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TEMPORARY WORKERS IN DUAL-EMPLOYER ARRANGEMENTS: WHO IS RESPONSIBLE FOR THEIR HEALTH AND SAFETY?

By Thomas J. Pardini

One of the most basic concepts in employment law is that employers have an obligation to furnish a safe workplace for their employees. Cal. Lab. Code § 6400. Until last year, however, the responsibility of staffing agencies that hired workers and sent them out to do temporary work for host employers was not so clear. If certain requirements were met that established that the staffing agency had no control over the host employer's worksite, the staffing agency was not responsible for safety violations that affected its own employees. This was referred to as the *PEMCO II* defense, and it was the law for three decades. In

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August of last year, however, consistent with a national effort to better protect temp workers, the California Occupational Safety and Health Appeals Board issued two decisions that both eliminated the *PEMCO II* defense and expanded the responsibilities of staffing agencies. These decisions, *Staffchex* and *Labor Ready*, bear important implications for all companies that hire temp workers or contract for their services.

The triangulated structure of temporary work arrangements—among the staffing agency, host employer, and employee—creates a more complicated situation than that of a typical employment relationship. If a person is employed by two employers at the same time, a dual-employment situation exists between the two employers. One is referred to as the primary employer (who hires and pays the employee) and the other is referred to as the secondary employer (who typically contracts with the primary employer for the employee's services and supervises the worksite). Dual-employment situations have become more common in recent years with the increase in demand for temporary workers. When a temp worker is injured on the job or exposed to a safety hazard, the primary and secondary employers often vehemently disagree over who bears responsibility.

In the past, primary employers in California could occasionally avoid responsibility for an injury to one of their employees using the *PEMCO II* defense. In *PEMCO II*, Cal/OSHA found worksite violations at a host employer's workplace. Because the temp workers exposed to the hazardous violations were employed by a staffing agency (PEMCO), Cal/OSHA issued citations to this staffing agency. PEMCO argued that, since it had no control over the worksite, it was unfair to punish it for the host employer's violations. The Appeals Board agreed and established the *PEMCO II* defense to ensure that staffing agencies could avoid responsibility for safety violations if all of these elements were met: (1) the contract employee carries out his or her work assignments wholly in and about the secondary employer's worksite; (2) the contract employee, in the execution of his or her work assignments, is supervised solely by management personnel of the secondary employer; (3) the primary employer is barred (by contract with, or by policy of the secondary employer) from access

UK: Proposed Changes to Employment Law

By Caroline Stakim

Earlier this month, the UK government outlined changes it proposes to make to two areas of UK employment law, along with related consultations.

Trade Unions and Industrial Action

The draft Trade Union Bill, introduced to Parliament on 15 July 2015, contains proposals which the government believes will modernize trade union law. Key among the proposed amendments is the requirement that all industrial action (such as a strike) be supported by a ballot at which at least 50% of the union members entitled to vote turn out to do so, in order to ensure that action only goes ahead where there is clear support from the union's members.

Alongside the Trade Union Bill, the government has opened three separate consultations on:

1. An additional requirement in certain key sectors such as education, health and transport, that the industrial action is supported by 40% of all eligible voters (and not only a majority of those who turn out to vote);
2. A proposal to remove the current ban on employers using agency staff to cover shortfalls caused by industrial action; and
3. How to tackle intimidation of non-striking workers.

Further details of these consultations, open until 9 September 2015, are available here.

Equal Pay and the Gender Pay Gap

Under plans to help narrow the gender pay gap, the government has also confirmed that it intends to introduce an obligation for employers

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to the worksite, except to maintain time records of contract employees, or for purposes unrelated to the supervision of work activities of contract employees; and (4) the primary employer maintains an accident prevention program and contracts out only employees who have been trained in the work they are able to do for the secondary employer, and who have been instructed concerning the hazards peculiar to such work. *Petroleum Maintenance Company (PEMCO II)*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985). The Board reasoned that a citation issued to a primary employer, which requires the primary employer to remedy violations at a worksite over which it has no control, "is unreasonable and unenforceable." *Id*.

In the time since *PEMCO II*, and especially over the past decade, temporary work has become a more prevalent and more established part of America's business sector. Several years ago, federal OSHA (OSHA) began receiving and investigating many reports of temp workers suffering serious injuries on the job. OSHA had concerns on a national level "that some employers may use temporary workers as a way to avoid meeting all their compliance obligations under the OSH Act and other worker protection laws; that temporary workers get placed in a variety of jobs, including the most hazardous jobs; that temporary workers are more vulnerable to workplace safety and health hazards and retaliation than workers in traditional employment relationships; [and] that temporary workers are often not given adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer." See here. Additionally, OSHA asserted that numerous studies have shown that new workers are at greatly increased risk for work-related injury, and most temp workers will be "new" workers multiple times a year. In response to these problems, OSHA launched the Temporary Worker Initiative (TWI) in April 2013 to help prevent work-related injuries among temporary workers, as well as clarify the legal responsibilities of their employers. The Cal/OSHA Appeals Board's August 2014 decisions can best be viewed in the context of this national movement to better protect temp workers.

in the private and voluntary sectors with 250 or more employees to publish gender pay information. By mandating greater transparency, the government hopes to motivate employers to tackle pay inequalities.

Alongside this announcement, the government has opened a further consultation which will look at, amongst other things:

1. Where the information should be published;
2. Whether an overall gender pay gap figure or a gender pay gap figure broken down, e.g. by full time and part time working, or by job type/grade, is most appropriate;
3. How often the information should be published; and
4. The appropriateness of using civil enforcement procedures to ensure compliance.

Further details of this consultation, open until 6 September 2015, are available here.

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Staffchex, Cal/OSHA App. 10-2456, Decision After Reconsideration (August 28, 2014), involved a temp worker whose fingers were amputated by an unsafe machine at the host employer's worksite. In this decision, the Cal/OSHA Appeals Board formally eliminated the *PEMCO II* defense, asserting that a defense that absolved primary employers of responsibility under these circumstances was inconsistent with OSHA's overall goal of protecting workers. *PEMCO II* had not only led to complexity and confusion, but also conflicted with the intent of the California Occupational Safety and Health Act, which mandates the duty of every employer to its employees to furnish a place of employment that is safe and healthful. Labor Code Section 6400; *Staffchex*, 10-2456.

The Board's decision in *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration (August 28, 2014), was an additional effort to improve safety for temp workers. In *Labor Ready*, the Board affirmed that the primary employer must ensure its employees are covered under an effective Injury and Illness Prevention Program (IIPP). Although the staffing agency in this case had its own IIPP, it contracted with the host employer to transfer its employees to the host employer's IIPP while at the worksite. However, the staffing agency failed to inquire into the host employer's program or determine that it was sufficient. The Board maintained that employers bear ultimate responsibility for the safety of their employees, regardless of whether they retain control over them, and cannot contract or delegate those duties away. *Labor Ready*, 13-0164.

When investigations reveal a temporary worker was exposed to a safety violation, Cal/OSHA will consider issuing citations to either or both of the employers, depending on the specific facts of the case. Temp agencies must take reasonable steps to evaluate the conditions at the host employer's worksite periodically, ensure temp workers are covered by an IIPP and other safety programs that the assigned work requires, and provide them with the necessary training and protective equipment. Host employers must provide site-specific training appropriate to the temp workers' particular tasks and working conditions. The primary employer has the duty to double-check that the host employer has adequately trained the employee and addressed all safety issues before allowing work to begin.

Cal/OSHA recommends that the temporary staffing agency and the host employer set out their respective responsibilities in their contract. Although the contract's allocation of responsibilities will help eliminate confusion, it will not exempt either party from its legal obligations. *Labor Ready*, 13-0164. Determining the precise responsibilities of host employers and temp agencies will be highly fact-specific, so employers should refer to the Labor Code and Title 8 of the California Code of Regulations to confirm that all their obligations have been met.

It is important to remember that the recent Board decisions involve dual-employer rather than multi-employer situations. A dual-employer situation only exists when an employee has two employers at the same time. A multi-employer situation occurs when two or more employers have workers present, for example, on a construction site. Both types of arrangements can occur simultaneously, but the presence of one does not necessarily include or exclude the presence of the other. Therefore, the multi-employer defense listed in California Code of Regulations Title 8, Section 336.11—which bears many similarities to the defunct *PEMCO II* defense[1]—should not be construed to also apply to an employer in a dual-employer relationship.

The California OSHA Board's *Staffchex* and *Labor Ready* decisions are a manifestation of the national effort to protect temp workers in dual-employer arrangements, and an attempt to motivate primary employers in California to accept their expanded responsibilities. Anyone hiring or using temporary workers should acquaint themselves with these decisions and determine the best course of action for their company.

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1 Specifically, this defense exempts from citation an employer at a multi-employer worksite who (a) did not create the hazard; (b) did not have the responsibility or authority to have the hazard corrected; (c) did not have the ability to correct or remove the hazard; (d) can demonstrate that the responsible employers were specifically notified or were aware of the hazards; and (e) took appropriate feasible steps to protect his/her employees from the hazard. Cal. Code Regs. tit. 8, § 336.11.

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U.S. DEPARTMENT OF LABOR'S WAGE AND HOUR DIVISION RELEASES GUIDANCE MEMORANDUM AIMED AT CURTAILING EMPLOYEE MISCLASSIFICATION

By Tritia Murata and John Raleigh O'Donnell

On July 15, the United States Department of Labor's (DOL) Wage and Hour Division (WHD) released a 15-page guidance memorandum on employee misclassification. For the most part, the guidance merely emphasizes what was already abundantly clear — in the DOL's view, almost no worker ought to qualify as an independent contractor.[1] If there is one takeaway for businesses from the WHD's recent guidance, it is this: If you have not recently audited your independent-contractor and other contingent-worker relationships, now is the time to do so.

The "New" Economic Realities Test

The guidance from WHD Head Dr. David Weil — which explains the DOL's views on how to determine whether a worker is an independent contractor or an employee — contains nothing substantially new. One central message is a reminder that the DOL's interpretation of the Fair Labor Standard Act's (FLSA) expansive definition of "employ" — "to suffer or permit to work" — is significantly broader than the common law "right to control" test. As a result, says the DOL, "most workers are employees under the FLSA's broad definitions." This is hardly surprising considering the Obama administration's recent actions aimed at expanding the FLSA's reach, such as the DOL's July 5, 2015 proposal to update the overtime exemption rules so fewer workers will qualify as exempt.

The DOL's guidance refocuses the "economic realities" test for determining whether a worker is an independent contractor or an employee, urging that "[t]he application of the economic realities factors must be consistent with the broad 'suffer or permit to work' standard of the FLSA." In the DOL's view, a business's degree of control over the worker should not be the pivotal factor. Instead, the DOL proposes that "[a]ll of the factors must be considered in each case, and no one factor (particularly the control factor) is determinative of whether a worker is an employee."[2] The DOL further instructs that the factors "should not be applied in a mechanical fashion," but instead should be evaluated using "a qualitative rather than a quantitative analysis," from the perspective of how the factors serve as indicia of "the broader concept of economic dependence." Essentially, for workers to be considered independent contractors in the DOL's view, they must truly be in business for themselves, servicing other clients and bearing a large portion of the investment in and risk of each project, and they must act with as little guidance as possible from the businesses with which they contract to perform work.

What the DOL's Guidance Means for Businesses Using Independent Contractors

One significant message from the DOL's guidance is that it signals that further increases in future enforcement actions will be taken by the DOL targeting misclassification. At a minimum, we can expect the DOL to audit companies with significant independent-contractor relationships at a higher rate, especially considering the substantial increase in both funding sought and investigators hired recently. As a practical matter, the DOL's memorandum reads more like an advocacy piece than a guidance memorandum. Thus, in addition to foreshadowing increased enforcement actions by the DOL, the guidance may encourage increases in misclassification lawsuits filed by workers and in enforcement actions taken by other agencies, such as the Internal Revenue Service.

It remains to be seen how courts will react to the DOL's guidance, which has no precedential effect.[3] Regardless, in light of this new guidance, stepped-up

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enforcement efforts by the DOL and other federal and state agencies, as well as increased civil litigation by workers claiming they were misclassified, companies are strongly advised to re-evaluate the nature of all existing relationships with independent contractors and other contingent workers and, if appropriate (in conjunction with the assistance of counsel), reclassify certain workers as employees. Taking appropriate steps to both determine whether and ensure that your workers are properly classified will put you in the best position to prevail if your classification decisions are later challenged by the DOL or another administrative agency, or in litigation.

1 Administrator's Interpretation 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, issued July 15, 2015, and available at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm.

2 The factors to be considered under the "economic realities" test are: (1) the business's right to control the manner and means of the work, (2) the extent to which the work performed is an integral part of the company's business, (3) the worker's opportunity for profit or loss depending on his or her managerial skill, (4) the extent of the relative investments of the company and the worker, (5) whether the work performed requires special skills and initiative, and (6) the permanency of the relationship.

3 For example, in the appeal of a case involving the alleged misclassification of unpaid interns, the Second Circuit recently rejected the DOL's informal guidance on trainees that enumerated six criteria and that stated a trainee is not an employee only if all six are met. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-CV, 2015 WL 4033018 (2d Cir. July 2, 2015).

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