Workbook: Independent Contractor versus Employee

I. Who is an "Employee?"

- In most circumstances, an individual is only protected from unlawful discrimination if s/he was an "employee" or "applicant" at the time of the alleged discrimination.

- Therefore, any individual deemed to be an independent contractor, partner or non-employee, will likely not be protected under the laws enforced by the Commission.

- An "employee" is "an individual employed by an employer."
  42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111(4) (ADA); 29 U.S.C. § 203(e)(1) (EPA).

- As will become more evident in Sections III and IV below, it is possible for an individual to have more than one employer; and the question of whether an employer-employee relationship exists when a worker is assigned to a Federal agency is a fact-specific inquiry.

II. EEO Counseling: Agency Responsibilities

- An agency Civil Rights or EEO Office should not assume that a worker is an independent contractor and therefore deny him or her access to an EEO counselor.

- o Makovsky v. Dep't of the Navy, EEOC Appeal No. 01A60197 (Apr. 7, 2006).

- All workers should be provided EEO counseling; and the EEO counselor can inform the worker about potential problems (e.g., timeliness, coverage issues, etc…) that may present barriers to successfully bringing a claim of unlawful discrimination in the Federal sector administrative process.

  - o Regardless of whether the worker is or is not an employee for purposes of coverage under the applicable anti-discrimination laws, if an EEO counselor can help facilitate a resolution of an employment concern between a worker and the agency, then such proactive measures help to avoid future legal problems in any venue, and also help make workers and other affected employees more productive.

- If an EEO counselor suspects that the worker's status may not entitle him or her to bring a claim in the Federal sector administrative EEO process, then the EEO counselor should inform the worker about the process to file a charge of discrimination in the private sector.

  - o Charges of discrimination can be brought at a local EEOC office or Fair Employment Practice Agency (FEPA); and workers should go to either a local FEPA or local EEOC office – but not both.

- Generally, workers have 180 or 300 days (in jurisdictions with a state or local FEPA) from the date of the adverse action to file a charge of discrimination.

- EEO counselors should also inform a worker that s/he could file both an administrative EEO complaint and a charge of discrimination to ensure that his/her complaint will be heard in the appropriate venue.

- The impact of dual filings related to the processing of an EEO complaint will be covered in Sections V and VI.

III. How to Determine if a Worker is an Employee of an Agency

- The Commission applies the common law of agency test to determine whether a worker should be considered an employee or applicant of the Federal agency.

  - There are two Office of Federal Operations (OFO) decisions that specifically provide that the common law of agency test is the appropriate method to determine whether or not a worker is an employee of a Federal agency:

  - Baker v. Dep't of the Army, EEOC Appeal No. 01A45313 (March 16, 2006); and

  - Ma v. Dep't of Health and Human Services, EEOC Appeal No. 01962390 (May 29, 1998).

- Both OFO decisions summarize a series of factors that a fact-finder must consider when examining the relationship between a worker and the Federal agency.

- Factors indicating that a worker has an employment relationship with an employer are set forth as follows:

  - The employer has the right to control when, where and how the worker performs the job.
  - The work does not require a high level of skill or expertise.
  - The employer furnishes the tools, materials and equipment.
  - The work is performed on the employer's premises.
  - There is a continuing relationship between the worker and the employer.
  - The employer has the right to assign additional projects to the worker.
  - The employer sets the hours of work and the duration of the job.
  - The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
  - The worker does not hire and pay assistants.
  - The work performed by the worker is part of the regular business of the employer.
  - The employer is in business.
  - The worker is not engaged in his/her own distinct occupation or business.
  - The employer provides the worker with benefits such as insurance, leave or workers' compensation.

- The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state and Social Security taxes).
- The employer can discharge the worker.
- The worker and the employer believe that they are creating an employer-employee relationship.

- The factors listed above are derived from a series of factors set forth in the EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002, 12/3/97 (Enforcement Guidance on Contingent Workers).

  - These same factors set forth above are located in the Commission's EEOC Compliance Manual, Section 2, Threshold Issues, EEOC Notice No. 015.003, 5/12/00 at pages 2-24 through 2-26.

  - In Ma, the Commission noted that when analyzing these common law factors, there is no "shorthand formula or magic phrase that can be applied to find the answer... [and that] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."

  - The Enforcement Guidance on Contingent Workers also cautions against simply counting the factors for or against whether the Federal agency would qualify as an employer of the worker.

  - The Enforcement Guidance on Contingent Workers also provides that no one factor would be decisive; and it is

not necessary to satisfy the majority of factors in order to consider a worker an employee of the Federal agency.

- A series of recent Commission decisions in May of 2007 demonstrate how the Commission will analyze the factors noted above with a particular emphasis on the extent to which an employer retains control over the worker's position.

- Ross v. Dep't of Justice, EEOC Appeal No. 0120070840 (May 8, 2007.)

- Henery v. Dep't of Justice, EEOC Appeal No. 0120064621 (May 8, 2007.)

- Bryant, Sr. v. Dep't of Justice, EEOC Appeal No. 0120064102 (May 8, 2007)

IV. Joint Employment

- The Enforcement Guidance on Contingent Workers provides that both a staffing firm and client will qualify as an employer of a worker if both businesses have the right to exercise control over the worker's employment.

- All of the circumstances in the worker's relationship with each business should be considered in order to determine whether one or both are employers of the worker.

- Thus, a Federal agency will qualify as a joint employer of a worker if it has the requisite means and manner of

control over that individual's work based on the above-listed criteria, even if a worker is not paid through the Federal agency's payroll system.

V. Developing a Record to Determine Employment Status

- Before an agency EEO Office issues a Final Agency Decision (FAD) dismissing a complaint from a worker it believes does not qualify as an employee of the agency, it should first ensure that the record is fully developed in order to issue a decision.

- To ensure that the record is fully developed, an agency EEO Office should gather the following documents:

  - A copy of the contract between the agency and the temporary staffing firm;

  - All relevant documents related to the worker's employment or the relationship between the worker and the agency, such as:

    - Payroll records
    - Leave records
    - Performance records
    - Discipline/Conduct records
    - Time and Attendance Records
    - Work Product
    - Documents related to the relationship between the temporary staffing firm and agency

- Statements from agency employees addressing the employment relationship between the worker and the Federal agency or temporary staffing firm.

- After all relevant documents and statements have been collected, the agency can draft the FAD.

- The FAD should address:

  - The factors set forth in the EEOC's Compliance Manual on Threshold Issues;

  - The terms of the contract between the temporary staffing firm and the Federal agency; and

  - Any allegations by Complainant regarding the employer-employee relationship.

- If the FAD fails to address relevant allegations by Complainant concerning the employer-employee relationship, then the FAD could be vacated and remanded for further processing.

  - Martell v. Dep't of Justice, EEOC Appeal No. 01A62346 (Aug. 15, 2006).

VI. Investigating EEO Complaints

- A worker assigned to a Federal agency through a temporary staffing firm who believes s/he has been a victim of unlawful discrimination may be unsure where his/her complaint of discrimination should be properly filed.

- To protect his/her rights, a worker will likely file both an EEO complaint in the Federal sector administrative process and a charge of discrimination at the local FEPA or EEOC office.

- In addition to taking appropriate steps to process a complaint of discrimination in the Federal sector EEO process, an agency must also cooperate with any efforts by a local EEOC or FEPA office to conduct an investigation related to a charge of discrimination from a worker.

- EEOC investigators are trained to contact Federal agencies to coordinate federal and private sector investigations in the event a worker files a charge of discrimination and a Federal sector EEO complaint.

▪ See EEOC Enforcement Guidance on Contingent Workers, at Question 9.

- Federal agencies are not required to coordinate investigations, and may elect to conduct its own investigation if the agency accepted for processing a complaint from a worker who also works for a temporary staffing firm.

- Regardless of whether a Federal agency coordinates its investigation with an EEOC or FEPA investigator, the Federal agency has a duty to provide relevant records to the investigator.

- Failure to provide relevant documents to an EEOC or FEPA investigator could result in a subpoena to produce relevant information.

VII. Joint Employment and Reasonable Accommodation

- Where a temporary staffing firm and a Federal agency are deemed joint employers, then both the Federal agency and temporary staffing firm are responsible for providing a reasonable accommodation for a qualified worker with a disability who requests a reasonable accommodation.

  - Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms, EEOC Notice No. 915.002, 12/22/00, at p. 12, question 7.

- Federal agencies should work closely with a temporary staffing firm and worker to engage in an interactive process in order to determine the appropriate reasonable accommodation.

- In order to avoid disputes with a temporary staffing firm, Federal agencies should discuss in advance, who would be responsible for providing a reasonable accommodation.

  - In some situations, the Federal agency would likely be the party primarily responsible for providing the accommodation (e.g., accommodations involving a facility or its equipment if the worker is at the Federal facility and using agency equipment).

- In other situations (e.g., providing an interpreter), the Federal agency and temporary staffing firm should take appropriate steps to address any potential needs in advance so as to avoid any dispute that could impact a worker's ability to perform the essential functions of his or her position.

VIII. Liability

- Joint employers who are found liable for discrimination against a worker will be jointly and severally liable for back pay, front pay and compensatory damages.

- A worker could therefore obtain the full amount of back pay, front pay and compensatory damages from either employer alone, or from both employers.