

Client Briefing

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TO LEASE OR NOT TO LEASE — RECENT DEVELOPMENTS TAKE AWAY MORE BENEFITS OF LEASING EMPLOYEES

By Nancy A. Noall and Patricia J. Haas

Think temporary employees are the answer to your human resource headaches? You might want to think again. That's because several new developments have just turned what were once actual good things about temporary or leased employees into fiction.

The mythical allure of the temporary and "baggage free" employee has led many a naïve employer to believe, "Who cares if she's over forty, get rid of her, it's the temp agency's problem!" Walter & Haverfield has represented many employers who — when the myths were unmasked — learned the hard way about "joint employers" and how pesky employment laws, like Title VII, the ADA, ADEA, etc., actually do apply to all those seemingly unattached workers. But even in the stark light of day, there were still plenty of actual reasons to lease rather than hire.

At one time, there were actually four real advantages to leasing employees instead of hiring them directly.

1. You could save on statutory benefits costs such as unemployment compensation and workers compensation premiums. (As long as the leasing agency paid its own workers compensation premiums and had its employees on its own payroll, the lessee-employer did not have to include them on its payroll for unemployment and workers compensation purposes.)
2. You could avoid being required to include the leased employees in pension and health and welfare benefit plans. (Provided you had the proper language in your ERISA plans.)

3. You could avoid having leased or temporary employees, who are often most vulnerable to union organizing tactics, included in a bargaining unit with the employer's regular employees. This would often prevent an employer's own employees from union organizing that was primarily targeted at, or most successful with, the leased or temporary employees.

4. You didn't have to worry about checking on whether the employees are legally entitled to work in the United States — the leasing company is supposed to do all that work.

Recent developments in the law have changed the tune for employers seeking advantages by leasing employees. The first change stems from a fairly recent NLRB ruling. This NLRB ruling in *M.B. Sturgis Inc.*, a reversal of its own 1973 and 1990 precedents, took away the third incentive for leasing employees. Now, temporary workers can be combined in the same bargaining unit with the regular workforce, without having to get the consent of all employers involved.

The NLRB decision raises many questions about your obligations to leased or temporary workers, particularly if you're fighting a union campaign, or if you already have a union and use temporary workers. And if you're dealing with both temporary and permanent workers in the same bargaining unit, how do you involve the temporary agency in your union negotiations? Their workers, as a rule, are usually paid less than yours are, which is how the leasing companies make a profit. Obviously, if the

leasing agency cannot keep its prices down, you'll have no incentive to continue the contract. And if it costs as much or more to hire a leased employee as it does to hire your own, why bother with the lease?

Another twist which affects the use of leased employees is from the Bureau of U.S. Citizenship and Immigration Service. You may be at risk of violating the Immigration Reform and Control Act ("IRCA") if you knowingly hire an alien who is unauthorized to be employed in the United States, or continue to employ an alien with the knowledge that his employment is unauthorized. The term "knowing" includes not only actual knowledge, but constructive knowledge, based on certain facts and circumstances which would lead a reasonable person to know an employee was an illegal alien. And this also can apply to leased employees. For example, in a recent case against Wal-Mart, the government alleged that subcontracted janitors working at Wal-Mart stores were under the exclusive supervision and control of Wal-Mart managers, so that Wal-Mart should have known of their illegal status. In this case, the contractor hired the janitors and was supposed to comply with all requirements in verifying the employees' eligibility to work in the United States. But the contractor violated IRCA and hired illegal aliens. Even though Wal-Mart didn't do the hiring, it still has been charged with knowingly employing illegal aliens. Wal-Mart was not the company which filled out the I-9 forms and checked identity and work-eligibility documents, but it was

charged with knowledge of the aliens' illegal status. Knowledge was implied from a "deliberate failure" of the employer to investigate suspicious circumstances. This recent Wal-Mart case will no doubt cause an employer's use of independent contractors to be strictly scrutinized in terms of abiding with the IRCA statute. You can't simply rely on your contractor to do everything it's supposed to do when hiring the employees.

What You Need to Know

There are no easy answers. For the moment, there are still two advantages to leasing employees, but depending on your situation, eventually all advantages to leasing employees might be distant myth. So what should you do? Remember that hiring temporary or leased employees is not a panacea for avoiding the human resource problems that come with various state and federal labor and employment laws. Also, in order to avoid possible liability for violating IRCA, you may wish to verify an employee's status even if that employee is obtained through a subcontractor or leasing company. By the time the latest rulings are sorted out in further action or litigation, your human resource department might even need to get prescription-strength Motrin.

If you have any questions or want more specific legal advice regarding any of these articles, please feel free to call your Walter & Haverfield attorney at 216.781.1212.

For information on this or other employment issues, please contact one of our Employment Law attorneys:

Randal G. Ammons	(rammons@walterhav.com)	216-928-2932
Darrell A. Clay	(dclay@walterhav.com)	216-928-2896
Jonathan D. Greenberg	(jgreenberg@walterhav.com)	216-928-2977
Patricia J. Haas	(phaas@walterhav.com)	216-928-2892
William R. Hanna	(whanna@walterhav.com)	216-928-2940
Morris L. Hawk	(mhawk@walterhav.com)	216-619-7842
R. Todd Hunt	(rthunt@walterhav.com)	216-928-2935
Barbara R. Marburger	(bmarburger@walterhav.com)	216-928-2891
Michael McMenamin	(mmcmenamin@walterhav.com)	216-928-2929
Nancy A. Noall	(nnoall@walterhav.com)	216-928-2926
Patricia F. Weisberg	(pweisberg@walterhav.com)	216-928-2928
Susan M. Zidek	(szidek@walterhav.com)	216-928-2936

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WALTER & HAVERFIELD LLP
ATTORNEYS AT LAW

The Tower at Erieview • 1301 E. Ninth Street • Suite 3500 • Cleveland, Ohio 44114-1821
Tel: 216.781.1212 • Fax: 216.575.0911 • www.walterhav.com