

Claims by Vendor Personnel in Outsourcing Deals: Mitigating the Customer's Risks

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When a company outsources, it is looking to engage a third party to provide a service—not to assume risks with respect to the third party's personnel. In fact, a key concern of a company looking to outsource is that it does *not* expose itself to claims by the third party provider's personnel, such as claims relating to compensation and benefits, co-employment, hiring and/or termination practices, visa and immigration issues, and personal injury (that should otherwise be covered by the third party provider's workers' compensation policies).

So what should the outsourcing customer do to guard against this type of exposure? While the answer may vary based on the scope of the services, the location of the personnel, and each party's leverage, the outsourcing customer may wish to consider including the following provisions in its outsourcing agreement:

- A provision placing responsibility on the third party provider for all employment-related issues and requirements (including all immigration issues, processing of visas, provision of workers' compensation or unemployment insurance, payment of wages and benefits, and payment of all employment-related taxes, workers' compensation, and unemployment benefits, and ensuring compliance with all applicable laws).
- A covenant that ensures that the third party provider is responsible for all acts and omissions of its personnel.
- A requirement that the third party provider ensure compliance by all personnel with the agreement and certain specified policies (including anti-bribery and insider trading).
- A requirement that the customer not be required to participate in any immigration or visa activities regarding the third party provider's personnel except as required by law.
- A requirement that the third party provider complete background checks for all its personnel.
- An indemnity from the third party provider with respect to claims by employees and

contractors of the third party provider (and their subcontractors). It is important to consider whether the indemnity should cover existing, past, and potential personnel. Examples of claims that may be covered by the indemnity include

- claims that an individual is an employee of the customer;
- claims that the customer is a joint employer, single employer, agent, or alter ego of the third party provider;
- claims arising from termination of employment;
- claims relating to hiring practices;
- claims for payment of wages or benefits;
- claims relating to occupational safety and health, workers' compensation, ERISA, unemployment compensation, or other applicable law; and
- claims relating to the handling and processing of any and all immigration or visa issues and requirements.

While the above list is not exhaustive, it is intended to illustrate the types of provisions that the outsourcing customer may want to consider as part of developing its risk mitigation strategy for issues related to its third party provider's personnel.

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