

# Managing Co-Employment Risks

A White Paper for  
Buyers of Consulting  
& Contract Services

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## Introduction

Today's companies are utilizing temporary employees more than ever before. Over the past decade, the number of temporary employees has exploded from 500,000 to 2 million — or nearly 1.5% of the US workforce.

This trend continues to grow exponentially, which has forced employers to take a closer look at employment law in this area. The issue of co-employment has gained prominence as a result of recent lawsuits that have been filed by contractors who claim that they are actual customer employees who deserve retroactive benefits.

The ideal way to avoid the pitfalls of co-employment is to partner with an experienced staffing solutions provider that has established policies and procedures in place to ensure compliance with employment laws.

## What is Co-Employment?

Co-employment refers to situations where two companies maintain control over an employee's work. This typically occurs when companies utilize temporary or contingent employees as part of their workforce.

Whether an individual is referred to as a contingent worker, nonemployee, temporary employee or contract employee, the employment arrangement presents both the customer and the staffing provider with issues related to the employment of that individual.

## The Employee/Employer Relationship

In a traditional temporary staffing arrangement, the customer is responsible for the day-to-day direction and control of the contract employee, while the staffing company is responsible for some or all other economic and employment aspects of the contract employee's assignment. Typically, a provider of staffing services:

- Recruits, screens, interviews, selects, hires, disciplines and terminates the contract employee.
- Maintains all necessary personnel and payroll records, including drug screens and background checks, if applicable.
- Computes wages and withholds applicable federal, state, and local taxes and federal Social Security payments.
- Remits employee withholdings to the proper governmental authorities and makes employer contributions for federal FICA and federal and state unemployment insurance payments.
- Pays net wages and fringe benefits, if any, directly to the contract employee.
- Provides liability, fidelity, and Workers' Compensation insurance coverage.
- Resolves the contract employee's complaints and grievances.
- At the request of the customer, for any valid legal reason, removes the contract employee assigned to the customer.

One risk of co-employment occurs when the customer's employees engage in conduct that directly impacts a contract employee. The customer may be held responsible under Title VII or other Civil Rights laws when a customer's employee engages in discriminatory or harassing conduct affecting a contract employee.

Similarly, the involvement of customer employees in the actual hiring or firing of a contract employee can create co-employment risks under applicable state or federal laws.

One of the main reasons co-employment issues have gained attention is due to the *Vizcaino v. Microsoft Corp.* court ruling. In this case, Microsoft failed to properly identify the roles of temporary workers, which resulted in a ruling against them.

Microsoft did a few inappropriate things: first, they treated their independent contractors like employees instead of as independent contractors. Second, they did not exclude contract employees provided by third party staffing companies from their stock purchase plan.

Following are some of the details of this case:

The *Vizcaino v. Microsoft Corp.* case is a class action lawsuit brought on behalf of a class of persons employed by Microsoft who were denied employment benefits because Microsoft considered them to be independent contractors or employees of third-party employment agencies.

The class in this case initially consisted of a few hundred people but was later significantly enlarged by the court.

## Microsoft failed to properly identify the roles of temporary workers.

It is important to understand the legal and practical ramifications of the Microsoft case. The case centers around the language found in Microsoft's Employee Stock Purchase Plan (ESPP). In that plan, Microsoft defined plan participants (those eligible to participate in the plan) as all "common law employees" on the company's payroll. The only employees specifically *excluded* under the language of the ESPP were employees who worked less than five months per year or less than half-time.<sup>1</sup> In reference to the independent contractors, the court held that because Microsoft conceded they were common law employees and not independent contractors, Microsoft had no legitimate basis for rejecting their benefit claims. With regard to the individuals provided by temporary staffing agencies, the court used the following five-factor test in determining whether they were truly "common law employees" and therefore eligible to participate in the plan:

- Recruitment
- Training
- Duration of employment
- Right to assign additional work
- Control over the relationship between worker and agency

<sup>1</sup>The "five month" time period being reported in the press has nothing to do with whether an employee of a staffing firm will also be found to be an employee of the customer. It is simply the time period that Microsoft put in its plan document to determine who would not be covered by the plan.

## Case Study – Microsoft (cont.)

There is an important aspect of the case (and of the law in general) that has not been reported in the press. That is, employees are not entitled to benefits unless they are “eligible” employees under a plan, regardless of whether they meet the common law test for “employee” status. In other words, a plan need not adopt or incorporate the common law definition of an employee in delineating the scope of its coverage. Employers are free to draft employee benefit plans that leave out certain groups of workers. For example, a plan can exclude contingent workers or workers hired through a third party agency. It can also exclude workers who do not elect to participate in the plan. Therefore, measures can and should be taken that help protect companies from claims such as those asserted in the Microsoft case.

## How Yoh Helps Manage Co-Employment Issues

As a leader in the staffing industry, Yoh manages co-employment challenges and can give you peace-of-mind in your utilization of a contingent workforce.



For the co-employment issues described above, we have developed a practice of working with our customers to ensure that each of us — Yoh and our customer — properly fulfills our respective role in the relationship with contract employees. While customer employees are regularly involved in the supervision of the actual work performed by our contract employees, we exercise great care, in cooperation with our customers, to make sure that we maintain control of the employment relationship at all times. This can be accomplished by following a few simple practices:

- All aspects of the economic relationship with contract employees (e.g. payroll, raises, bonuses, benefits) are administered by Yoh without customer involvement.
- All communications regarding the duration, or termination, of employment are handled by Yoh without customer involvement.
- Employment-related issues that arise between contract employees and customer employees are promptly communicated by the customer to Yoh management, enabling Yoh and the customer to work together to resolve these issues effectively.
- Most importantly, lines of communication are kept open so that contract employee issues are recognized early and addressed by Yoh management before they escalate.

By implementing the above practices, Yoh has been successful in avoiding co-employment issues with our customers. Moreover, if such issues should arise in our performance, we have the support of our experienced human resources and legal staff to advise and assist in these matters. Another option companies can use to further reduce their co-employment risk is to select a managed staffing provider to manage their entire contingent workforce.

## How Yoh Helps Manage Co-Employment Issues (cont.)

For those customers who require a comprehensive managed solution for the procurement and administration of contract employees, Yoh can deliver a customized, web-based Yoh Exchange program that allows our customers to focus on what is most important — growing their business.

In a managed staffing relationship, Yoh assumes responsibility and accountability for the overall procurement and administration process. Our customers work directly with a dedicated Yoh project team, often residing onsite, working to ensure qualified, responsive staffing services that provide meaningful cost savings.

## How the Customer Benefits

In the years since the resolution of the Microsoft case, we — along with our customers — have developed a series of best practices regarding co-employment. This proactive approach has been beneficial to customers who are concerned about avoiding similar lawsuits.

Yoh has provided customers with education and key information regarding the Microsoft case to help them proactively address co-employment. Following are some additional services we have provided to help manage this risk:

1. We offer to place strong language into our contracts identifying Yoh as the sole employer of our employees.
2. We offer to have our contract employees sign a waiver stating they are not entitled to, and will not seek, our customer's benefits (this waiver is now included in our employment application).

## Several of our customers have adopted policies to attempt to shield themselves from co-employment claims.

Court cases since Microsoft have held that in situations where the customer has language in its benefits plan that excludes employees provided by third parties, and where employees of the staffing firm have signed waivers agreeing that they are not eligible to participate in the plans, the employees are not entitled to plan coverage. Providing more benefits to Yoh employees will not decrease the risk of a Microsoft-type lawsuit. Specifically excluding contract employees from benefit coverage by way of plan documents will.

## Other Approaches

Several of our customers have adopted policies to attempt to shield themselves from co-employment claims. While there is no absolute way to determine which of these is the most effective, following are a few of the examples we have seen:

- **Limitation on Assignment Length** — Some companies limit the number of total hours, or length of assignment, for contract employees. Although length of assignment does not appear to effect the determination of co-employment, Yoh will work with our customers to determine the appropriate assignment duration.
- **No Interviews** — Some customers remove themselves completely from the hiring process, including interviews with prospective contract employees. All recruiting, screening and interviewing is done by the staffing company, reinforcing the employee-employer relationship from the beginning.

Clearly, whether or not these and other policies impact co-employment risk, companies are taking a closer look at proper contract employee usage and their relationships with staffing companies.

## 1099 Independent Contractor Management

An issue related to co-employment is the use of 1099 independent contractors. Today companies are increasingly utilizing the services of independent contractors in a wide variety of work roles. This trend has grown exponentially, forcing many employers to evaluate their expenditures and internal processes in this area.

Yoh's 1099 management services allow customers to avoid the hassles of hiring, managing and paying independent contractors. We eliminate the administrative burden while helping customers navigate the complex IRS and state tax laws governing the 1099 environment. We also have the capability to advise a customer's staff on how to properly engage and manage this classification of worker.

When evaluating 1099 independent contractors, we adhere to the guidelines established by the IRS as well as our own time-tested policies and procedures. Independent contractors are required to demonstrate their compliance by providing a variety of information including articles of incorporation, references, work history, proof of insurance and more.

Yoh engages the services of 1099 independent contractors utilizing a contractual agreement that treats the professional like a true business enterprise — no different than how our customers contract with us. This contract and all other documents are carefully maintained to ensure accurate record keeping in the event of a tax audit.

## Conclusion

While co-employment is an issue that needs careful assessment and review, the basic premise is that only one party — the employer — should be involved in recruiting, interviewing, selecting, hiring, disciplining, compensating and terminating the employee.

When properly managed, a temporary workforce can give a company a competitive advantage, allowing it to flex the size and make-up of its workforce to respond quickly in a global marketplace.

## About Yoh

**Yoh** is one of the largest providers of talent and outsourcing services to customers in the United States. With over 374 Million USD in total sales, Yoh operates from more than 75 locations and provides long- and short-term temporary and direct placement of technology and professional personnel, as well as managed staffing services, for the information technology, scientific, engineering, health care and telecommunications communities. For more information, visit [yoh.com](http://yoh.com). Yoh is part of Yoh Services LLC, a Day & Zimmermann Company.

## About Day & Zimmermann

**Day & Zimmermann** accelerates customer success by delivering reliable managed services. Operating from more than 150 worldwide locations with 2.2 billion USD in revenues, the Day & Zimmermann family of companies employs 24,000 professionals and is currently ranked as one of the largest private companies in America by *Forbes*. Founded in 1901 and headquartered in Philadelphia, PA, Day & Zimmermann is a former winner of the U.S. National Family Business of the Year award. For more information, visit [dayzim.com](http://dayzim.com).

