



Information for Insurance Professionals In the Know

Staffing Companies and their Exposures A mini-white paper containing an expanded version of information first published as a 5-part series of Knowledge Knuggets

"I've got a staffing company."

I've heard that many times -- but what does it mean?

What is a "staffing company"? And if your staffing company has coverage, what does it have coverage for?

In the following pages you'll find a review of the intricacies of various types of staffing companies and the coverage pitfalls that await you when you insure one.

What is a "Staffing Company"?

Staffing companies fall into four general categories:

- Temporary staffing
- Long-term or contract staffing
- Recruiting
- Employee leasing

They can occur in any number of combinations and may serve a variety of industries that can complicate their coverage issues.

The temporary staffing category includes home healthcare agencies, nurse registries and locum tenens (substitute doctor) staffing companies. It can also include staffing of interim executives. The word "temporary" is frequently defined by state labor codes and generally contemplates a job assignment of 90 days or less.

Long-term or contract staffing contemplates longer assignments or assignments that are pertinent to completing a specific project. The assignments can easily be for a year or two.

Recruiting services screen potential candidates for a job per the employers' requirements, then turn the candidates over to the employer for interviewing and selection. Recruiters are generally responsible for confirming the candidate's credentials.

Employee leasing companies enter into a co-employer relationship with their client companies and frequently provide insurance options and administrative services such as payroll processing.



Information for Insurance Professionals In the Know

Temporary Staffing Agencies

Temp agencies are one of the more straightforward exposures -- as long as the staff being supplied does not have its own professional liability exposure. There is also a GL-related bugaboo you will want to be aware of.

If you are insuring a temp staffing agency that supplies clerical, retail or warehouse staff, for example, the Professional Liability exposure is pretty well insured by any given market or program. The GL exposure tends to be insured for the staffing office's premises only, but if an on-site temp employee does damage to a client's premises, that may be covered as well. There are some markets that provide these coverages on a packaged basis. That package sometimes includes EPL as well, and you will want to make sure you know whether the EPL coverage is only for core employees, or if it extends to the temps in the field as well. And if so, is third party exposure covered?

What's the GL bugaboo? Some temporary agencies supply construction or factory workers where a construction defect or products liability loss can arise pursuant to the temporary staffer's performance. If the GL policy for the temp agency seems to good to be true, it probably is. I have not yet found a temporary agency policy that includes GL coverage that actually extends to the staffers' work product or completed operations. The coverage is always, always, always premises liability only.

Temp agency GL is not a way to get around the need for appropriate GL coverage for a contractor, yet I have seen construction companies try time and again to shunt the coverage off to the temp agency by hiring workers as temps and requiring that the temp agency carry GL and name the construction company as an Additional Insured. Upon careful observation, an agent can determine that the temp agency policy is not intended to cover the construction exposure because the underwriter does not ask those questions typical of contractor underwriting: tract work, number of stories, new versus remodel, etc. If those questions are not being asked, you can bet your bottom dollar the underwriters are not intending to cover the construction exposure. Same theory applies to staffers that go to work in a factory assembling products, doing machining, etc.

The "Staffing Exposure"

The professional liability exposure covered for most temp staffing agencies is referred to as the "staffing exposure". What is the "staffing exposure"? That's the liability arising from failure to provide qualified personnel, or failure to provide personnel that show up in the first place.

For example, if the client company engages your insured to provide a receptionist for the week, and he or she doesn't show up, the client will incur additional costs to replace the temp with a rush order from another temp agency, or will have to incur internal costs by staffing the desk with their own people, etc. Or, the receptionist may show up, but let's say he or she is incompetent and causes the client company harm in some way, such as requiring three days of constant oversight and training to complete a one week assignment, or is so rude on the phone as to cause customer

Command central is at: www.pltidbits.com

Knowledge Nuggets, White Papers, and other Items of Interest pertaining to Professional Liability
Chris can be emailed at: chrisc@usrisk.com



Information for Insurance Professionals In the Know

complaints.

Another example would be that the client company requests a data entry clerk for a project, and the person your insured sends has no familiarity with the required systems or software. The client wastes time and effort trying to get this person up to speed, or may not even discover their incompetence until the project has been compromised.

Failure to screen, failure to test, and failure to provide qualified personnel are common allegations.

Frequently your insured can mollify an upset client by waiving the payment due or offering some kind of credit in these situations. But if the harm done was large enough, the client company may take action against the insured, and an insurance policy may be called into play.

Vicarious Liability for Professional Activities

Temp agencies can also place professional or executive staffers, and these placements carry significantly more exposure. Many temp policies do not properly cover either the staffers or the insured entity for these types of risks.

These agencies include interim executive firms (CFOs for hire, interim managers), home healthcare staffing agencies, nurse registries, locum tenens staffing firms (temporary doctors), and firms that provide computer programmers, architects, engineers, or accountants.

Because these staffers stay under the control of the temp agency, even though they are deployed to a client company, the temp agency retains a liability exposure for the staffers' actions in the field.

The challenge for you is making sure that the insurance coverage you place includes the insured's vicarious liability. The rule of thumb in seeking that coverage is that if you've placed a policy, and the underwriters did not ask a lot of questions about the work being done, and the qualifications of the professionals, and if the pricing is relatively cheap (i.e. less than it would be if you were insuring a professional firm performing the same services), chances are you have only placed coverage for the "staffing exposure", and your insured has no vicarious liability coverage for the services rendered by their staff. The exception might be if the professional staffers carry their own E&O coverage (how often does that happen?) and vicarious liability is provided on a de facto excess basis.

Direct Liability Exposures for Professional Staff

Your insured also needs to be concerned about coverage for the professional's direct exposure. Normally, if a staffer is alleged against by a client company, he or she will enjoy coverage under the policy as an employee of the insured. If the staffer is a professional, you will want to check the policy to make sure there are no exclusions for professional services (again, if the policy was cheap, and underwriting questions specific to professional exposures were not asked, chances are there will be).

Command central is at: www.pltidbits.com

Knowledge Knuggets, White Papers, and other Items of Interest pertaining to Professional Liability
Chris can be emailed at: chrisc@usrisk.com



Information for Insurance Professionals In the Know

To sum up -- whenever your temp agency provides workers that are more than clerical, retail or warehouse staff, check the policy language very carefully. Look for exclusions regarding certain professional services, BI/PD claims, and vicarious liability. Make sure that the professionals have their own coverage, or that the policy you're placing provides that coverage. Oddly, many policies relative to healthcare staffing cover only the healthcare exposure, and not the lower-hazard staffing exposure. When available and cost-effective, you will want to place a policy that includes both types of coverage.

All of the above exposures focus on claims that can be brought by client companies against the temp agency. What about claims brought by the temps themselves?

Temps can certainly bring claims for misrepresentation, discrimination, and contractual breaches. Not all of these exposures can be covered, or sometimes multiple policies (such as an EPL policy) may need to be written to address them.

Long-term or Contract Staffing

Long-term or contract staffing falls into a sort of no-man's land. These insureds frequently don't feel that they're a staffing firm at all, and their exposure goes unacknowledged. But, they have the same kind of vicarious exposure that a temp staffing agency does. Whether or not they have an exposure for the direct liability of the staff actions is probably subject to dispute, since the longer a staffer is on-site, the more direction he or she tends to take from the employer, versus the staffing company. At some point, the employer is probably equally liable, or maybe wholly liable. The exact fact circumstances will make this question quite a variable.

You'll still find that many policies for contract staffing exclude vicarious liability, and therein lies the rub. If they don't have vicarious coverage, about the only claims that will ever be covered are ones arising from the staffer's failure to show up.

Recruiters

The responsibility of a recruiter is relatively cut and dry. "Find us a qualified candidate." Once the candidate is interviewed by the potential employer, and a job offer is made, liability is generally deemed to cease, so the recruiter does not have an exposure to claims arising from the candidate's actions on the job.

However, if the recruiter has committed to perform such services as reference checking, credentialing, confirmation of education, and background checks, claims that arise from the candidate's actions can come back to haunt the recruiter based on an allegation that the checking or confirming was not done, or was not done adequately.

Additionally, claims can also arise from the candidate based on allegations of misrepresentation.

Leasing Companies (PEOs)

A PEO is a "professional employer organization". PEOs can provide services including the placement of workers compensation coverage (what started the whole rage),

Command central is at: www.pltidbits.com

Knowledge Nuggets, White Papers, and other Items of Interest pertaining to Professional Liability

Chris can be emailed at: chrisc@usrisk.com



Information for Insurance Professionals In the Know

health insurance, payroll services, human resources services, and any number of other services. They typically enter into what is called a "co-employer" relationship with their client company, and they are recognized as the employer for purposes of those activities subject to their agreement with the client company, and the client company continues to be recognized as the employer for day-to-day supervision, workplace safety, and any other employer tasks that were not assumed by the PEO. The PEO leases employees back to the client company. These employees have been provided to the PEO by the client company initially. The client company retains the right and duty to interview, screen and hire its employees.

There are many programs that say they cover PEOs. Several of those do not include a component for the PEOs professional liability. Some do.

When reviewing the professional liability coverage, keep an eye out for exclusions pertaining to the administration of insurance programs. Since one of the main purposes of a PEO is administration or placement of insurance, such an exclusion is deadly. Confoundingly, it is as common as it is inappropriate.

There can also be issues arising from Employee Benefits Liability coverage on a PEO placement. This is because the EBL usually covers "sponsored plans", and that means those sponsored by the PEO itself. If there are other plans sponsored by co-employers (client companies), but not the PEO, you can find yourself in possession of an E&O claim when an uncovered failure to enroll or failure to advise occurs.

I have also seen policies written on PEOs where the only services covered were payroll and HR consulting. Not good. Oddly, I have also seen forms where the only PEO service covered was the screening and placement of candidates for employment. Since the employees are supplied to the PEO by the client company, and the PEO does not screen or place candidates, this coverage struck me as puzzling.

Read the policy carefully, including the definition of covered services. Compare that to the scope of services conducted by your PEO, and take nothing for granted.

As always, please note that the above is not intended as legal opinion or advice and is offered for informational purposes only. The above is not the opinion of US Risk, nor is it published in concert with, by permission of, or in any way related to US Risk.