WILMERHALE

The Contingent Workforce: Employer Expectations and Legal Realities

2003-04-14

It has become common in the legal field for law firms to rely upon the so-called "contingent workforce," but even law firms need to be aware of the potential problems that can arise in utilizing "contingent workers." The contingent workforce provides a convenient mechanism for employers to fill essential personnel needs quickly, while not (they assume) increasing the ranks of the regular employee population or placing themselves at legal risk under employment laws. In using the contingent workforce, however, law firms, just like other types of employers, may find themselves immersed in very complicated legal issues. Such issues arise most often, although not exclusively, when an employer utilizes contingent workers to provide services which are in substance identical to those services provided by the employer's regular, full-time employees, or when such workers are not properly excluded from employee benefit plans.

Contingent workers are usually thought to fall in four separate categories. The first is the *agency temporary* employee. These are employees who are hired by a temporary placement agency and then assigned to work on a temporary basis at client law firms. The second category is the *payroll temporary* employee. Such temporary employees are actually hired by the law firm, and perform services on payroll as an employee. The third category of contingent worker is the *leased* employee. While resembling agency

temporary employees, leased employees (hired through an employee leasing company) often perform a specific departmental function for the client law firm. The final category of contingent worker is the independent contractor, often referred to as *consultant*. These individuals are typically workers who are engaged to perform specialized tasks requiring skill, discretion and independent judgment.

In recent years, there has been much litigation regarding the contingent workforce, and these cases highlight some legal issues which may arise from the use of contingent workers. One of the most high-profile contingent workforce cases ever litigated is *Vizcaino v. Microsoft Corp.*, No. 93-178 (W.D. Wash. Filed Feb. 9, 1993), which was a lawsuit initiated by contingent workers who worked for Microsoft from 1987 through 1990. While working for Microsoft, these individuals had been classified by Microsoft as "independent contractors" or "freelancers." The contingent workers were paid through Microsoft's accounting department, and were not on Microsoft's payroll. They worked side-by-side with regular Microsoft employees, however, and were thoroughly integrated into the workforce. After years of litigation, a federal court of appeals found that the Microsoft contingent workers were, in essence, employees, and should have been permitted by Microsoft to participate in certain Microsoft employee benefit plans. *Vizcaino v. U.S. Dist. Court for the W. Dist. Of Wash.*, 173 F.3d 713, amended by 184 F.3d 1070 (9th Cir 1999). Following this decision, both sides entered into settlement discussions. The settlement agreement of $97 million was approved by the court and the case was dismissed in April 2001. The U.S. Supreme Court subsequently denied reviewing the settlement agreement, and the long and costly litigation has finally come to a close.

Another high-profile case is *Herman v. Time-Warner*, No. 98-7589 (S.D.N.Y. filed Oct. 26 1998), which has also been subsequently settled. The *Herman* case is significant because it represents the first time that the federal government took action in the contingent worker area. The issues

presented in *Herman* are similar to those presented in *Vizcaino*. In *Herman* , the Department of Labor sued Time-Warner as well as various subsidiaries and employee benefits plans maintained by those corporations. The complaint alleged that Time-Warner and its subsidiaries misclassified workers as either "temporary employees" or "independent contractors" in order to prevent them from participating in certain employee benefits plans. Furthermore, it was alleged that Time-Warner's Administrative Committee had reason to know of the misclassification and should have investigated the matter. The Department of Labor and Time-Warner reached a settlement in November 2000 for $5.5 million. Of the settlement amount, $5 million will be divided between the misclassified temporary employees and independent contractors. The remaining $500,000 will go to both categories of contingent workers who had uninsured and unreimbursed medical expenses.

However, in another case involving Time-Warner, a more favorable outcome for the company was reached. Simultaneously with the above case, the Administrative Committee for Time-Warner sued for a declaratory judgment to determine whether or not contingent workers who performed services for Time-Warner subsidiaries were entitled to benefits. The Committee sought judgment in its favor based on two reasons: 1) the independent contractors were not "common law" employees, or 2) even if they were common law employees, the particular benefits plans defined "regular or full-time" employees, and therefore the individuals at issue would still not be covered. The court determined that there was a factual issue as to whether these individuals were common law employees, but ruled in Time-Warner's favor on the second basis. The court examined the wording of the plans; how the plans clearly anticipated contributions via payroll deductions but that these individuals were not paid through the subsidiaries' payroll; and the fact that the individuals knew what type of agreement they were signing and how benefits were not going to be provided under their

independent contractor agreements. See *Admin. Comm. Of the Time Warner, Inc. Benefit Plans v. Biscardi* , 2000 U.S. Dist. LEXIS 16707 (S.D.N.Y. Nov. 17, 2000).

Since *Herman*, the federal government has gotten involved in suing other companies for various practices involving contingent workers. Currently pending is the *EEOC v. Allstate Insurance* , No. 01-07042 (E.D. Pa. Filed Dec. 27, 2001), lawsuit that was filed in December 2001 after yearlong negotiations fell apart. The EEOC is accusing Allstate of "illegally converting agents from permanent employees to independent contractors, and then forcing them to sign releases waiving any age discrimination claims they may have against the company." Allstate counters this accusation by stating the conversion was needed to "jump start the corporation's growth." As independent contractors, the agents receive a slightly higher commission rate, a 2% increase, but no longer receive pensions or other benefits. The court may find in favor of Allstate in the end, but employers, including law firms, should be aware of the potential problems that can arise from employing a corporate strategy such as the one used by Allstate.