



Chapter 1

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They’re Not Our Employees — Are They? An Examination of the Labor, Employment and Employee Benefits Issues that Can Arise with the Use of Temporary, Contract and Leased Employees

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§ 1.01. Introduction.

Employers frequently augment their workforce with non-traditional contingent workers to fulfill a short-lived need, to evaluate employees before hiring them as regular employees, to obtain services that are not paid for through the employer's normal employee payroll, and/or to avoid the obligations that come with the employer's regular common law employees. In some cases, employers directly hire these workers, but classify them as independent contractors, contract employees, or temporary employees. In other cases, employers lease the workers by contracting with a firm that provides them for a fee, with the firm paying their wages, providing their benefits (if any), and paying the employment taxes on their wages.

To the extent employers hire contingent workers to avoid the obligations that come with their regular common law employees, they may not achieve their objectives. Insulation from common law employee obligation generally depends on proving that a worker is an independent contractor. Whether a worker is an independent contractor or a common law employee, however, turns on the application of one of several fact-intensive tests that focus on how the worker is treated.

Courts and administrative agencies increasingly are finding that workers labeled as independent contractors, contract employees, or temporary employees are in fact common law employees. Additionally, courts and administrative agencies oftentimes find that leased employees are jointly employed by both the leasing firm and the client employer, which generally means that both may be jointly liable for obligations owed to the leased employees.

This chapter will explore many of the labor, employment, and employee benefits issues that come with the use of temporary, contract, and leased employees, and offer some practical suggestions for dealing with those issues.¹

¹ The chapter focuses on federal law; however, the chapter also briefly explores, for illustrative purposes, the workers' compensation/tort immunity aspects of using temporary, contract, and leased employees under the laws of several states.