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Christopher Marchese
John Land

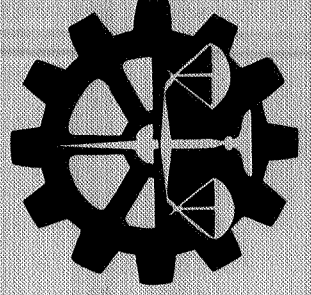
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Journal of the
Corporate Counsel Section
State Bar of Texas

Corporate Counsel Review

Corporate Counsel Review is the journal of the Corporate Counsel Section of the State Bar of Texas. The mission of the Corporate Counsel Section includes the exchange of ideas through the dissemination of materials of interest and concern to the members. The *Review* is published semiannually by South Texas College of Law and has a circulation of approximately 2,600.

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What Every Corporate Counsel Using Temporary Employees Needs to Know

John R. Walker

I. INTRODUCTION

Temporary or contract employees make up approximately 25% of the American workforce.¹ These percentages continue to grow.² The reasons cited for this growth are providing corporations with a wide range of skilled workers, creating a transition for unemployed and underemployed workers, and legal benefits and protections for the temporary employees.^{3,4,5}

Some commentators have objected to the temporary employment relationship on the basis that it creates an imbalance of power between the temporary employees and employers which "rent labor."⁶ Other critics have objected to the use of temporary labor on Marxist grounds, arguing that the relationship alienates the worker from his product.⁷ The Bible also ap-

1. See J. Tansky and P. Veglahn, *Legal Issues in Co-Employment*, LAB L.J., May 1995, at 293; see Contingent and Alternative Arrangements, (visited Feb. 1997) <<http://stats.bls.gov/newsrels.htm>>; USDS Newsrelease 97-422, 12/2/97. This percentage is achieved by adding all workers who do not hold permanent, full-time jobs, including part-time, temporary, self-employed, contract, independent contractors, and on-call workers.
2. See Scott F. Cooper, *The Expanding Use of the Contingent Workforce in the American Economy; New Opportunities and Dangers for Employers*, 4 EMP. REL. L. J. 525 (1995); <<http://stats.bls.gov/newsrels.htm>>; USDS Newsrelease 97-422, 12/2/97. The Bureau of Labor Statistics reports a slight decrease in contingent and alternative employment arrangements from February, 1995 to February, 1997.
3. See *National Association of Temporary and Staffing Services Annual Update*, <<http://www.natss.org>>.
4. See *Global Companies Hiring More Temps; Trend Expected to Grow, Survey Finds*, BNA EMP.POL. & LAW DAILY, Sept. 19, 1995.
5. See *The Empl. Pol'y Found.*, <<http://www.epf.org/index.html>>.
6. See *Temporary Employment and the Imbalance of Power*, 109 HARV. L. REV. 1647, 1648 (1996).
7. See Kai Nielson, *Alienation and Work in Moral Rights in the Workplace*, 28, 31 (Gertrude Ezorsky, ed., 1987) (describing temporary labor as 'alienating and estranging').

pears to reject the temporary employee concept: "One servant cannot serve two masters: for he will hate the one, and love the other; or else he will hold to the one, and despise the other."⁸

Apart from the potential Biblical, Marxist or other implications, it appears that the temporary or contract employee relationship will continue in our society.⁹ The purpose of this Article is to provide the corporate counsel a practical framework for analyzing the potential benefits and liabilities of utilizing non-traditional employment relationships, including contract, temporary or leased labor.¹⁰

The central factual and legal issue is who is the "employer" of the non-traditional worker. This issue is critical because the law has historically viewed relationships in two mutually exclusive categories; either independent contractor or employee. The classification assigned to the relationship governs the application of a wide range of responsibilities for both parties. Typically, the relationship will have three parties: the temporary worker¹¹, a temporary agency or placement firm¹², and the company which utilizes the services of the temporary worker.¹³

II. FEDERAL CONSIDERATIONS

A. Background

Most federal statutes contain an initial section of definitions to be used in that statute. Otherwise, the federal common law definition will control. The federal government has also

8. Luke 16:13 (King James).
9. See, e.g., Lance Morrow, *The Tempting of America*, Time, March 29, 1993, at 47; Marc Silver, *The Truth About Temping*, U.S. News & World Report, Nov. 1, 1993, at 95; Jerry Flint, *A Different Kind of Temp*, Forbes, Feb 28, 1994 at 54.
10. This article is designed to be a practical approach to analyzing potential rights and liabilities from the perspective of the corporate counsel who must advise the corporation of the tax, accounting, benefits, and human resource issues raised by utilizing non-traditional employees. It is not intended to be an exhaustive summary of all potential issues.
11. This is the individual which provides the services. In economic terms, he exchanges his time and skills for remuneration.
12. This party provides a consistent, stable source of workers. In economic terms, it is a labor retailer. It may provide education, training, testing and certification to the workers as well as a range of benefits historically provided by traditional employees.
13. This party utilizes labor. In economic terms, it is a consumer of labor. It may have also formerly been a traditional, full-time permanent employer of laborers performing services of the temporary worker.

created the "Dunlop Committee" which has recommended that "the definition of employee in labor, employment and tax law should be modernized, simplified, and standardized."¹⁴ Until that time, the corporate counsel should be aware of the following federal statutes which create responsibilities and liabilities on users of temporary workers.

1. Internal Revenue Service

The Internal Revenue Service ("IRS") requires employers to withhold federal, state, and local income taxes.¹⁵ The employer is obligated to pay these withheld taxes to the IRS. Moreover, if the employer fails to forward taxes to the IRS, criminal liability is possible.¹⁶

The IRS uses a "20 Factor Test" to determine whether a worker is an employee or an independent contractor.¹⁷ No particular factor is deemed to be dispositive and the relative significance of each factor depends upon the facts of each case.¹⁸

14. Report and Recommendations of the Commission on the Future of Worker-Management Relations, January 9, 1995, reprinted in No. 6 Daily Labor Report (BNA) Special Supplement, p. 36 (January 10, 1995).
15. See Ani Hadjian, *Hiring Temps Full-Time May Get the IRS on Your Tail*, Fortune, Jan. 24, 1994, at 34 (advising uncertain employers of temporary workers either to err on the side of caution and file the W-2 forms required for regular employees, rather than the 1099 forms required for independent contractors).
16. See 26 U.S.C.A. § 6672(a).
17. See Rev. Rul. 87-41, 1987-1, C.B. 296. (These factors are: 1. Instructions by the principal as to how, when and where the work is to be performed; 2. Training provided by the principal; 3. Integration of the individual's work into the overall business operations of the principal; 4. Services must be rendered personally by the individual or the individual can hire employees, assistants or subcontractors; 5. Hiring, paying and supervising of assistants is done by the principal; 6. Continuing relationship between the parties; 7. Hours of work set by the principal; 8. Full-time required; 9. Work on principal's premises; 10. Order or sequence of work set by the principal; 11. Regular reports (oral or written) required by the principal; 12. Pay by hour, week or month (pay on a commission or per-assignment basis indicates independent contractor); 13. Payment of business and travel expenses by principal; 14. Furnishing of tools, equipment and materials by principal; 15. Individual's investment in facilities or equipment; 16. Opportunity for profit or loss; 17. Work for more than one principal at a time; 18. Services available to the general public; 19. Principal's right to discharge indicates employee status; and 20. Individual's right to terminate the relationship indicates employee status).
18. See *Id.*

