

## Temporary Workers and Employment Agencies Strategies For Meeting Due Diligence Obligations

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A large shipment order just came in. The local temporary placement agency has a seemingly endless supply of forklift drivers—just what you need for the job. You sign a contract and pay a recruitment fee and *voila!* — an instant workforce.

Not so fast. As a health and safety conscious employer, and mindful of your own highly compliant training program, you inquire as to whether the temporary workers you are hiring are trained and qualified to perform the job.

“Most of them are trained,” says the agency rep. “They’ve been doing this type of work for quite a while.” Do you accept these statements and put the temps straight to work? What exactly are your health and safety responsibilities as an employer hiring temporary workers?

Under the *Occupational Health and Safety Act* both temporary placement agencies and the employers who use their workers are considered to be “employers” and are subject to liability for failing to

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ensure the health and safety of workers. This principle was underscored in *R v. Grant Forest Products Inc.* [2002] O.J. No. 3375 (QL) (Ont. Ct. Jus.), one of the only court decisions to discuss due diligence standards as they pertain to temporary workers. In this case, Grant Forest Products

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hired a contract worker from a temporary placement agency. The worker fell into an unguarded machine after attempting to push a board through it and lost three fingers. At trial, Justice Belanger found that the company had failed to provide adequate supervision and instruction to the temporary worker, and made the following observations with the respect to the company's deficient training efforts:

Training was delegated to other contract employees and was extremely brief. No significant effort was made to determine either the content, the extent or the quality of the information, neither was there any evidence of significant efforts made to determine the employee's comprehension of his duties, apart from a brief period of observation.

The law recognizes that both employers and temporary placement agencies have a shared responsibility when it comes to health and safety. Many temporary agencies have thorough and effective safety programs prepared by OHS professionals. However, there is no license required to operate a temporary agency and my experience has been that many agencies fail to meet to due diligence standards.

Given this unfortunate reality, an employer hiring temporary workers should, under no circumstances, expect and/or rely on full compliance from a temporary placement agency. Expect rather that you, as the employer, will have to treat the temporary worker in the same manner as your regular employees.

Given the high level of responsibility placed on employers for ensuring the health and safety of temporary workers, it is important that employers take adequate compliance steps *before* hiring and *throughout* the employment relationship. We recommend the following strategies.

- **Do not blindly accept what a temporary placement agency tells you** about their workers. Do some digging yourself. Ask to see evidence of a worker's qualifications, licenses, certifications and test results where applicable. When in doubt, carry out your own assessments or consult with industry regulators to ensure the appropriate certifications have been acquired. Do not accept naked promises.
- **Assess whether the temporary agency is health and safety minded.** Is it familiar with and knowledgeable about the *Occupational Health and Safety Act*? Is there a training program and policy in place? Is it being used and implemented? Is the agency at all concerned about the quality of your own safety program, safety record and what training initiatives you intend to apply to the new temporary workers?
- **Be careful about dealing with temporary agencies that do not perform a safety audit** of your facility and conduct a detailed site visit. Temporary agencies have legal obligations as

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“employer” under the OSHA. Temporary agencies that do not perform site-specific safety evaluations of your workplace are not meeting due diligence obligations and should be avoided.

- **Ask for a list of references.** You are not the temporary agency's first customer. Other employers have used workers from the agency and may be able to offer valuable insight into how the agency operates, its level of regulatory compliance, training practices, and whether the workers are familiar with health and safety considerations generally.
- **Be involved in the screening and selection process.** You know what the job entails and are looking for specific qualifications and experience. Assist the agency by explaining your requirements clearly. You may even want to review the work history and qualifications of top applicants yourself and choose from the pile.
- **Carry out your own pre-qualification assessment, training and monitoring.** You must ensure temporary workers know how to perform the job safely. The case law has held, however, that a prudent selection process is not sufficient. Effective training and ongoing monitoring is also necessary. Even with an effective pre-qualification and/or training system in place,

employers are at risk of being found to have fallen short of due diligence requirements without evidence of on-going monitoring.

- **Address temporary workers in written policies, and clarify any processes for pre-qualification training and monitoring.** Do not deprive temporary workers of the training available to permanent workers. Where relevant, provide the same. Maintain written records of any training given to temporary workers just as you would for permanent workers.
- **Notify your temporary agency if and when the worker is assigned to different duties or different machines.** Temporary placement agencies have a duty to ensure that workers are only doing the jobs they are trained to do and only operating the equipment they are qualified to operate. Ongoing, two-way communication between the agency and the employer will avoid gaps in safety.

From an occupational health and safety perspective, it is best to treat temporary workers as new hires, affording them adequate orientation, instruction, supervision, and monitoring. Never assume that a temporary agency has satisfied all of its due diligence obligations. When it comes to qualifications and training, communication is key. Where there is insufficient or a complete lack of communication between agency and employer, gaps in safety compliance are inevitable. While the law demands shared

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responsibility, employers should be wary that, when an agency fails in its duties, the employer is left to shoulder the burden of full compliance.

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