Consequently there is a big link between the contractual basis for both the contractor/umbrella company and the end client and the legal interpretation of who has control of the contractor in a practical sense. As an employment intermediary, this has a direct bearing on the shape and effectiveness of your Employers’ Liability cover.

In a nutshell: if you have overall control in directing the working environment then you are responsible for your labour’s health and safety. You should be arranging Employers’ Liability cover for them plus declaring the payments to your insurers so you pay the right insurance premium. In the event of a loss, it’s the courts that will decide whether or not you should have had cover in place – but this could leave you at risk of fines and penalties for failing to put the right statutory cover in place.

In this bulletin, we take a look at the grey areas you face as an employment intermediary.

Unpicking the situation …

Employment intermediaries using a traditional onshore contracting model have historically only had an employers’ liability exposure for direct employees - unless there is some sort of professional duty triggered probably by contract. However, like all things that involve our civil law system there are grey areas when there is a claim that the courts will examine and make decisions on.

If there is a claim in the future – say for a long-term disease or a gradually developing injury such as RSI - and if the contractor has worked for multiple end clients or employers it’s possible the legal system will hold the recruitment firm liable for the sake of clarity as they will want someone to be liable in order to support the injured party through their illness or injury.

• Regulated by the Financial Conduct Authority, the Employers’ Liability Tracking Office (ELTO) tracks all employers’ liability cover against the employers’ reference number (ERN) of each company (the ERN is the number against which national insurance contributions are now paid to HMRC). So the ELTO will help claimants and their legal representatives find the insurer of potential employers where the claimant is suffering from a disease/injury caused by or at work - and enable the claimant to pursue compensation.

“If you have overall control in directing the working environment then you are responsible for your labour’s health and safety”
Who really is the employer?

Another way of looking at it is to try and determine ‘who is the employer?’ In the event of a claim, the courts will look at the contracts in place as primary evidence of the intention of the parties involved. Here are the practical realities to consider …

• Who is obliged to provide work for the contractor? Usually this works in the intermediary’s favour, as you have no obligation to ensure that a contractor has employment. However, more recently this has not been a powerful enough argument to avoid a claim.

• Who has supervision and control of the contractor when they are doing the work day by day? There are various legal cases out there and each one has led to different conclusions. For example, Hawley v. Luminar Leisure hinged on the contractor being ‘seen’ as an employee due to branded clothing being provided and the contractor working at the same place for 2 years, as well as answering to Luminar for the details of the job.

• Grey areas also extend to what the recruitment firm provides – for instance protective personal equipment or having to provide a set number of people to get the job done under a job specification or contract. Both of these will blur the lines towards the recruitment firm being viewed as the employer by the courts.

• We highlight the case of Thompson v. Paymaster where an Employment Tribunal heard a claim from six workers supplied through an umbrella company. Although the employees had contracts of employment with Paymaster, the Tribunal held this didn’t necessarily mean they were actually employed by Paymaster. Why? Because that company had not issued any instructions on how they were to do their jobs.

The courts will take the lead deciding whose employers liability should be triggered - but who that will be is likely to vary from day to day because of the vagaries of our civil law system. The only thing we can be sure of is that the Employers’ Liability insurance would respond as allocated by the court - meaning responsibility for the claim may hang on the recruiting firms experience rather than the umbrella company or the end client.

Labour only and bona fide sub-contractors: the differences …

LABOUR ONLY SUB-CONTRACTOR (LOSC)

• LOSCs work directly under your supervision. They use materials, kit, equipment and even tools that you provide and are paid wages by the main contractor.
• Working under your control they are legally treated as employees: you need Employers’ Liability insurance by law - even if they’re only with you for a short time.
• Remember to include the LOSCs wageroll under your employers’ liability wageroll declaration for employers’ liability insurance. Your broker will need to know the annual LOSC payroll figure and the maximum number of LOSCs working in your business at any given time.

BONA FIDE SUB-CONTRACTOR (BFSC)

• BFSCs work under their own supervision and use their own materials and kit – the main contractor pays them as if the contractor was an external company/third party providing products and services.
• BFSCs are usually specialists in a particular discipline so there is usually no need for Employers’ Liability cover.
• Even if it’s not a condition of your Employers’ Liability policy, always check in advance that your BFSCs have public liability cover with the same indemnity limit as your own PL policy if possible.
• Check that the BFSC maintains Public Liability insurance cover every year just in case – your insurer will be able to recover from their insurer if they are the cause of an incident while working for you.
• It’s important to let your insurers know how much you pay your BFSCs: so they can include contingency public liability cover on your insurance policy in the event of a claim. It also protects you if the BFSCs in question lack the right insurance cover for whatever reason.

Some useful questions to consider …

• Do you provide worker training, supervision, project or job management or planning, equipment, materials or uniforms/branded clothing to contractors going to work for end clients?
• Do you contract with any clients on the basis that you actually employ the workers?
• Do your end clients ask for your Employers’ Liability certificate in relation to workers that you place?

Any of the above could increase your exposure or mean that you are likely to be seen as a party in the claim - so any way that you can avoid this is useful risk reduction. We definitely believe that trying to limit this exposure is a good idea but the difficulty will be everyone else will be trying to do that as well.
About Arthur J. Gallagher

Founded in 1927, Arthur J. Gallagher & Co. has become one of the largest, most successful insurance broking and risk management companies in the world. With extraordinary reach internationally, our parent group employs over 20,000 people and provides services in more than 140 countries. Outside the US we are known as Arthur J. Gallagher and wherever there is an issue of risk, we’re there for our clients. We are a business without barriers – working together to create solutions that drive value and competitive advantage for our clients. Our people, our depth of technical knowledge and our global reach will deliver unrivalled advice and coverage expertise.

Arthur J. Gallagher: our conclusions…

It's likely that lawyers will caution insurers to be aware that over time, courts may come to believe that there is more than one party acting as employer. There are proposals tabled for an Employers’ Liability Insurance Bureau covering uninsured case administration - which again may push up premiums and increase claims.

Generally speaking, insurance companies apply the Employers' Liability rate to labour only sub-contractors and insure bona fide sub-contractors on the Public Liability at 20% of those rates. It is possible that as case law develops and recruitment firms are hit / insurance policies triggered, insurers may review this rating and look to increase the BFSC allocated percentage.

• Pressure-test your broker and ask questions. What is their experience of defining where a sub-contractor employment risk sits? Do they have the clout with the insurer to fight your corner when they do find cover gaps and/or exclusions that may leave you exposed?

• Plan out the risk: does your broker have the specialist in-house health & safety risk management skills to audit the employer’s liability and contractor risks for your business?

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