IT’S THE LEASE WE CAN DO:
Advantages and Pitfalls of Leased Employees

Leased Employees

• Q. What are leased employees?
• A. A person performing services for a lessee under an employee leasing arrangement. (Illinois Employee Leasing Company Act, 215 ILCS 113/1, et seq.).
• Q. So, what is an employee leasing arrangement?
• A. The statute says it is “a contractual arrangement, including long-term temporary arrangements whereby a lessor obligates itself to perform specified employer responsibilities as to leased employees, including the securing of workers’ compensation insurance”.

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Who Leases Employees?

- Employers lease employees from professional staffing organizations.
- Such an organization is called an “employee leasing company” (ELC) or “professional employer organization” (PEO).
- In a leasing arrangement, the ELC is the “Lessor” and the company that leases the employee is the “Lessee”.
- Leased employees typically are referred to as “Worksite Employees”.

Leased employees and temporary help

- Q. What is the difference between a leased employee and someone who is brought in to perform temporary help?
- A. The statute says that an ELC is not a “temporary help arrangement”, defined as “a service whereby an organization hires its own employees and assigns them to clients for a finite time period to support or supplement the client’s work force in special work situations, such as, but not limited to, employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects”. The difference is like the difference between a leased car and a rented car.
What kinds of employees are leased?

• When employer wants employee for relatively long-term commitment but does not want to hire an employee, employer may decide to lease employee from ELC.
• One example may be persons who perform finance or accounting work; sometimes a company will use an ELC to staff an entire department, such as bookkeeping.

What Does An Employee Leasing Agreement Provide?

• An employee leasing agreement typically provides that the ELC will provide Worksite Employees to the lessee company and will:
  – Pay the employees the agreed-upon wage or salary;
  – Withhold and pay all applicable taxes and other required deductions;
  – Pay agreed-upon employee benefits; and
  – Maintain and administer workers’ compensation and safety and health programs.
What About Supervision and Termination of Leased Employees?

- A leasing agreement typically provides that leased employees are supervised on the job by lessee managers and supervisors.
- The lessee can request transfer or termination of a leased employee, but:
- The right to hire and fire leased employees remains with the ELC.

Advantages

- The lessee is freed from the administrative side of employing employees -- payroll and benefit administration, in particular.
- If agreement is structured properly, lessee is freed from certain benefit obligations that otherwise would apply, including retirement plans.
- If employer is dissatisfied with performance, can request employee to be reassigned or terminated by ELC, without procedural or legal hassle accompanying termination of its own employees.
Pitfalls and Concerns

Pitfalls and Concerns: IRS

- Agreement typically provides that ELC will withhold and pay federal and state taxes.
- This is contractual arrangement, not binding on IRS.
- IRS reserves the right to seek recourse for unpaid taxes, interest and fines against the common law employer.
- Almost every case has held that the Lessee is the common law employer.
Pitfalls and Concerns: FLSA

• Regulations published to interpret FLSA provide that ELC and client are joint employers.
• If ELC does not pay Worksite Employees properly under FLSA, Department of Labor or private plaintiff can come after Lessee.
Anti-Discrimination Statutes

Pitfalls and Concerns: Anti-Discrimination Statutes

- Title VII and other anti-discrimination statutes apply to leased employees as well as employer’s regular employees.
- ADA regulations require employer to provide reasonable accommodation to leased employees with disabilities.
- Contract usually contains provision incorporating obligation.
Workers’ Compensation

Pitfalls and Concerns: Workers’ Compensation

• Primary purpose of Employee Leasing Company Act was to make Lessor liable for workers’ compensation coverage for leased employees.

• Effective January 1, 2017, ELC and Lessee can agree to make Lessee liable for Workers’ Compensation insurance coverage.
Unemployment Compensation

Pitfalls and Concerns: Unemployment Compensation

- Contract usually makes Lessor liable for payment of State unemployment compensation contributions, but:
  - ELC must file report with IDES naming the client and providing information about it.
  - IDES may recognize ELC as employer of leased employees but reserves right to come after employer (client) if leasing arrangement not reported or contributions not paid.
Example

• Illinois Administrative Code Section 2732.306 gives example of what can go wrong.
• ELC contracts with Client to supply leased employees. But ELC does not report relationship and thus cannot report workers as its workers.
• Client B terminates relationship but, because ELC did not report, Client is liable for contributions, penalties and interest.

ACA
Pitfalls and Concerns: ACA Reporting

• Normally, employer would file 1095-C reports only for its own employees, and ELC would file for Worksite Employees.
• However, there are circumstances in which employer and ELC could be regarded as Aggregated ALE Group.
• Not clear who has reporting responsibility.

Employee Benefits

“If I get a paper cut while filling out my disability forms, do I get extra time off?”
Pitfalls and Concerns: Benefits

- ELC contract normally provides that Lessee is not to provide Worksite Employees with any wages or benefits, or include them in any benefit plan. This is to avoid running afoul of the “exclusive benefit” rule.
- But employer can still run afoul of “non-discrimination” rule if too much of the combined leased employee and regular employee workforce consists of leased employees.

Unions
Pitfalls and Concerns: Unions

• Contract will usually provide that ELC is independent contractor in attempt to avoid joint employer status.
• Under NLRA, however (and possibly IPLRA), Lessor and Lessee may be found to be joint employers, especially since on-site supervision is provided by Lessee.
• What happens if union organizes employer’s employees, Worksite employees, or both?

What Legal Principles Govern?

• Under NLRB decision in *Browning-Ferris* (2015), it is pretty clear that Lessor and Lessee would be joint employers in most leased employee situations.
• Trump NLRB tried to overrule *Browning-Ferris* in 2017, but that decision had to be vacated because of Board member conflict of interest.
• Cases under Obama Board allowed unions to organize both regular and leased or temporary employees, even in mixed units.
• Not sure of current status before NLRB or ILRB.
The Land of What If

Protecting Clients in the Land of “What If”

• Lawyers live in the land of What If?
• Clients think in terms of what will go right. Lawyers have to think in terms of what if something goes wrong?
• So if your client wants to enter into an employee leasing arrangement, you have to be aware of pitfalls and concerns and protect your client against them.
What kinds of protections?

- Written contract.
- Spell out respective responsibilities and obligations.
- Allow for problems arising under each of the possible areas of concern.
- Client must have protection of indemnification provision, but:

Is Indemnification Enough? (1)

- What happens if either Client or Leasing Company terminates contract?
  - Obligations to Worksite Employees don’t necessarily end with contract termination:
    - Unemployment compensation;
    - Workers’ compensation;
    - FLSA issues;
    - Wage Payment and Collection claims;
    - Workplace discrimination issues.
  - Who is going to be responsible in each scenario?
Is Indemnification Enough? (2)

• Worse: What happens if ELC walks away, goes out of business, and owner flees to Brazil?
• May want to consider something stronger than indemnification, such as some kind of surety:
  – Bond or letter of credit;
  – Available to employer if ELC bails or disclaims liability under contract.

Overdoing It in the Name of Protecting Your Client
What happens if your protective efforts cause the contract to fall through?

• You are paid to be protective.
• But ELC may walk away rather than agree to protective measures.
• Then it’s a business decision, but:
• That is the client’s choice to make.