the contingent worker arrangement. Therefore, it is important to be educated about both the benefits and liabilities of utilizing contingent workers. You should seek guidance from your legal counsel to ensure that you completely understand the potential risks in becoming a joint employer of contingent workers, because the laws and regulations concerning this status are constantly changing.

Staffing Agency–Supervised Contingent Workers

An alternative model for an organization using contingent workers can help lessen the chances of being considered a joint employer and many of the liabilities that come with this status. In this model, the staffing agency assumes sole operational responsibility for contracted services, including direct supervision and training of the contingent workers. All the recruitment, record keeping, payroll deductions, and so on continues to be the responsibility of the agency. Under this model, providing its division of responsibilities is rigorously followed, most of the liabilities associated with employment of a contingent worker are with the agency.

As we mentioned, while there are many advantages to shifting the responsibilities to the contract agency, this may not always be practical. The size of the contingent workforce may become the biggest determining factor in this decision. In many cases, it wouldn't be practical for a staffing agency to supervise on-site for a relatively small number of contingent workers assigned to an organization's facility. The agency would pass the costs of such an arrangement to the organization, and this expense could become prohibitive or cancel any economic advantage contingent workers may bring.

Other potential obstacles to establishing this type of classification may be the nature of your business. Complexity of the operation, the confidential nature of the process, or even the lack of experience or expertise of any staffing agencies willing to enter into such an agreement may prevent this contingent

workforce model from being established. Also, having staffing agency supervisors working in your facilities may not be something that your management sees as desirable or acceptable.

However, this option may work very well in circumstances in which there is a need for larger numbers of contingent workers in a facility, especially on an ongoing basis. In these situations, the organization can train the agency's supervisors concerning their duties and responsibilities overseeing these contingent workers to help ensure that their work is performed correctly.

As with being a joint employer, there can be downsides to this type of agency-supervised arrangement, even if you can overcome the obstacles we've mentioned. Having the agency become the sole employer means losing control over the contingent workers' direction and performance. This could cause quality or service problems with your customers if the agency does not properly manage contingent workers' performance.

In most contingent employee arrangements, the staffing agency will retain responsibility for establishing its work rules and procedures, including disciplinary rules and procedures. Contingent workers will not have any right or access to the disciplinary procedures and policies established for permanent employees. This is as it should be if the client does not want to be considered an employer of the contingent workers.

However, most sophisticated client companies will require the staffing agency to have and enforce, at a minimum, employment policies and training regarding discrimination, harassment, safety and health, confidential information, and drug use. Contingent employees, like any other business guests on the client's premises, may also be required to adhere to the client's safety and health, harassment, confidential information, and other such generally applicable rules and regulations while on-site.

Due to the difficulty of operating under the "agency in charge" model, there can be a gradual erosion in the separation of responsibility between local management and the outside agency, resulting in a surprise finding of joint employment in a critical legal proceeding. For example, one Canadian company that had taken great lengths to set up a vendor-supervised contingent worker arrangement for its entire hourly workforce to avoid being considered the workers' employer was shocked to find that local management, unbeknownst to senior management, had over time assumed responsibility for such

things as approving hires, scheduling time off, and issuing discipline because it wasn't happy with the performance of the agency's supervisors. When a union petitioned to represent the contingent workers, the Canadian Labor Board found the company to be the employer and, thus, under an obligation to bargain with the workers.

Independent Contractors

The term *contingent worker* is increasingly used in connection with independent contractors. An independent contractor is someone or some entity retained to achieve a specified result using their knowledge, skill, and expertise, free from the control and direction of the organization using the contractor's services.

An entity hired as an independent contractor provides its own workers and bears all liabilities and responsibilities connected to those workers. This could be a company providing production or service workers, one engaged to perform engineering and drafting services, or any other professional services.

An individual working as an independent contractor is self-employed. The contracting company bears no responsibility for employer obligations like Social Security and Medicare taxes, employee benefits, workers' compensation, and unemployment compensation. Thus, using independent contractors can be a means of obtaining critical expertise when needed without incurring the wage and benefit costs and other ongoing expenses and liabilities associated with permanent employees. Examples of an individual independent contractor relationship might be:

- an IT consultant temporarily hired to assist in implementing new software
- a retired executive temporarily hired to oversee a nonprofit organization as it searches for a permanent replacement for an executive director who departed suddenly
- an itinerant emergency-medicine doctor who makes her living contracting her services to different hospitals with seasonal influxes in emergency room admissions.

As defined, they are independent and not subject to the same potential joint employment liabilities as contingent workers provided and employed by a staffing agency. They are self-managed and responsible for virtually all the employment and payroll functions that a staffing agency would perform.

Thus, you may find independent contractors through different sources including agencies, online resources, advertisements, reputation, word-of-mouth, former employees, or even personal contacts.

Casual Employees

There is another employment alternative to hiring permanent employees to meet your temporary staffing needs. While we have defined contingent employees for our purposes as excluding workers who are on your payroll, most definitions of contingent employment include casual, seasonal, or part-time work. Hiring casual or part-time employees may be an option to consider. Your organization would directly pay these employees, unlike other contingent workers; however, they typically are categorized differently than permanent employees. They may work less than 40 hours a week as part-time employees, or they may work a full-time schedule but for a defined or limited period. One of the major advantages is that the organization isn't adding to its permanent headcount, which could be one of its primary business objectives. Pay for these workers is typically at a lower rate than that of permanent workers and there are usually no benefits of any kind provided to them.

The downside of this employment status is that virtually all the potential liabilities associated with permanent workers still exist for this category of employee. The organization assumes all the responsibility and expense of recruiting, hiring, processing, and orienting these workers rather than a staffing agency. There also may be limitations on the duration and number of hours that these employees are able to work without affecting their casual status and making them potentially eligible for pension or medical benefits afforded to the organization's permanent workforce.

Misclassifications

Misunderstanding or misclassifying contingent workers can become a significant liability to your organization. This point cannot be overemphasized. You can have a false sense of security thinking that your organization is protected from the liabilities and responsibilities associated with being an employer if you fail to meet the legal requirements for establishing that someone else is the sole employer of your contingent workers. Claims that your organization

is a joint employer of contingent workers assigned to your workplace can be difficult to defend against should there be a dispute.

There can also be disagreements concerning the status of independent contractors if an organization gets overinvolved in the supervision and direction of the work being performed—as in the software engineer example—thereby negating the independence that is the hallmark of this status. The financial penalties for incorrectly designating someone as an independent contractor can be large!

Thus, it is important that your organization knows and fully understands the current legal requirements for establishing such a status and seeks legal advice if there is any uncertainty about whether an arrangement complies with the law.

Table 1-1 can serve as a quick reference regarding these different classifications of contingent workers.

Table 1-1. Contingent Worker Classifications

Contingent Worker Classification	Description	Advantages	Disadvantages
Joint Employment	<ul style="list-style-type: none">• Responsibility for workers shared by both organization and staffing agency	<ul style="list-style-type: none">• Agency assumes responsibility for all administrative functions of workers	<ul style="list-style-type: none">• Company still has shared liability for workers
Agency Supervised	<ul style="list-style-type: none">• Workers are sole responsibility of staffing agency	<ul style="list-style-type: none">• Agency assumes full liability for workers	<ul style="list-style-type: none">• Company loses control over day-to-day direction of workers
Independent Contractor or Consultant	<ul style="list-style-type: none">• Contractor or consultant is self-employed and assumes all responsibility and liability for workers or self	<ul style="list-style-type: none">• Contractor assumes full responsibility of workers or self and all administrative functions• Paid for completion of work or project	<ul style="list-style-type: none">• Company has little or no control or involvement in how work is performed—only the work result
Casual Employee	<ul style="list-style-type: none">• Not technically a contingent worker but different from permanent full-time employees• On company payroll but works a reduced schedule or for limited time periods• Usually receives no benefits	<ul style="list-style-type: none">• Company has full control over hiring, pay, training, and supervising employees• Costs less than full-time employees• Employed only as needed• A good way to cover temporary peaks in business or demands	<ul style="list-style-type: none">• Company assumes full liability for employees, as it does for permanent full-time employees• Company responsible for all administrative functions of casual employees

Rights of Contingent Workers

It is important to remember that regardless of who is their true employer, contingent workers have all the basic legal rights of your permanent employees. If those rights are violated, someone is going to be held accountable and regardless of which entity is ultimately found responsible, both entities are likely to wind up as defendants. Disgruntled contingent employees can adversely affect the order, discipline, and productivity of your operation as much as disgruntled permanent employees. Thus, you should always try to ensure that contingent workers are treated by their employer, whoever that is, with the same respect, dignity, and legal correctness afforded to other employees. Regardless of whether the employees are yours or someone else's, unlawful or abusive treatment is never good for your business. That you do not condone such treatment should be clear in all your dealings with staffing agencies, contractors, and contingent workers, both formal and informal.

The following chapters will guide you on how to educate and involve everyone in your organization about their roles and responsibilities concerning the introduction and use of contingent workers.

Practical Applications

- Before introducing contingent workers in your organization, conduct informational meetings for your managers and supervisors to educate them about the various definitions presented in this chapter and possible pitfalls.
- Review recent cases in your industry or business in which companies had either positive or negative experiences with contingent worker arrangements, or were found to be noncompliant and the consequences they faced as a result.
- Don't unnecessarily alarm managers and supervisors about potential problems. Assure them that leadership has carefully considered the matter and believes that it is in the organization's best interest to move ahead with this contingent worker initiative. Explain why, and make it clear that this information is being presented to them to help them avoid any problems or pitfalls.

Questions to Consider

- If you use contingent workers in your organization, are there any potential misclassifications existing that should be addressed?

Chapter 1

- Do your supervisors or managers understand the differences in contingent worker classifications as presented in this chapter and what their responsibilities should be concerning these workers?
- Are the rights of your contingent workers understood and assured?

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