



on the job

TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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Who's The Boss? MIOSHA Might Provide a Different Answer Than You

By John G. Mitchell

In 2014, with momentum picking up as the year went on, MIOSHA launched its Temporary Worker Initiative. The purpose of this Initiative is to help both temporary staffing agencies and host employers understand their responsibilities under the Michigan Occupational Safety and Health Act. Arguably, recent history precipitated this Initiative and MIOSHA's concern as it was determined that 16% of fatal work-related injuries, from 2012, were to temporary workers (per the Bureau of Labor and Statistics, and the data from the last full year for which such information was available).

MIOSHA estimates that there are approximately 356 temporary staffing service offices in the State of Michigan. These offices provide a wide range of temporary employees to host employers. The temporary employees who work through an employment agency are generally called temporary, leased or supplied workers. Host employers are a secondary employer who have entered into a contract with an employing agency.

Independent of what might be the basis for tort liability, MIOSHA considers both the host employer and staffing agencies as employers of the temporary worker. MIOSHA considers that they both share responsibility and control over the employee.

The temporary agency needs to provide certain baseline training. This includes hazard communication (of generic hazard information), lock-out/tag-out protocols, emergency action plans, and recording and reporting.

The host employer also has a responsibility for hazard communication, but with regard to more specific hazards at the site. The host employer is also responsible for lock-out/tag-out communication and specific training, detailed emergency action plans, which are site-specific, and recording and reporting.

In determining potential citations and fines, MIOSHA is going to determine which employer is best-suited to comply with specific requirements. MIOSHA will consider it the staffing agency's responsibility to make appropriate inquiries

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Traditionally, defining potential liability for an on-the-job injury resulted in a determination where but a single employer may be liable and/or entitled to the protection of the Workers' Disability Compensation Act (and the exclusive remedy provision therein). Determining who was an employee evolved from the merger of the "economic reality" and "control" tests. While this may still define potential tort liability and/or the immunity from tort claims, MIOSHA is making it clear that there can be liability, including citations and fines, independent of this traditional scheme. MIOSHA is going to look to both the host employers and agencies as equally responsible, and both potentially subject to administrative action, in the event there is an on-the-job injury to a temporary worker. Employers need to recognize that the Temporary Worker Initiative can create potential issues that had not historically been the focus of MIOSHA's efforts. MIOSHA is placing a specific emphasis on this new workplace dynamic due to the expansion of this type of worker and the increased frequency with which such employees have been subject to injury.

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regarding potential risks. MIOSHA will consider both employers, as joint employers, responsible to assure that the respective health and safety responsibilities between agencies and host employers are spelled out in contracts.

Generally, MIOSHA will presume that staffing agencies are best positioned for general safety and long-term medical surveillance. Host employers will be primarily responsible for work and site specific training and compliance with standards. Significantly, MIOSHA will consider that both employers can be or may be held responsible for non-compliant conditions. Each case will be evaluated on its individual merits.

Both employers should have an injury and illness prevention program, perform hazardous assessments for the worksite, define scopes of work in applicable contracts, hand out new project orientation and safety training materials to address hazards to which temporary workers may be exposed, and maintain effective communication.

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