Assurex GLOBAL | Construction Practice Group

Risk Management Considerations for

TEMPORARY WORKERS

OVERVIEW

In November, the U.S. Occupational Safety and Health Administration (OSHA) announced increases to federal penalties for workplace safety violations. It's the first escalation in OSHA penalties in 25 years. The increased penalties, which were buried in the Bipartisan Budget Act of 2015, will take effect August 1, 2016, in all states regulated by federal OSHA. The move allows OSHA to raise fines in step with inflation, with an expected initial increase—or "catch-up" adjustment—of approximately 80 percent. The potential impact on businesses is huge, particularly for companies that employ temporary or leased workers. There are large labor law liabilities associated with the use of temporary, leased and borrowed employees. Under the revised OSHA penalty scale, companies could face fines ranging from $12,600 for serious violations to $126,000 for willful or repeat violations.

"This is an area of ongoing concern on the legal front for any business, but particularly for construction companies," says Thomas Benjamin Huggett, an attorney with Littler Mendelson. "OSHA is focused on employee status, and issues frequently arise that bring questions to the forefront."

The increase in fines, along with OSHA's long-standing multi-employer citation policy and newer Temporary Employee Initiative, raise concerns for construction companies that use temporary and leased employees. Huggett shared insight on related risk management considerations at a webinar for Assurex Global's Construction Practice Group. His views and advice form the basis of this white paper.

OSHA fines initial increase adjustment: approximately

80%

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ABOUT THOMAS BENJAMIN HUGGETT

Thomas Benjamin "Ben" Huggett is a shareholder with Littler Mendelson, P.C. in Philadelphia. He focuses his practice exclusively on representing management in all aspects of labor and employment law. Huggett has extensive litigation experience related to the Occupational Safety and Health Act as well as the Mine Safety and Health Act. He has defended clients against OSHA inspections and citations before the Occupational Safety and Health Review Commission (OSHRC) and OSHA state plans.

Huggett is a member of several professional associations, including the Labor and Employment Section of the American Bar Association and the Occupational Safety and Health Committee of the American Bar Association. He has contributed content on labor management relations and workplace safety to more than 30 print and online publications as well as eight books.

Section 1:

EMPLOYEE TYPES

The news is filled with stories about companies paying millions in back wages to misclassified workers. In April 2015, a nearly five-year federal investigation of illegal business practices by 16 defendants in Utah and Arizona led to $700,000 in back wages, damages, penalties and other guarantees for more than 1,000 construction workers. Operating collectively under three company names, the defendants avoided payroll taxes by claiming the construction workers were not employees, according to the U.S. Department of Labor (DOL), which initiated the investigation.

David Weil, Wage and Hour Division Administrator for the DOL, commented on the case in a press release: "Legitimate independent contractors are valuable contributors to our economy, but those who deliberately misclassify actual employees as independent contractors or partners are a serious problem in many industries, especially construction."

While the vast majority of construction companies do not intentionally violate labor laws, some get caught up in a hazy area when trying to determine what constitutes an employee. "In the new economy, we have a number of different kinds of employees who are not directly on your payroll," says Huggett.

There are four primary types of employees:

- **Direct employees** are those that companies hire. Companies withhold payroll taxes. Direct employees receive W-2s and, if eligible, participate in employee benefit plans. Their payroll counts toward the calculation of the company's workers' compensation insurance premium.
- **Temporary employees** are used on a short-term basis when a firm needs to temporarily fill a position due to seasonal demands or the extended absence of an otherwise permanent employee. These employees are paid by the temporary help agency.
- **Leased employees** are provided by Professional Employer Organizations (PEOs) and used on a non-temporary basis. PEOs supply all or the vast majority of a company's workforce on a permanent basis.
- **Borrowed employees**, also called loaned employees, are borrowed for a short time period from another company, which may or may not be a temporary help agency (but not a PEO).

The distinctions may seem simple enough, but in reality companies often grapple with how to classify employees. The challenge arises, in part, due to differing standards for determining whether someone is an employee. Standards vary in federal tax, wage and hour, benefits and anti-discrimination laws. They also vary from state to state, with individual states often applying multiple tests depending on whether the analysis is for purposes of employment law, workers' compensation law, wage and hour law or other state employment statutes.

"All of this makes it very hard for companies to make an ultimate determination and create a consistent employment program," says Huggett. "That's good for lawyers—lots of extra work and things we have to advise people on. But it's not necessarily good for American business."

There are a handful of tests that state and federal agencies—and companies themselves—use to determine employee types, including the following:

- **IRS "20 Questions"** – The IRS offers a list of 20 questions to help companies decide whether they have sufficient control over a worker to be considered an employer. The questions cover everything from work hours (Do you set the worker's hours?) to instructions (Do you have the right to give the worker instructions about when, where and how to work?) and reports (Must the worker give you reports accounting for his/her actions?).
- **Common Law Rules** – The IRS encourages businesses to weigh three factors. The first is behavioral: Does the company control or have the right to control what the worker does and how the worker does his/her job? The second is financial: Are the business aspects of the worker's job controlled by the payer? This includes things such as how the worker is paid and whether expenses are reimbursed. The last factor considers the type of relationship: Are there written contracts or employee-type benefits? Will the relationship continue?
- **Economic Realities** – The DOL asserts that a number of "economic realities" serve as guides for employee status. The list includes the extent to which the work performed is integral to the employer's business, whether the worker's managerial skills affect his/her opportunity for profit and loss, and the worker's skill and initiative.
- **The "ABC" Test** – Used by almost two-thirds of U.S. states, this test proclaims a worker an independent contractor if he/she meets two or all three of the following criteria, depending on the state:
    - **A.** The worker is free from control or direction in the performance of the work.
    - **B.** The work is done outside the usual course of the company's business and is done off the premises of the business.
    - **C.** The worker is customarily engaged in an independent trade, occupation, profession or business.

Once again, while these tests may be helpful, they sometimes lead to further confusion. "They are applied in different context, so they can—for the same individual—come to different conclusions depending on which test you apply," says Huggett. "And that is very unfortunate because it raises the risk associated with businesses using temporary workers."

What Triggers an Audit?

Certain actions or documents may spark a knock on the door from a state or federal agency and lead to an audit. Here are some common triggers:

- A workers' compensation claim
- An unemployment insurance claim
- High 1099 volume
- A claim for unpaid overtime
- Both 1099s and W-2s issued
- A single 1099
- A claim of wrongful discharge

Section 2:

THE TEMPORARY WORKER INITIATIVE

OSHA began paying closer attention to temporary workers when it launched the Temporary Worker Initiative (TWI) on April 29, 2013. The initiative is designed to help prevent work-related injuries and illnesses among temporary workers. OSHA sites three primary reasons for launching the TWI:

A. The increased risk of worked-related injury and illness among temporary workers compared to employees.
B. A lack of training for temporary workers.
C. The overall rise in the use of temporary workers in today's economy.

OSHA defines temporary workers as "workers hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis." Perhaps the most noteworthy part of OSHA's explanation of temporary workers—and the one that can affect construction companies who use temps—follows that initial definition: "In general, OSHA will consider the staffing agency and host employer to be **'joint employers'** of the worker in this situation."

While OSHA looks at the facts of any violation on a case-by-case basis, as a rule of thumb it will hold both staffing agencies and host employers jointly responsible for maintaining a safe work environment for temporary employees. This includes ensuring that OSHA's training, hazard communication and recordkeeping requirements are fulfilled. (Issues surrounding joint employers will be discussed in detail in the next section.)

The TWI is a new approach to stemming OSHA's concern, as highlighted on its website, that "some employers may use temporary workers as a way to avoid meeting all of their compliance obligations under the Occupational Health and Safety Act and other workplace protection laws." While the goal is commendable, Huggett has misgivings with how temporary employee violation inspections are conducted under the TWI. He compares the initiative to OSHA's National & Special Emphasis Programs for perspective.

The National & Special Emphasis Programs revolve around keeping workers safe from specific risks, such as hazardous machinery, trenching and evacuation, combustible dust and lead. The directives include instructions for OSHA representatives on when to open a violation inspection. There are no such guidelines for the TWI, says Huggett. The only guidance provided – and it's limited and generalized – is in a July 2014 memorandum to OSHA regional administrators.

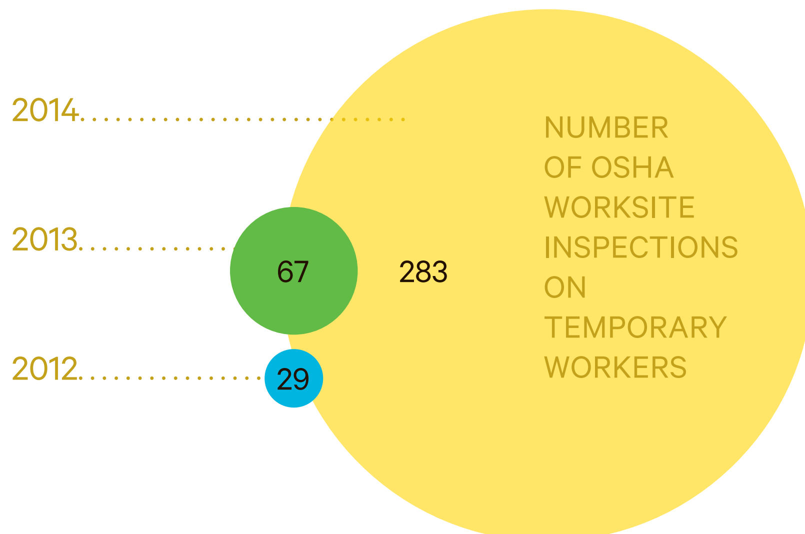
"There's no specific outline for how OSHA will select host employers for inspection of what standards would be applied," he says. "It's simply something being done by the agency behind the scenes. And, of course, that gives employers a great level of concern because OSHA normally operates on some level of transparency."

Huggett says OSHA has conducted many TWI inspections since rolling out the initiative in 2013. One of the first things they often ask host companies is to provide information on temporary employees. OSHA representatives may also hold an opening conference with the staffing company, effectively pitting the two companies against one another. “This can lead to questions between the two companies as to who is responsible for what,” says Huggett. “If those issues have not been carefully considered beforehand, this type of inspection brings them up for the first time and may reveal a lack of coverage in particular areas.”

During a TWI inspection, OSHA may request the following:

- **The Form 300 Log** – It records work-related injuries and illnesses. “OSHA’s record-keeping laws say that a host employer who uses temp employees and supervises them on a day-to-day basis has an obligation to keep the log,” says Huggett. However, some staffing companies provide their own supervision, so the agency and host employer need to determine in advance who will maintain the Form 300 log.
- **The HazCom Program** – “All companies are required to keep a hazard communication program for all chemicals used on the work site. The information must be made available to OSHA on request,” says Huggett. However, this can be quite difficult for staffing agencies to do since they don’t purchase chemicals or maintain safety data sheets like a host employer. “This is something that OSHA is exploiting under the TWI. It may request this information even if there’s nothing at issue in the complaint or accident related to hazard communication,” he adds.
- **The Hazard Assessment** – Companies must determine what hazards are present or likely to be present and what type of personal protective equipment employees must use. Huggett says OSHA also uses information on hazard assessments to pit companies against one another. “It raises potential for identifying issues that haven’t been covered or fully resolved between the two entities and provides an opportunity for OSHA to issue additional citations and penalties,” he says.

The overall impact of the TWI has been huge. According to the Bureau of Labor Statistics, inspections involving staffing agencies increased 322 percent in fiscal 2014. During that year, OSHA conducted 283 worksite inspections involving temporary workers compared to 67 in 2013 and 29 in 2012.



One State's Response to

THE TEMPORARY WORKER INITIATIVE

SO FAR, OSHA-APPROVED STATE PLANS HAVE NOT YET ratcheted up inspections, according to labor attorney Ben Huggett. But California's Division of Occupational Safety and Health, better known as Cal/OSHA, seems to support the federal initiative.

A 2014 ruling in California overturned a 30-year-old law, eliminating the PEMCO II defense and expanding the responsibilities of staffing agencies. In the 1985 **PEMCO II** decision, Cal/OSHA stated that staffing agencies couldn't be punished for host employer's safety violations because they have no control over the worksite. Agencies could avoid responsibilities if they met all four of these criteria:

1. **Contract employees worked exclusively at the secondary employer's site.**
2. **Contract employees were supervised solely by the secondary employer.**
3. **The primary employer was barred by contract or policy from accessing the worksite.**
4. **The primary employer maintained an accident prevention program and contracted out only properly trained employees.**

But Cal/OSHA's 2014 **Staffchex** decision, following on the heels of the Temporary Worker Initiative, said that the PEMCO II defense "led to complexity and confusion" and "is not consistent with achieving the goal of each employer furnishing a safe and healthful workplace." In response, Cal/OSHA now will find joint liability for both host employers and staffing agencies.

"For a host employer, this can be an area of concern," says Huggett. "If you're utilizing temp workers, you can be faced with the prospect of the staffing agency reviewing your health and safety programs because they now have a legal obligation to do so. And the agency may come to different conclusions about what's required, which can create disputes between the two companies."

Section 3:

MULTI-EMPLOYER CITATION POLICY

Aside from the TWI, another long-maintained OSHA policy affects construction companies that hire temporary workers. Under the Multi-Employer Citation Policy, CPL 2-0.124, "more than one employer may be citable for a hazardous condition that violates an OSHA standard." OSHA uses a two-step process to decide whether more than one employer may be cited for violations:

- **Step One** – The first step is to determine whether the employer is a creating, exposing, correcting or controlling employer.
- **Step Two** – If the employer falls into one of those four categories, it's obligated to meet OSHA requirements. The second step determines if the employer's actions were sufficient to meet those obligations.

OSHA defines the four types of employers in its Multi-Employer Citation Policy:

- A creating employer is one that causes the hazardous condition that violates an OSHA standard.
- An exposing employer is one whose employees are exposed to the hazard.
- A correcting employer is engaged in a common undertaking, on the same worksite as the exposing employer, and is responsible for correcting a hazard.
- A controlling employer has general supervisory authority over the worksite, including the power to correct safety and health violations or require others to correct them.

"The Multi-Employer Citation Policy is not strict liability," says Huggett. "It recognizes there's a reasonable care standard. If the host employer meets its duty, the company will not be subject to citation." Whether or not "reasonable care" has been shown depends on several factors, including the scale of the project, the nature and pace of the work, and the extent to which the controlling employer knows about the safety history and practices of the employer it controls.

Section 4:

AVOIDING CITATIONS

All of this information about the TWI and Multi-Employer Citation Policy may leave you feeling helpless to control multi-employer situations and, ultimately, avoid OSHA citations. However, Huggett offers a handful of advice for construction companies that rely on temporary and borrowed employees.

- **Review contracts to ensure OSHA** compliance is the responsibility of the party with whom your company is contracting and that your company is indemnified and held harmless from any OSHA violations.
- **Review work practices and management relationships** to ensure that a joint employment relationship is not established. "Although OSHA will likely find your company to be the controlling employer because of management of safety issues, there shouldn't be any common management of the employees' wages, benefits, workers' compensation or other remunerations of employment," says Huggett.
- **Modify your safety policy** to establish procedures for the following:
    - Reviewing safety records during the selection process and removal of unsafe employees or contractors.
    - Ensuring training on your company safety rules and programs, PPE utilization, exposure monitoring and medical surveillance.
    - Ensuring your company conducts on-site safety inspections and suspends work until safety violations are corrected.
    - Completing or reviewing required documentation for temporary employees. "Make sure contractor employees aren't filling out any paperwork that should be completed by your employees," advises Huggett. "Temp employees shouldn't be acting as agents of your company for formal documentation purposes."
- **Maintain an effective OSHA compliance and audit program** in order to detect and correct violations at your facilities and worksites, thereby reducing the risk of exposure to contractor employees.
- **Designate expert subcontractors,** and require them to observe all safety rules and OSHA regulations.

Another option, says Huggett, is to fully embrace temporary employees. “For all practical purposes and from OSHA’s point of view, they are your employees. You are responsible for them, so you need not worry about any issues related to separation of responsibilities and you aim for 100 percent compliance,” he says.

“Dealing with multi-employer situations is certainly a challenging area, but it’s one that can be controlled,” says Huggett. “It just requires thought and consideration in advance of having temporary employees on site so you ensure, either directly or through the staffing company, that all issues are addressed. In the end, that’s what we all want as professionals concerned about the health and safety of our workers.”

Construction Practice Group

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