

Using Cleaning/Maintenance Services or Consultants *Are You Putting Your Company at Unnecessary Risk?*

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Using an independent contractor or subcontractor whose illegal workforce is on your premises creates an area of vulnerability where Immigration Customs and Enforcement (ICE) can apply sanctions against your company. ICE can deem these workers to be your employees under two circumstances: (1) there are indications of an employer/employee relationship, extremely broadly defined by the amount of control your managers exercise over these workers or (2) if you have actual or “constructive” knowledge that the independent contractor’s workforce is illegal.

Independent Contractor or Employee?

In assessing the risk of ICE sanctions through your independent contractor, your treatment of your independent contractor’s workforce is determinative. Broadly stated, an independent contractor can be deemed to be your employee based upon the amount of control you exercise. A true independent contractor performs work according to its own means and methods and is subject to your control only as to results. A few factors indicating a true independent contractor relationship are that it offers its services to the general public and works for several clients simultaneously, supplying its own tools or materials and independently determining the order in which it performs its work. To illustrate, let us look at two common types of independent contractors you might have on your premises and assist you and your company to be as ICE-proof as possible in both situations.

Using an Outside Cleaning or Maintenance Service?

To avoid liability based on knowing that cleaning or maintenance workers are illegal, your HR department should not review these workers’ I-9s. Reviewing the I-9s would give your organization either actual or constructive knowledge of a potentially illegal worker. Further, doing so may evidence an employer-employee relationship with the worker because this could be seen as a form of control you are exercising over him or her.

Knowing or having constructive knowledge that the independent contractor’s employees on your premises lack employment authorization can be considered by ICE to be harboring, a felony carrying a maximum of ten years’ imprisonment and the greater of \$250,000 in fines or twice the gain these workers afforded your company. Walmart agreed to a settlement with ICE of \$11 million in penalties for turning a blind eye to a subcontractor that employed an illegal workforce to clean Walmart’s premises.

At a minimum, there are several protective measures you can take if you use such independent contractors. Have your agreements with the independent contractor reaffirm the independent contractor relationship, confirm the legality of its workforce, and provide indemnification in the event you are targeted by ICE for any illegal workers on your

premises. Note, however, that this protection may still not absolve your company from liability if the independent contractor's workforce is being supervised, controlled and otherwise treated by your managers as if they are your employees. It is therefore critical that you also train your managers to treat independent contractors and their workers as independent entities rather than as your employees.

What About Using Consultants?

The second common form of independent contractor relationship is through the use of an outside consultant, as is frequently the case in the IT industry. In fact, it has become standard practice for an H-1B nonimmigrant visa holder to be sent by his or her employer, an IT consulting firm, to work on long term projects on a client's premises. These arrangements are coming under scrutiny by the United States Citizenship and Immigration Service (USCIS) for two reasons: for not conforming to a true employer/employee relationship required to maintain H-1B visa status and for failing to meet local wage standards for the geographic location where the visa holder is actually working vs. the employer's location. While the USCIS has not yet determined that the company on whose premises the IT consultant's "employee" is working is actually that company's employee, you do not want to be placed in a position of defending your lack of control over this consultant to demonstrate that he or she is not your employee. Instead, in addition to reaffirming in writing the independent contractor relationship with your IT consulting firm, require a certification that the individual on your premises, if an H-1B visa holder, is both its employee by US immigration law standards and authorized under both state and federal Department of Labor standards to work on your premises. Once again, do not treat this individual as your employee by exercising control or providing supervision.

Conclusion

Independent contractors perform valuable services for a company. Just be certain that their employees are not considered by either ICE or the USCIS to be your employees. Have experienced immigration counsel review any agreements you have in place, and impress upon your managers how to treat these individuals.