

SPECIAL REPORT

I HAVE TEMPORARY WORKERS, SO WHAT'S THE PROBLEM?

(Revised 04/10/2014)

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Problem # 1: A Temporary Worker Is Injured

If a person **employed by another company** such as an employment agency or temporary employment placement company is injured while working in or around your premises, a **claim can be made against you** by:

- the injured person or that person's family in **tort** (injury caused by your negligence);
- the **workers' compensation insurance carrier that insures the actual employer** of the injured person (the temp agency WC carrier, to recover what it pays for medical bills and loss of wages);
- **a hospital or other health care provider** that has not been paid for treatment by the injured person who was not insured;
- **an insurance company providing employee benefits** to the injured worker seeking to recover what it has paid;
- **an automobile insurer** attempting to recover medical bills paid because of injury to the temp worker while in a vehicle being used in conjunction with your business;
- **Medicare or Medicaid**, seeking reimbursement for payments made on behalf of the injured worker; or
- **the injured person making a claim under your workers' compensation policy on the basis that he or she was really your statutory employee** as an economic reality because the injured person was:
 - in the service of another under any contract of hire, express or implied;
 - did not maintain a separate business;
 - did not hold himself or herself out to and render service to the public;
 - was not an employer.

Problem # 2: Your Workers' Compensation Carrier Denies the Claim

You submit a claim by this injured person to your workers' compensation carrier but that carrier can deny the claim:

- if it is not filed as a workers' compensation claim by the injured person;
- or it can be rejected by your workers' compensation carrier because the person was not, in its opinion, a statutory employee.

Problem # 3: Your Commercial Liability Carrier Denies the Claim

You submit the claim to your commercial general liability carrier because of the bodily injury that occurred on the premises.

That claim is denied because this policy specifically **excludes injury to an employee and the policy defines an employee as including a leased or temporary worker** and that the exception indicated below for short-term temporary workers does not apply.

“Temporary worker” under your liability policy means a person who is furnished to a party **to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.**”

This definition would provide the basis for a **denial of a claim against you by a long-term temp employee** such as a **temp-to-hire** or a **temp employee placed on other than a very short-term basis.**

Problem # 4: Your Workers' Compensation Carrier Charges a Premium After Your Policy Expires

Your workers' compensation carrier may charge you for the temporary worker that is employed by another entity as if the temporary worker was your employee **resulting in significant additional workers' compensation costs.**

The reason for this is that many agreements with a labor broker will stipulate that you are a “**co-employer**” of the temp worker and even if this is not the case, the Michigan Workers' Compensation statute **makes you a co-employer as an economic reality.**

Your workers' compensation will adopt the position that if it is going to be asked to pay all or a portion of a claim, it should be able to charge a premium.

What Happens If a Temp Employee Or Others Make a Claim Against You?

Result 1:

You will incur significant legal fees to sort all of this out, most of which cannot be recovered even if you win.

Result 2:

If you lose, you could face an uninsured judgment that is significant and would be disastrous for your company.

Result 3:

When your workers' compensation carrier realizes you have temporary workers because of a claim for injury to a temp agency employee, it will likely charge for those employees as if they were your employees. There is a three-year look back for audits.

For example, if you pay a temp agency for an average of 25 employees through the year working 2000 hours each, at \$15 an hour, and if your average workers' compensation rate is \$3.50/100, your additional premium for three years will be \$78,750.

Possible Solutions

Solution # 1: Your Entity Being Named as an Alternate Employer

Make sure that the temp agency has added you as an alternate employer endorsement to its workers' compensation policy. Attached is the endorsement.

This has many advantages:

- The temp agency's workers' compensation policy will apply to you, the alternate employer, as if you were an insured under the temp agency policy.
- The WC insurer for the temp agency will not ask your WC carrier to share the loss. This should block your WC carrier from asking for an additional premium from you when your policy expires.

It is critical that your entity is added as an alternate employer to the temp agency's workers' compensation policy.

ALTERNATE EMPLOYER ENDORSEMENT

This endorsement applies only with respect to bodily injury to your employees while in the course of special or temporary employment by the alternate employer in the state named in Item 2 of the Schedule. Part One (Workers Compensation Insurance) and Part Two (Employers Liability Insurance) will apply as though the alternate employer is insured. If an entry is shown in Item 3 of the Schedule the insurance afforded by this endorsement applies only to work you perform under the contract or at the project named in the Schedule.

Under Part One (Workers Compensation Insurance) we will reimburse the alternate employer for the benefits required by the workers compensation law if we are not permitted to pay the benefits directly to the persons entitled to them.

The insurance afforded by this endorsement is not intended to satisfy the alternate employer's duty to secure its obligations under the workers compensation law. We will not file evidence of this insurance on behalf of the alternate employer with any government agency.

We will not ask any other insurer of the alternate employer to share with us a loss covered by this endorsement.

Premium will be charged for your employees while in the course of special or temporary employment by the alternate employer.

The policy may be canceled according to its terms without sending notice to the alternate employer.

Part Four (Your Duties If Injury Occurs) applies to you and the alternate employer. The alternate employer will recognize our right to defend under Parts One and Two and our right to inspect under Part Six.

Schedule

1. Alternate Employer

Address

2. State of Special or Temporary Employment

3. Contract or Project

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Insured

Effective Policy No.

Endorsement No. Premium

Insurance Company

Countersigned by _____

**WC 00 03 01 A
(Ed. 2-89)**

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Solution # 2: Your Commercial Liability Can Add an Endorsement to your Policy Which Would Remove the Leased or Temporary Worker Exclusion.

Request that your insurance carrier add the following to your commercial general liability policy:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE FOR INJURY TO LEASED WORKERS

This endorsement modifies insurance provided under the following:

- COMMERCIAL GENERAL LIABILITY COVERAGE PART
- LIQUOR LIABILITY COVERAGE PART
- OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
- POLLUTION LIABILITY COVERAGE PART
- PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

With respect to the Employer's Liability exclusion (Section I) only, the definition of "employee" in the DEFINITIONS Section is replaced by the following:

"Employee" does not include a "leased worker" or a "temporary worker."

Some carriers will not do this unless you can show that an Alternate Employee Endorsement with your company name has been included on the temp agency policy.

The advantage of this solution is that your commercial liability carrier will pay for the legal fees to sort all of this out and pay judgments against you, if any.

Solution # 3:

Have the **temporary employment agency**, the employer of the person being placed, execute the attached "Agreement."

This is very important because there is no requirement in the Alternative Employer form that requires notification to you if the form is removed midterm or the policy is canceled.

If this happens, you will have a cause of action against the temp agency because they have promised to do this.

Solution # 4: Seek Proof From the Temporary Employment Agency

Have the **temporary employment agency** provide you with evidence that:

- your company has been **added as an Alternate Employer** to its workers' compensation policy. This can be accomplished by the temp agency providing you with a copy of the actual endorsement;
- **you possess A Certificate of Insurance** providing evidence of the coverages required in the Agreement;
- the Alternate Employer endorsement has actually been added. **Do not assume that the temp agency signing this suggested Agreement has added this endorsement.** It is imperative that you have, at a minimum, a certificate of insurance indicating that this is in place as well as a copy of the Alternate Employer endorsement itself.
- **an administrative system** is in place that verifies each year that the Alternate Employer form has been renewed.

All of these solutions should be implemented in order to avoid having to pay the legal fees and a possible judgment or settlement arising out of someone who is not your employee being injured on your premises while working for you.

Solution #5: Consider a Separate Acknowledgement from the Temp Employee

Because in Michigan, as we said, a long-term temp may be deemed by law to be co-employed by your organization, you may be responsible for providing employee benefits such as health benefits, group life or group disability, or 401(k) plan benefits to temporary employees who otherwise pass the eligibility test.

A temp employee might make a claim against you for these benefits.

Benefit plans are governed by the Federal Employee Retirement and Income Security Act (ERISA) which generally allows for certain exclusions of employees as long as they do not violate anti-discrimination laws. Therefore, the co-employer can exclude temp agency employees and similar groups of people from its plan, but the plan itself must clearly say so and must not violate Federal anti-discrimination laws. The co-employer, therefore, cannot exclude individuals over a certain age or belonging to a certain ethnic group for those reasons only.

It is important to consult with an attorney who is experienced in ERISA law as well as human resources law in order to be certain that plans, as written, will not inadvertently include long-term temporary employees otherwise working for a temporary employment agency.

Should the Temp Employee Sign Anything?

An additional consideration is whether or not the temporary or leased employee should sign a waiver, disclaimer, or similar contractual provision. Quite often, these employees are required to sign agreements by the temp staffing company containing such language. Again, the key is the language contained in the benefits plan itself.

The advantage of such a form is that they do let these workers know your intentions up front. Just do not rely on them exclusively for avoiding benefits claims.

The temp agency may ask the temp employee to sign a document it provides and/or you also may want to consider requiring that the temp employee sign the attached suggested Acknowledgement of Status form.

One Final Note

There are various categories of on-site people who are not regular employees.

- Leased Employees: These are typically part of an entire workforce or entire departments who are leased from a professional employer organization. In Michigan, since September 1, 2012 these PEO's need to be licensed under Act 370 of 2010.

The same risk management concepts apply to this category of co-employee.

- On-Site Contract Employees: In this arrangement, typically, control of the activities of this person remains with the primary employer of the contract worker or the contract worker may work independently.

Here, again, it is important to have the workplace employer added as an Alternate Employer to the workers' compensation policy secured by the employer of the contract worker.

AGREEMENT

This Agreement is made between the **TEMPORARY EMPLOYMENT AGENCY** indicated on Page 2 (hereafter "**TEA**") and the **RECIPIENT ORGANIZATION** indicated on Page 2 (**RO**) and is attached to and incorporated into the Agreement for supplying temporary workers between these parties dated the ____ day of _____, 20 ____.

INDEMNIFICATION AGREEMENT AND INSURANCE REQUIREMENTS

I. Certificates of Insurance

- A. **TEA**, before providing assigned workers to **RO**, shall provide a certificate of insurance to **RO**. The Certificate of Insurance shall provide evidence that the insurance requirements contained herein are satisfied in their entirety.
- B. The certificate shall also provide that at least 30 days prior notice of cancellation or material change shall be provided to **RO**.
- C. In addition, **TEA** shall provide a complete and true copy of any of the Alternate Employer and Notice of Cancellation endorsements required by this Agreement to **RO**.

II. Minimum insurance requirements which shall apply to **TEA** each of which shall be placed through an insurer rated "A" or better by A.M. Best & Company.

- A. Workers' Compensation and Employers Liability coverage covering the statutory requirements of the State of Michigan where the work is being done and insuring **TEA**.
 - 1) An Alternate Employer endorsement scheduling **RO** as an Alternate Employer shall be added.
 - 2) Employers Liability coverage will have at least a \$500,000 limit.
 - 3) An endorsement requiring at least thirty (30) days prior written notice of cancellation to **RO**.

III. Agreement to defend, indemnify and hold harmless

- A. **TEA** agrees to indemnify and defend **RO**, including reasonable attorneys fees and hold harmless, for the failure of **TEA** to maintain insurance as required in this Agreement.

- B. **TEA** agrees to hold harmless **RO** for any claims made against **RO** as a result of **TEA** wrongful acts relating to its discipline, demotion, dismissal, discharge, failure to employ, breach of employment contract, discrimination, libel, slander, retaliation, violation of any federal, state, or local civil rights laws, sexual or other workplace harassment of any kind.

Agreed to this _____ day of _____, 20_____

TEA: _____
Name of Temporary Employee Agency (TEA)

By: _____
(TEA's Authorized Officer)

RO: _____
Name of Recipient Organization (RO)

By: _____
(RO's Authorized Officer)

ACKNOWLEDGEMENT OF STATUS

I, the undersigned, am employed by the **TEMPORARY EMPLOYMENT AGENCY** indicated on Page 2 (hereafter "**TEA**"), and I agree to accept a temporary work assignment at the premises operated by the **RECIPIENT ORGANIZATION** (hereafter "**RO**") indicated on Page 2. As a condition of my assignment, I acknowledge the following:

1. As a temporary employee, I am neither covered by, nor do I have rights in, personnel policies, procedures and practices established by **RO** for its permanent employees.
2. I may not participate in, and I am not eligible for, any benefit plan, fringe benefit or pay practice that **RO** has or may hereafter establish for its permanent employees.
3. The **TEA** will make payment to me directly for services rendered and withhold taxes from my wages.
4. Only the **TEA** may address any questions I might have about my compensation and benefits.
5. I will direct any problems or complaints I may have regarding the terms of my assignment to the **TEA**.
6. The terms of this "Acknowledgement of Status" may not be amended except in writing and signed by an authorized representative of **RO**. Verbal understandings have no effect. This Acknowledgement of Status constitutes the full and complete understanding between **RO** and myself, and supersedes any and all prior oral or written understandings between us, with respect to the subject matter herein.
7. I agree that **RO**, whenever stated in this Agreement, includes all related entities owned by or controlled by **RO**.

Agreed to this _____ day of _____, 20_____

Please print: _____
(Name of the individual who has been or is being placed at RO by TEA)

Signature: _____
(Signature of printed name above)

RO as indicated in this document is _____
(Name of Recipient Organization)

TEA as indicated in this Agreement is _____
(Name of Temporary Employment Agency)