



Greetings to our CompAnalysis clients and friends! We hope you enjoy our early autumn 2009 newsletter.

In each publication, we highlight an emerging HR practice or issue. This time, our topic is contingency hiring, the practice of bringing on new staff on a trial basis.

### Contingency Hiring: Avoiding bad decisions while watching costs

It seems as though a number of employers are now taking advantage of the current high unemployment rate to experiment with a “try before you buy” approach to hiring new employees. This practice is viewed by some as a way to watch costs during a volatile economy, and by others as a less risky way to make employment decisions.

The practice of contingency hiring raises a number of questions about hiring practices in general, including both legal and employee relations issues. It’s always helpful to think through what we’re trying to achieve when we make new hires. For example, in most cases, we want to attract and hire the most qualified candidates at salaries that are within the market range for the job without taking legal risks. O.K., that’s pretty straightforward.

So, why consider contingency hiring? Based on an article in the August 23, 2009 *S.F. Chronicle*, here are the main reasons employers have cited:

1. Take advantage of the “buyers’ market” associated with the current economic downturn to try out a prospective employee before committing for the longer term
2. Minimize the legal risks that could be associated with termination in the event the person turns out to be unqualified and/or a poor performer
3. Avoid providing costly employee benefits during the initial period
4. Avoid creating false expectations of permanent employment on the part of the employee
5. Create elasticity in staffing, especially in an unpredictable business

Sometimes, the initial employment relationship is called a “probation period” (*a term I’ve never liked, as it sounds as though they’ve done something wrong, or, even worse, just got out of prison!*) In other cases, it’s termed a contract, applying to a specified period, typically from a month to six months. In other situations, the employee is simply a temporary staff person having the opportunity to apply for a regular position once the initial period is over.

Apparently, the idea is appealing as a way for employers to assess the new employee’s performance before putting them on the payroll as a regular employee. In one 15-person firm reported in the *S.F. Chronicle* article, all of the other employees voted on the cultural fit and skill set of the new person before he/she was offered a regular job.

The most common underlying purpose of this practice appears to be concern about the potential difficulty of terminating a new employee who doesn't work out. As we all know, even in an at-will state like California, where employers may theoretically fire employees at any time and for any reason, terminations often become causes for legal action as unlawfully discriminatory or for other "wrongful" reasons that the employer must defend at great cost.

On the other hand, this practice may lead both the temporary individuals and their "regular" co-workers to distrust the employer's hiring competence and/or ability to deliver as an employer of choice. The unfortunate message could be that the employer is unwilling to commit to a mutually beneficial employment relationship, and that the longer-term prospects of working for the company may be tainted by this initial lack of trust and/or competency.

If you are interested in trying out this practice in spite of these concerns, here are some suggestions for managing it:

- Be clear on your goal. Engage in this practice only if you can define the benefits it is likely to produce for your company. Decide whether it is a temporary practice or one that you expect to embrace ongoing. If it's more than temporary, write and communicate a policy about it and monitor compliance. Remember that you will be setting a precedent.
- Watch your language. Avoid promises of "permanent" employment once the initial period is over. (Use "regular" instead.) Do not label the employee as a "contractor" unless he/she qualifies as an independent contractor under the IRS rules. Don't promise that the employee will become "salaried" if by "salaried" you mean exempt, unless the job in which he/she will be placed qualifies as exempt under state and federal regulations. Most of all, don't make any promises that may not be kept.
- Pay right and obey payroll laws. Set the hourly rate and/or base salaries in a way that is consistent with your job classifications and ranges for other employees holding the same or similar jobs. This avoids the problem of forgetting to make appropriate adjustments if and when the employee goes on the regular payroll. Also, make sure that you pay overtime and withhold taxes for temporary non-exempt employees as you would for any regular employee.
- Don't make it a popularity contest. Although you can and should assess an individual's qualifications relative to those required for the job, subjective assessments of personality traits by other employees could lead to a claim of illegal discrimination.
- Watch out for hidden costs. Even if you save money by not having to pay for health benefits during the initial period, you may be spending more on training for the short-term (if you don't hire the person as a regular employee) and agency or search firm fees if professional help is engaged for the search process. Also, there will be additional, hard-to-quantify costs such as the impact of the practice

on the morale and feelings of employment security by other staff, work disruption, and perceived inequities as the employees discuss the situation among themselves. Don't discount the potential impact of social media on such matters!

- Stay tuned to the market. Even if the practice works for you, make sure to watch the supply and demand situation, as it may shift from a buyers' market to a seller's market before you realize it.

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