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Watch Your Step When Using Temp Employees

If you use temporary staffing firms to supply some of your personnel needs, you need to prepare for federal and some state government agencies scrutinizing your operation.

This nationwide and state-level campaign targeting temp employees has progressed hand-in-hand with the efforts of labor unions targeting what they term “contingent employees” – temp workers and independent contractors – the unions say are exploited, and of course who cannot be organized.

For example, for several years union front called worker centers have waged war on third-party logistics warehouse operators who use temp workers, and successfully enlisted the help of state wage and safety enforcement agencies as part of a back-channel war against the unions’ ultimate bete noire: Walmart (See article on Page 2).

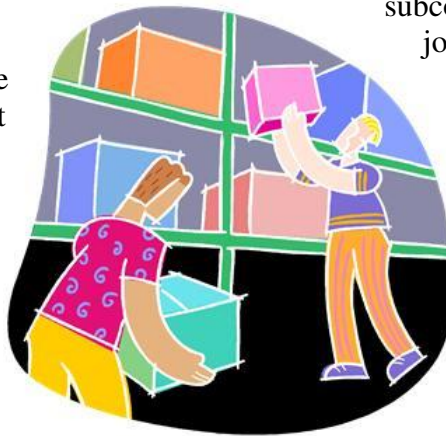
Late last year the OSHA Administrator announced a campaign specifically aimed at logistics and transportation providers.

In addition, the new chief of the U.S. Labor Department’s Wage and Hour Division also has vocal about the fact that he considers the logistics and moving and storage industries among that agency’s prime targets. (*ACWI Advance*, 5-15-14, Page 5).

“As a number of business executives have learned the hard way, leasing employees – although convenient and cost effective – will rarely shield their company from liability for employment law violations, says Nicholas R. Hankey, an attorney

specializing in labor law with the law firm of DLA Piper.

“To the contrary, the courts have consistently ruled that the customer is a joint employer along with the subcontractor or labor supplier and, thus, jointly liable for all aspects of the employment relationship,” he adds.



To protect yourself Hankey says you should start by insisting on a contractual mandate that the leasing agency have Employment Practices Liability Insurance (EPLI) and that your business be included as an “additional named insured” at the leasing company’s expense.

The contract also must also include an indemnification clause because EPLI won’t cover wage-hour violations. “But, unless the business uses a reputable, well-capitalized leasing firm, this provision may be worthless,” Hankey warns.

When the leased employees are on your premises, he adds, it is imperative to audit your leasing agency: Check on the most common problems that flow upstream – I-9 compliance; wage-hour compliance and OSHA violations. “The best answer remains ‘trust but verify,’” Hankey points out.

Preparing for an OSHA Visit

Employers have more detailed information available to help them with OSHA’s initiative launched last year, including detailed instruction to its inspectors about what to look for, according to attorneys Mark S. Dreux and Matt Thorne of the law firm of Arent Fox LLP.

(Continued on next page)

OSHA's recurring theme for protecting temporary workers is joint responsibility between the host employer and staffing agency. However, regardless of responsibilities staffing agencies bear regarding worker safety, OSHA said its bottom line you "must treat temporary workers like any other workers in terms of training and safety and health protections."

The agency specifically recommends that host employers communicate with the staffing agency at the outset of the engagement to "set out their respective responsibilities for compliance with applicable OSHA standards."

Evaluate the hazards to temporary workers because the host is in a position to prevent and correct, then act accordingly, OSHA asserts. For example, it points out, host employers are usually in a better position to provide safety training on a hazard/piece of equipment that is unique to its worksite.

Dreux and Thorne offer the following advice to host employers:

Audit/evaluate worksite hazards. Review the anticipated scope of the temporary workers' tasks and determine if they will be exposed to any potential safety hazards that are unique to the worksite. This will help determine which employer (host or staffing agency) will be in a better position to address them.

Maintain good communication. At the outset of any engagement, find out from the staffing agency what are the respective safety responsibilities for temporary workers (e.g., training), then document them in the parties' contract.

Address the issue of injury/illness records responsibility. Confirm which employer will supervise the temporary workers on a day-to-day basis. This will determine who bears responsibility for maintaining their injury/illness records.

Confirm adequate safety training/tools. Depending on the hazards or equipment used at the work site, confirm that all temporary workers have received the necessary safety tools, personal protective equipment and training in a language and vocabulary they understand.

In OSHA's view, temporary workers should receive the exact same training as hourly employees. The training should also be documented and readily available should an inspector request it.

Walmart, Schneider Logistics Settle Temp Staffing Lawsuit

Walmart and its third-party warehouse services provider Schneider Logistics Trans-Loading and Distribution have settled a lawsuit for \$21 million that accused them of abetting poor treatment of 1,800 temp workers in California's Inland Empire.

The suit was brought in 2011 as part of a nationwide effort by labor unions to target warehouse providers of the retail giant after they failed to unionize Walmart directly.

This corporate campaign by union-run "worker centers" has included media events, lawsuits and the recruitment of friendly state legislators and regulators to intervene on their behalf.

This suit charged that wages were unpaid and records were not kept as required by law. Earlier this year a federal district court in California ruled that Walmart and SLTD along with the subcontractors could be held jointly liable because of the control STLD and the retailer exercised over these workers. (*ACWI Advance*, 3-15-14, P. 3)

The court found Walmart imposed screening requirements for all the employees, approved overall staffing levels, oversaw hours worked, monitored and enforced productivity standards, and influenced pay rates and working schedules.

Attorneys for the workers argued that they often were forced to work 16 hours a day, up to seven days a week, were denied minimum wage and overtime pay, and were not given proper breaks.

Although Walmart has not commented, Schneider stressed it contractually requires subcontractors to comply with all legal and ethical standards.

"Our customers hold us to the highest standards, and we in turn hold our vendors to the same high standards," the company said.

"We are deeply disappointed when those third-party vendors do not live up to our standards and fail to fulfill their contractual and legal responsibilities."

The warehouse workers earlier secured a combined settlement of \$1.7 million from two subcontractor firms: Impact Logistics Inc. and Premier Warehousing Ventures.

Maryland Makes Warehouse Vertical Conveyors Illegal

Under lobbying pressure from the elevator industry, Maryland has made it virtually illegal to use vertical reciprocating conveyors in warehouses and other industrial facilities.

The state did this by placing VRCs within the same category of safety regulations that covers freight elevators, even if they don't carry passengers.



According to *DC Velocity* magazine, the ban extends to all kinds of VRCs. The material handling association MHI defines VRCs as power- or gravity-actuated lifts that move material vertically between two or more fixed

elevations, such as warehouse mezzanines.

The association stressed that this equipment is not designed to carry passengers or an operator. MHI members meet regularly to review, discuss and implement programs promoting the safe application, design, installation and operation of VRCs.

The American Society of Mechanical Engineers sets standards for both VRCs and material lift (freight) elevators that recognize the substantial differences between the two types of systems, MHI noted.

To confuse the two systems under the regulations, the association said, "is not only a misinterpretation of the code itself, but imposes unreasonable requirements on, creates unnecessary regulatory and administrative obstructions for, and places an additional financial burden on the end user of the equipment."

DC Velocity reported that other unnamed states are considering similar measures but none has moved as aggressively as Maryland.

The magazine also reported that conveyor manufacturers fear that such strict regulations will spread to other states and that elevator codes may also end up covering other vertical technologies including spiral conveyors, vertical shuttles, inclines and vertical lift modules.

NLRB Seeks Input About Unionizing College Football

The National Labor Relations Board has invited public input on whether college football players should be allowed to form a union. The only catch: You need to be a labor lawyer to comment.

On March 26 an NLRB regional director held that Northwestern University players receiving grants-in-aid are employees and thus can form a bargaining unit. (*ACWI Advance*, 4-15-14, P. 2)



As a result, an election was held on April 25 where the employees cast ballots on whether to join a union. However, the ballots were immediately seized and the NLRB has postponed counting them until the full board can decide on the issue.

The board is seeking friend-of-the-court briefs from parties other than the university to address a range of issues. Those briefs are due June 26.

In particular, the board requested briefing on the application of a 2004 decision in which it found that Brown University graduate student teaching assistants were not employees under the National Labor Relations Act and thus could not engage in collective bargaining.

Attorney Christine Holst of the law firm of Barnes & Thornburg LLP said the inclusion of this question may signal the NLRB's potential willingness to overrule the decision.

However, other legal observers believe the regional director wouldn't have acted in the first place without the go-ahead from the general counsel, who must have known the views of the board majority.

The board also sought input on the relevance of the players' status under other federal and state laws, such as Title VII and Title IX.

Holst believes this suggests that the NLRB may be amenable to an argument that because scholarship football players are not considered employees under other federal laws, they should not be considered employees under the NLRA. We shall see.

All Intermodal Market Sectors Post Gains in First Quarter

Despite severe winter weather, intermodal volumes rose 2.6% in the first quarter above 2013, the Intermodal Association of North America reported.

For the first time in nearly a decade, piggyback trailer growth outperformed all other intermodal segments, posting a 7.5% increase, IANA noted, ending a sustained streak of market leadership that had been enjoyed by domestic containers.

IANA President Joni Casey said that in spite of the weather, “intermodal volumes showed modest growth, led by gains in trailer movements particularly in some of the regions that were hardest hit by winter, such as the Northeast and Eastern Canada.”

Domestic containers saw a 3.2% increase over the first quarter of 2013. International intermodal volumes demonstrated volatility but gained 1.1% when compared year-to-year. In the face of declines in the first two months of 2014, international shipments posted an 8.5% gain over March 2013.

“It’s a little too early though to tell whether March is indicative of an upward trend or an anomaly when considering the strength of the international sector,” IANA pointed out.

The Northwest, Midwest and Eastern Canada all underperformed the industry average, while the Mountain Central, South Central, Southwest and Western Canadian regions all performed better.

At the extremes, the Mountain Central region posted a 17.2% growth and the Northwest saw a 12.9% decrease from the same quarter in 2013.

Intermodal marketing companies, generally a good indicator of broader industry trends, also felt the effects of adverse weather. Total volume levels dropped by 1.2% year-to-year, marking the first decline since the third quarter of 2009. However IMCs reported improved average revenues for the first quarter, mostly boosted by tighter capacity.

“Given the long-term strength demonstrated by domestic intermodal coupled with tight trucking capacity, it’s likely that intermodal will continue to be the dominant source of IMC growth for the balance of 2014,” IANA predicted.

Employer Groups Tell OSHA: Pull Proposed Reporting Rule

Employer groups have asked OSHA to withdraw its proposal to publish employers’ injury and illness logs on the Internet because it would result in “significant negative impacts.”

Proposed in November, the new rules would require employers with locations with 250 or more workers to electronically



submit workplace injury and illness information to OSHA on a quarterly basis.

Non-exempt employer’s establishments with 20 or more employees in

designated industries would electronically submit the information to OSHA annually (AA, 12-31-13, Page 3).

The U.S. Chamber of Commerce and the Coalition for Workplace Safety called the proposal a bad idea, noting it would require disclosure of company, location and incident specific information.

“We know that this proposal will trigger malicious uses because these are already occurring without easy access to such specific information,” said Marc Freedman, executive director of labor law policy at the Chamber.

He observed that a request for such disclosure was part of a wish list made to the Obama transition team by the AFL-CIO in 2009. “Unions are known for taking company injury reports out of context when they are trying to organize an employer or pressure one during contract negotiations.”

CWS said OSHA failed to consider the impact on small businesses which do not keep such records in electronic form or have ready access to computers. For larger businesses, CWS added that it would force them publicize confidential information which could be used in takeover attempts.

The coalition also said OSHA has failed to adequately quantify the annual benefits the agency asserts would significantly exceed the annual costs.

Purchasers Say Logistics Crucial in B2B Ecommerce

A shift is underway for the distributors of industrial supplies and the e-commerce experience they provide to their customers, according to research recently released by UPS.

In 2013, more than 63% of industrial supply buyers said they made purchases online, with half of them spending at least 50% of their annual budget with suppliers who have an e-commerce platform.

The researchers said this preference for e-commerce purchases offers potential growth opportunities for distributors of industrial supplies by helping them reach buyers who are using the Web to expand beyond their existing supplier base.

"Sales representatives and other methods are still in demand, but the study shows B2B and B2C purchasing habits are becoming more similar," said Brian Littlefield, industrial distribution director at UPS. "The findings underscore the need for industrial suppliers' e-commerce sites to offer a positive customer experience, much like B2C companies."

He added, "Distributors' e-commerce websites are opening new routes for customers." Of those surveyed, 34% said they made online purchases outside their existing supplier base in the last year.

UPS joined with TNS, a global market research firm, to survey 1,500 U.S. industrial supplies purchasers about their e-commerce perceptions.

The vast majority of respondents said their experience with vendors' e-commerce sites are the same (56%) or better (37%) than the consumer sites they use for personal purchases.

However, that doesn't indicate complete satisfaction regarding their experience with either B2C or B2B sites, the researchers warned.

Although industrial supply purchasers are embracing e-commerce, they believe traditional purchasing capabilities are still important, along

with best-in-class product quality, purchase visibility and delivery speed. They also still want access to traditional sales support capabilities, such as printed catalogs and access to a sales representative.

They cited post-sales support as being particularly important, with 68% indicating they would be more likely to do business with a new supplier if its website had strong post-sales service and support.

Among the top 17 criteria buyers cited for deciding whether to buy online, price was No. 3, barely edging out No. 4, which was delivery when products are needed (63% said this was very or extremely important). At No. 5 were shipping costs. (Nos. 1 and 2 were product quality and product availability, respectively).

Buyers want to see accurate shipping costs (87%) and estimated delivery dates (85%) before they buy, and 85% indicate that it's important to have discounted shipping for large orders as well as tracking information.

Among the benefits of purchasing online, knowing shipping costs prior to making an order was cited by 64% while the ability to see real-time product availability was chosen by 63%.

Opportunity exists in making the returns process more streamlined and convenient for B2B customers, with the key needs being ease, speed and flexibility, the researchers said.

Most buyers who make returns (53%) think the returns process could be improved by including a pre-printed return shipping label with the original delivery, and 40% think the ability to handle all aspects of a return online would help.

Responses differed based on annual spending, the survey found. Buyers that spend \$250,000 and more annually tend to favor handling all aspects of returns online, but those spending less than \$50,000 more often tend to value more returning products to a physical location.

