

# Gig economy: Legal and practical considerations for employers

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New technologies for the gig economy have allowed temporary staffing candidates to find work via online or mobile applications that use algorithms to match people to positions.

With names like tilr and Shiftgig, these apps use an alternative, temporary or on-demand staffing model akin to those that ride-sharing apps use to connect passengers with drivers.

Traditionally, employers with temporary staffing needs have used outside staffing companies or professional employer organizations to provide temporary employees under negotiated staffing agreements. Typically, these staffing businesses must operate under state statutory and regulatory schemes.

Because a PEO or staffing company may be a co-employer or joint employer with the employer it serves, it must comply with applicable employment laws and maintain documentation required by those laws.

The same compliance considerations apply if a temporary worker is retained through an app-based matching process.

Employers looking to engage temporary workers may want to closely assess and proactively manage any new or traditional methods of engagement. As new gig economy options to engage employees emerge, here are seven areas of concern that employers may want to consider.

## **Employee or contractor?**

The employer-or-contractor question looms when an employer is deciding how to classify a worker. If the individual is an employee rather than a contractor, the employer has certain obligations (including withholding taxes, covered next). Even if both parties agree to the characterization, it may not be legally valid under federal wage-and-hour laws.

Misclassifying employees as contractors or vice versa can have serious consequences for employers and individual managers.

## **Tax withholding**

If a temporary worker is an employee, the employer must withhold federal, state and local taxes; Federal Insurance Contributions Act taxes; Federal Unemployment Tax Act/state unemployment tax acts taxes and more.

If the individual is misclassified as an independent contractor, potential corporate and individual liability exists. Which company is required to withhold taxes if a matching algorithm assigns the worker to a project? What happens if neither company withholds taxes and the Internal Revenue Service shows up?

## Workers' compensation

Laws vary, but most states have strict rules requiring employers to provide workers' compensation coverage. While some app-based temporary staffing models may suggest that workers' compensation coverage is provided, it might be helpful to verify coverage.

The fact that a hiring employer provides workers' compensation benefits may appear to be an admission that the temporary worker is an employee of the business. Independent contractors are typically not covered by workers' compensation.

## Enforcement agencies

The federal Department of Labor, the Occupational Safety and Health Administration and other agencies may regulate employers' relationships with gig workers. Some states and localities have special requirements and notice obligations with respect to temporary employees.

The Fair Labor Standards Act and some state laws require employers to record the time that nonexempt temporary employees have worked.

If temporary employees sustain injuries, employers may need to record these injuries on their OSHA logs.

## Indemnification

The traditional staffing model may offer some indemnification protection within the agreement between an employer and temporary staffing provider. Without a contract with an app-based service, however, indemnification protection may not be available.

Employers may want to seek clarification with regard to which entity will perform the background checks on temporary employees. Is the process compliant with the Fair Credit Reporting Act? Are all temporary employees subject to the employer's drug-free workplace policy? Does the employer maintain government contracts requiring employee drug testing?

## Anti-harassment

Many jurisdictions require employers to provide anti-harassment training to employees and make proof of training available. Employers may want to ensure that temporary employees have access to the anti-harassment policy that applies to them. In the traditional model, the staffing company/PEO or hiring employer may provide the policy and employee handbook.

## Trade secrets, confidential info

Temporary employees can take trade secrets and confidential information, even if they work just one day. Employers may want to require temporary employees to sign written agreements prohibiting the use and disclosure of trade secrets and other proprietary information. If an employer complies with the federal Defend Trade Secrets Act, it may be able to enforce its agreement in federal court.

**Final note:** There are a number of considerations to be weighed in temporary staffing options, new and traditional. Regardless of the staffing model used, employers will want to ensure compliance with myriad employment laws.

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