

Temporary Employment Agencies: Understanding Your Insurance Risks

Employer Issues to Consider

Employers are using the services of temporary employment agencies at an increasing rate. While this can be a good solution for employers to get quick access to needed personnel without having to make long term commitments, there are unique insurance risks that need to be considered. Further, the lines are often blurred between temporary employees, leased employees, and actual employees, however, there is an important distinction between them.

Distinction Between Leased and Temporary Employees

Temporary employees are short-term employees usually hired to provide extra help during peak seasons or to fill in during regular employees' absences. Leased employees, on the other hand, are contracted as a unit on a permanent or indefinite basis. The usual scenario is for an employer to transfer some or all of its employees to the leasing company, which then leases them back to the client.

From an insurance perspective, coverage typically extends to leased employees the same as regular employees. Temporary employees, however, are often excluded from the definition of employee, which leads to the following key issues to consider if you use temporary employees in your business.

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Temporary Employees: Insurance and Risk Management Considerations

If you choose to work with a temp agency, consider the value of having a contract. Temp agencies may be hesitant to provide a contract. However, in the absence of a formal contract, employers are exposed to situations and risks they had not intended and may not be insured appropriately. These risks could possibly be avoided with a contract in place.

The liability for temporary employees arises for an employer due to the governmental determination that temporary employees are “joint employees” between the temporary agency and the employer. Joint employer status means there is shared control and supervision of an employee's activity among two or more business entities, in which said business entities have a relationship with one another.

The recent OSHA memo maintains that temporary staffing agencies and employers share control over the employee, meaning they are jointly responsible for temporary workers. Host employers must treat temporary workers like any other workers in terms of training, safety, and health protections – including ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled.

PROFESSIONAL LIABILITY ISSUE:

Generally, professional liability policies only provide coverage for independent contractors if a certificate evidencing the contractor's liability insurance is on file with the provider. This would also apply in the event a temp agency provides independent contractors instead of temporary employees.

Professional liability policies are for acts of your employees and generally do not extend to a third party, including temporary employees.

Recommendations:

- Request confirmation that the temp agency's professional liability coverage extends to independent contractors. Also request a certificate of liability insurance for any independent contractors used.
- For temp employees, request confirmation that temp agency's professional liability coverage extends to temp employees and require the temp agency to hold harmless the employer for actions or liabilities related to the temporary employee placement with the company.

GENERAL LIABILITY ISSUE:

Standard general liability policies do not include temporary employees as insureds. This means that a temp employee can sue you as the employer for injuries they sustain while working for you or at your place of employment.

Recommendations:

- Request a waiver of subrogation endorsement from the temp agency's workers' compensation and general liability carriers. The subrogation condition gives the insurer the right to attempt collection from another party (the employer in this case) for payment made for which the insured was not totally responsible for (such as a work-related injury).

By adding this endorsement, the temp agency and its workers' compensation carrier cannot look to the employer's general liability policy for reimbursement for a workers' compensation injury.



COMMERCIAL AUTO ISSUE:

Standard commercial auto policies do not include temporary employees as insureds. This may not be an issue in the same way as the general liability, since the driver of a vehicle is always covered by the owner of the vehicle, unless they did not have permission to use the vehicle.

If a temporary employee is driving their own vehicle or an employer's rented vehicle for business, the temporary employee's insurance would respond (as the driver of that vehicle). Generally an individual's limits are not sufficient. Your business's auto policy would not be in excess, like it would be in an employee situation.

Moreover, coverage would not apply to temporary employees while they are moving property to or from a covered auto (such as loading or unloading items).

For example, George is a temporary employee for Senior Home, an assisted living provider. George rode with John, an employee of Senior Home, to take a few residents to a movie. While unloading the wheelchair for a resident, George loses his grip, and the wheelchair falls and seriously injures a young child who was watching. George is not an insured, so he would not have any coverage under the employer's auto policy.

Recommendations:

- Do not allow temporary employees to drive for your business.
- If the employer has a need for the temporary employees to drive for business purposes, have the temp agency add auto coverage for the temporary employee, as there is no coverage under your policy as the employer.

WORKERS' COMPENSATION ISSUE:

Workers' compensation insurance should be carried by the temp agency for the temporary employee; however, without an alternative employer endorsement to the temp agency's policy, you as the employer could be held responsible to provide the workers' compensation benefit under the "Borrowed Servant Doctrine." In addition, even though workers' compensation is covered by the temp agency, OSHA issues are still your responsibility as the employer.

Recommendations:

- Request a waiver of subrogation on the temp agency's workers' compensation policy.
- Request the temp agency's workers' compensation policy include an Alternate Employer Endorsement naming your company as the employer.
- Request staffing agency provide you with job-rated temporary workers only (which, for example, includes OSHA training.)
- Include all hours of temporary employees on annual OSHA summary and be sure to record temporary employee injuries that fall under OSHA.
- Specifically address in the temp agency contract that the temp agency is responsible for any and all OSHA liability.
- Your contract with the temp agency should address training and safety expectations, hold temp agency responsible, and indemnify employer.



EMPLOYMENT PRACTICES LIABILITY ISSUE:

Insurance-related matters are not the only potential issues in working with temporary employees. There are multiple regulatory considerations as well. For instance, all providers are required to perform background checks on anyone working directly with residents. This requirement includes temporary employees. Further, the Office of Inspector General (OIG) keeps an updated list of excluded individuals and entities. No federal health care programs will provide payments for any services provided by excluded individuals and entities.

Also, the Department of Labor, OSHA and NLRB have all had recent rulings regarding the relationship between temp agency and employer that affect determining joint employment status. Federal agencies, including EEOC, ADA, FMLA, and ACA, have come down and said you are jointly responsible for employment issues if you do not have it defined.

Recommendations:

- Require temp agencies to perform background checks on all temporary employees.
- Require the temp agency to check the OIG's excluded list of individuals prior to providing temporary employees. The list can be found at: <https://oig.hhs.gov/exclusions/index.asp>
- Set a pre-determined time frame for the service of any one temporary employee.
- Have a contract stating the issue and indicating respective responsibilities. Consider addressing:
 - National Labor Relations Board (NLRB)
 - Family and Medical Leave Act (FMLA)
 - Occupational Safety and Health Administration (OSHA)
 - Affordable Care Act (ACA)
 - Americans with Disabilities Act (ADA)
- Avoid mutual indemnification language, which may further complicate the issue should something arise.

Each of these issues and recommendations are based on standard, non-tailored coverage forms and may not apply in every situation. In addition, there may be other issues of concern depending on your current insurance program and the changing regulatory environment.

If you currently engage in, or are considering engaging in the services of a temp agency to assist you with your personnel needs, please contact your M3 service team. We can assist in the review of the contracts and discuss the specific risks and exposures you may face.

About M3

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