



OUTSOURCING YOUR WORK SHOULD BE DONE CAREFULLY

By: Richard J. Firfer

Employee outsourcing is something that more and more employers have been doing lately. Those employers may not fully grasp, however, the importance of making certain that the staffing agencies who fill their outsourced positions have very carefully vetted the workers filling those positions. An employer's failure to make certain that a thorough vetting process has taken place may lead to a lawsuit against the employer, as well as its staffing agency, when something goes seriously wrong.

Take the case of the 77-year-old New Jersey widow who was murdered by a door-to-door salesman who had been recruited by an outside staffing agency to sell magazines on behalf of a magazine subscription processor. As a result of the salesman's criminal action, both the processor and its staffing agency were named as defendants in the civil lawsuit that was filed in the wake of the widow's death. The plaintiffs in that case alleged that both the processor and the staffing agency should have known about the salesman's prior criminal record and the potential risk he posed to the processor's intended customers. The processor defended by claiming it should not be held responsible for the actions of a salesman who was actually an independent contractor working on a commission basis. The processor also pointed out that because the salesman was recruited by the staffing agency, the processor should not have had a duty to perform a background check on the salesman. This case has not as yet been resolved. The attorney representing the processor has claimed, however, that, with respect to similar suits brought against his client in the past, the processor has either been cleared of wrongdoing or the cases were settled by the processor's insurance company.

There have also been instances of lawsuits being filed against employers whose outsourced employees have allegedly stolen various items of property or committed a fraud of some kind while engaged in commercial activities intended to benefit the outsourcing employer. There are also cases pending that involve the use by staffing agencies of illegal immigrants to fill outsourced positions for the agency's clients. Allegations have been made in some of those cases that the employers knew of such tactics by their staffing agencies and conspired with them to use the illegal immigrants to drive down wages.

What lesson should be learned from all of this? While it may involve an additional layer of administrative work, the employer should make certain that the staffing agency to which the outsourcing has been entrusted will do a thorough a job of screening recruits on behalf of the employer, including conducting criminal background checks. Therefore, when entering into an agreement with a staffing agency for the outsourcing of jobs, the employer should make certain that the agreement contains the following provisions at a minimum:

1. Require the staffing agency to certify that it will conduct appropriate background checks for all of the workers that it supplies for the employer's jobs, including criminal background checks.
2. Require the staffing agency to immediately bring to the employer's attention anything revealed by such background checks that might indicate the

placement of a particular worker in one of the employer's positions, or at any particular work site, would be inappropriate.

3. Provide that the staffing agency will defend and indemnify the employer for any liability that may result from the actions or inaction of the outsourced employees.
4. Mandate that the staffing agency carry appropriate insurance to back up its indemnity, and that the employer will be named as an additional insured on such policy.

A note of caution, however. Some states, like Pennsylvania and New York, have laws prohibiting the use of criminal records in regard to making hiring decisions. Other states prohibit even inquiring about arrest or conviction records in the first place. Illinois is among a group of states that prohibit employers from discriminating against persons with arrest, but not conviction, records. Thus, employers and staffing agencies must be careful when making background checks so that the rights of the potential workers are not violated. Obviously, such legal restrictions may place the employer between a rock and a hard place, because if an outsourced worker does something wrong, the employer may have vicarious liability for the worker's behavior. On the other hand, if the employer causes inappropriate questions to be asked during the vetting process, the employer may be sued by the worker. The bottom line, therefore, is not necessarily to shy away from outsourcing your work, but, rather, to be cognizant of the issues involved in the process and to adopt a very careful approach when adding outsourced employees to your workforce.

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