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Effective Processing of
Third Party Contractor
(EEO) Complaints

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Presentation Overview

- Welcome / Introduction.
- Learn how to determine if a worker is an employee or independent contractor.
- Learn what information to gather and how to analyze the information when determining whether a contract worker is also a federal employee.
- Learn how and when to counsel, mediate and investigate claims resulting from actions by contract workers.

Identifying Employers and Employees

- An "employee" is "an individual employed by an employer."
- An individual may have more than one employer.

Scenario One

Susan, a worker hired by a Federal agency through ABC Temporary Services on a one-year contract to provide administrative support, contacts the agency's Civil Rights or EEO Office to raise a concern that she is being sexually harassed by a co-worker.

What should the agency's Civil Rights Office advise Susan to do?

EEO Counseling

- All workers, regardless of employment status, are entitled to meet with an EEO counselor.

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



EEO Counseling (cont.)

- Employees should be advised about:

– the Federal sector EEO process; and

– the private sector process/deadlines to file a charge of discrimination at a local EEOC or FEPA Office.

- Unlike the Federal sector, workers in the private sector 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.

Employer-Employee Relationship

- The Commission applies the common law of agency test to determine if a worker is an agency employee or applicant.
 - Kereem v. Dep't of State, EEOC Request No. 0520110069 (April 26, 2012).
 - Baker v. Dep't of the Army, EEOC Appeal No. 01A45313 (March 16, 2006).
 - Ma v. Dep't of Health and Human Services, EEOC Appeal No. 01962390 (May 29, 1998).

Employer-Employee Relationship (cont.)

- The Commission will examine several factors that are set forth in the Commission's Compliance Manual, Section 2: Threshold Issues, 2-III.A.1, pages 2-25 and 2-26 (May 12, 2000). These factors include:
 - 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.

Employer-Employee Relationship (cont.)

- 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.

Employer-Employee Relationship
(cont.)

- 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.

Employer-Employee Relationship
(cont.)

- 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.

Employer-Employee Relationship
(cont.)

- The employer provides the worker with benefits such as insurance, leave, or worker's 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.

Joint Employment

- Both a staffing firm and a Federal agency may be employers of the same worker.
- The Commission refers to each employer as a joint employer.
- A Federal agency will qualify as a joint employer if it has the requisite means and manner of control of a worker under the previously discussed factors.

Scenario Two

The Agency contracted with XYZ Co. to provide social work services to its employees & dependents. The Agency asked XYZ Co. to hire John and assign him to its D.C. office. Jane, a GS-12 Agency employee, oversaw John's work for several years. John was paid by XYZ Co. The Agency's org. chart identified John as the EAP counselor. John's performance was evaluated by XYZ Co., but with input from Jane. According to the contract, John could be terminated "at the request of the government." XYZ Co. placed John on a corrective action plan due to poor performance. Ultimately, based on Jane's recommendation, John was terminated. John files an EEO complaint.

Should the Agency accept or dismiss John's complaint?

Scenario Two (cont.)

- In this case, the Commission would conclude that the agency is a joint employer.

– *Johnson v. Dep't of the Army*, EEOC Appeal No. 0120052842 (March 7, 2007).
- Dismissal under 29 C.F.R. Section 1614.107(a)(1) would therefore be improper.

Scenario Three

Mona was hired by Acme Services and assigned to the Agency as a General Clerk III. Mona's duties involved salaries, benefits, training, counseling, and other human resources related work. The Agency provided Mona a work location and office equipment. The Agency's Project Officer, Stuart, informed Acme that Mona was having performance problems. Stuart had no authority to counsel, discipline or terminate Mona, so he shared his concerns with Acme. After meeting with Stuart and Mona, Acme removed Mona from the Agency and assigned her to another employer. Mona files an EEO Complaint.

Should the Agency accept or dismiss Mona's EEO Complaint?

Scenario Three (cont.)

- In this case, the Commission would conclude that the agency is not a joint employer.
 - Price v. Dep't of Justice (U.S. Marshals Service), EEOC Appeal No. 0120061770 (Feb. 8, 2007).
- Dismissal under 29 C.F.R. Section 1614.107(a)(1) would therefore be proper.

Scenario Four

According to the EEO Counselor's Report, Ted works for Spectrum Health Resources and performs work at the Agency. Ted filed an EEO complaint alleging race discrimination by his supervisor at the Agency. The Agency dismisses Ted's EEO Complaint because Ted is an employee of Spectrum Health Resources and therefore is not an employee of the Agency.

Did the Agency properly dismiss Ted's EEO Complaint?

Scenario Four (cont.)

- In this case, the Commission would be unable to conclude if the Agency is an employer based on the evidence in the file.
 - Korehbandi v. Dep't of the Air Force, EEOC Appeal No. 0120070911 (April 20, 2007).
- The Commission would vacate and remand the Final Agency Decision (FAD).

Developing the Record to Accept or Dismiss an EEO Complaint

- The record should contain:
 - Copies 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 Agency; and
 - Statements from relevant Agency employees addressing the employment relationship.

Developing the Record to Accept or Dismiss an EEO Complaint (cont.)

- The FAD should address:
 - The factors set forth in the EEOC Compliance Manual, Section 2, Threshold Issues;
 - The terms of the contract; and
 - Any allegations by Complainant regarding the employer-employee relationship.
- Failing to address allegations by a Complainant could result in the FAD being vacated and remanded for further processing.
 - Martell v. Dep't of Justice, EEOC Appeal No. 01A62346 (Aug. 15, 2006).

Investigating EEO Complaints

- An EEOC Investigator processing a private sector charge from a worker at a Federal Agency may contact the Agency's EEO Office to coordinate federal and private sector investigations.
- 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, question 9.

Investigating EEO Complaints (cont.)

- A Federal Agency can elect whether or not to coordinate federal and private sector investigations.



- Agencies who refuse to provide documents to an EEOC Investigator could be served with a subpoena to produce relevant information.

Scenario Five

ABC Co. sends Elisa, a hearing impaired employee, to an Agency to perform project management work on a three-year contract. Although Elisa is on a contract and is paid and provided benefits by ABC Company, the Agency supervises Elisa's work and provides her an office, equipment and instructions on how to manage the contracts. Elisa's work directly relates to the overall mission of the Agency. The Agency supervisor rates Elisa's work, but ABC Company completes the formal rating and determines what pay increase is appropriate. Elisa requests an interpreter when her assignment begins.

Is the Agency obligated to provide a reasonable accommodation?

Scenario Five (cont.)

- As joint employers, both ABC Co. and the Agency are required to provide Elisa 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.
- Agencies should ensure that its contract with a staffing firm specifies who provides and/or pays for any reasonable accommodations.

Liability

- Joint employers found liable for discrimination are jointly and severally liable for back pay, front pay and compensatory damages.



Helpful Resources

- 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: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms, EEOC Notice No. 915.002, 12/22/00.
- EEOC Compliance Manual, Section 2: Threshold Issues, 2-III.A.1. pages 2-25 and 2-26 (May 12, 2000)
- Available at www.eeoc.gov


