

# Ten Things That Should Be in Your Staffing Agency Agreements But Probably Aren't



Retaining temporary labor can be convenient for your business, but the retention introduces new legal risks. Under a joint employment theory, your company can be 100% legally liable for errors made by a staffing agency. You could be sued by temps in a class action. Simple indemnity clauses are not enough.

Most template agreements also lack business terms that can save you money and add predictability.

A well-drafted staffing agency agreement can substantially reduce risk and provide other benefits that are often ignored in template agreements. The BakerHostetler Contingent Workforce Practice team works regularly with companies retaining temp labor.

## Here are 10 things that should be in your staffing agency agreement but probably aren't:

1. Individual arbitration agreements with class action waivers. The individual agreement should also include an acknowledgment that the agency is the sole employer and an agreement to protect confidential information. Have the agency require each temp worker to sign it as a condition of being placed with your company.
2. Specific tasks the agency will perform as the employer. Make a list. Include a contractual obligation to track all hours worked, pay overtime, pay minimum wage, provide all required meal and rest breaks, etc. This list helps establish a breach of contract claim if the agency fails to do these things and your company is deemed a joint employer by law.
3. Specific indemnity. Include a specific reference to indemnity for any claim alleging joint employment, claims of bodily injury, breach of any contractual obligations and claims brought by agency temps under various circumstances. A general indemnity clause might not provide sufficient protection.
4. Modified limitation of liability. Boilerplate clauses often say the agency will not be liable for more than the fees it received or for punitive damages. Strike these clauses, or make sure they do not apply to indemnity claims. It's OK to have a cap on damages for disputes between your business and the agency if no third party is involved, but if you're both sued as joint employers and punitive damages are awarded, you don't want your business to be on the hook for damages that were intended to punish the agency's bad behavior. And you certainly don't want the agency's indemnity obligation to be capped by the amount of fees your business paid to the agency.

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5. *Eisenhower Medical* settlement clause. Include a stopgap clause to prevent the agency from settling out from under you in a claim brought by agency temps who were assigned to your company. Temps could settle with the agency and then go after your business as a joint employer. This happened in a significant California case; don't let it happen to you.
6. Affordable Care Act (ACA) fees that include an additional fee charged to your company for each temp worker who accepts an offer of coverage from the agency. This additional fee per person *who accepted coverage* creates a safe harbor against certain ACA violations. Charging an aggregate amount for all temps does not.
7. Limit on overtime multipliers. Just because the agency must pay time and a half on wages doesn't mean you need to pay the full markup percentage on top of that.
8. Volume discounts. Does your company use this staffing agency frequently? If so, the agency might be happy to reduce its fee in exchange for your company providing a certain volume of business.
9. Insurance. Make sure you specify the types and amounts of insurance coverage you require. If temps will be able to access your electronic systems, consider requiring cybercrime insurance.
10. Reasonable accommodations. Address in the contract who pays for reasonable accommodations for temps. Your company retains responsibility for Title III compliance at your facility, which involves public access (e.g., wheelchair ramps and accessible doorways). But consider requiring the staffing agency to reimburse your company for expenses incurred for Title I accommodations for its employees – without markup. Some accommodations can be expensive without rising to the level of “undue burden.”

These ten items are just a few of the recommended terms to consider. Other recommended clauses include the right to audit, survivability of obligations after termination, performance guarantees, and many more.

The temptation to use a short boilerplate staffing agency agreement can be strong, especially when your business needs temp labor on short notice. Resist that temptation. A well-drafted staffing agency agreement can provide tools to reduce joint employer liability, reduce the risk of class actions by temps, preserve your company's rights in a dispute and save your company money on the business side.

### **Plan ahead!**

Contact a member of the BakerHostetler Contingent Workforce Practice team with questions.

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