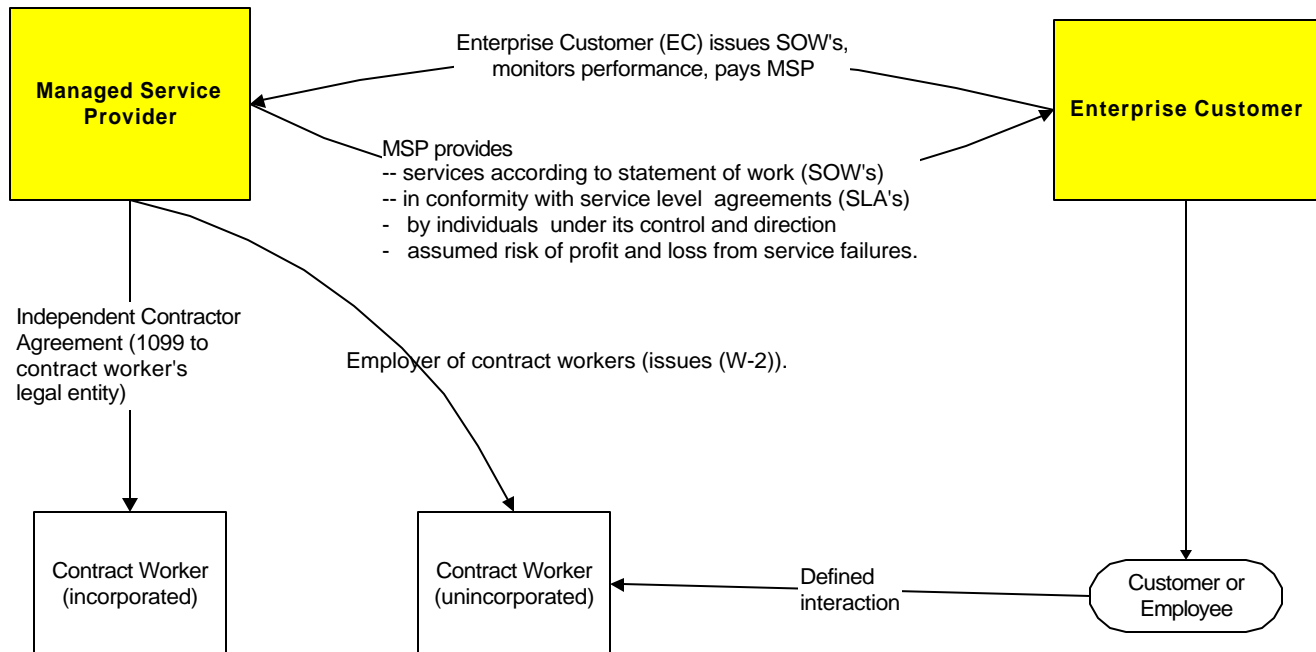


Managing the Contingent Workforce through HRO: The "Managed Services Solution" to Co-Employment Risk



Potential Liability of the Inadvertent Co-employer

Back pay, front pay, overtime, damages (compensatory and punitive), costs, penalties, interest, attorneys' fees, litigation distraction, damage to reputation and trademarks, negligent or intentional damage to third parties, invalidity of ERISA plans (nullification due to breach of anti-discrimination provisions), ingenious litigation claims targeting a deep-pocket settlement.

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Key Legal Elements

1. Scope of Legal Compliance Obligations Relating to Co-Employment Risk

Civil rights, discrimination, EEO reporting and affirmative action, ADA (Americans with Disabilities Act), ADEA (Age Discrimination in Employment Act), NLRA (Labor Relations/ unionization), OSHA (worksites safety), I-9 compliance, Breach of contract, wrongful discharge, ERISA (Employee Retirement Income Security Act of 1974, with fiduciary duties of plan trustees who are usually Executives of Customer Enterprise), Income tax recordkeeping requirements, withholding (tax, Medicare, Social Security) and employer contributions, FLSA (Fair Labor Stds Act - "Time and a half for overtime"), vicarious liability (respondeat superior) for acts and omissions by the employee/contractor, WARN Act (60-day notice to employees before mass layoff or plant closing), stock option eligibility and vesting, Family Medical Leave Act (headcount).

2. Independent contractors under the Law

a. **IRS 20 Factor test:** instructions, training, integration, services rendered personally, hiring/supervising/paying assistants/continuity of relationship, set hours of work, full-time work, place of business, work schedule, reports, method of payment, liability for expenses of travel and operations, furnishing tools and materials, significant investment, realization of profit and loss, working for more than one company, making services available to the general public (multiple clients), right to discharge, right to quit.

b. **FLSA:** "economic realities": degree of economic integration with principal's business, permanency of relationship, worker's investment in equipment, worker's assumption of economic risk of profit and loss.

c. **Common Law agency test:** right to control the manner and means by which worker completes each task.

3. Unincorporated Workers- Contractual Allocation to the MSP of Employer Prerogatives, Roles and Responsibilities.

a. The MSP retains exclusive control over all aspects of operations and the persons.

b. The Customer has no control other than to contractually agree on the recruitment process workflow, the service levels and individual requisitions.

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4. Incorporated Workers - Independent Contractor Agreement

MSP ensures they have obtained business license, build a comprehensive statement of work, sign a contract that clearly states they are independent contractors, grants the independent contractor discretion to implement the SOW in contractor's own methods, according only to the requisition and not to the supervision of the MSP (= flow down), and pays on a 1099.

5. Governance of Relationships

a. MSP and EC alone have discussions on any changes in assignments or duties. Changes are reflected in a control document.

b. MSP alone decides on all elements of employment relationship with the workers, including pay, benefits, employment practices, forms, etc..

c. EC receives the services. It does not try to make any MSP employee part of EC's "team" by T-shirts, titles, picnic/ employee parties, employee functions (including training of employees). Has rights to request MSP to request (but not mandate) removal of individuals but not dictate how they perform. EC needs to identify what intellectual property rights it wishes to own as result of the "outsourced services," to be agreed in contract.