

Responsibility for occupational health and safety outcomes in the labour hire industry: a tripartite arrangement?

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ABSTRACT

Labour hire workers are one category of a group more generally labelled contingent, temporary, precarious or casual workers. Research shows they are generally at increased risk of occupational injury and illness compared to permanent employees. It is proposed that one of the causal factors is the unique tripartite employment relationship used to engage labour hire. The dynamics and behaviours in this triangular relationship are discussed with reference to the legal and organisational uncertainty that it frequently presents. A model is proposed that suggests the occupational health and safety interdependence between the three parties. The potential occupational health and safety outcomes for the labour hire worker are examined. Apparent gaps in the existing literature are identified, along with future research opportunities.

Keywords: Labour hire, tripartite relationship, occupational safety

INTRODUCTION

The intention of this paper is to examine the tripartite relationship between the labour hire worker, their employer (the 'agent') and their host (who actually provides the 'work'). This relationship is of interest because its particular dynamic may lead to uncertainty between the parties regarding their responsibility for the health, safety and welfare of the labour hire worker. This generates particular behaviours that produce tangible and intangible occupational health and safety outcomes for the labour hire worker that are usually negative.

The use of contingent workers has become increasingly common and the use of labour hire (or agency) arrangements has also increased considerably over the past fifteen years, and across many industries; hospitality, tourism and construction are examples often used, because of the fluctuating labour demands (Quinlan, Mayhew and Ferris 1997; O 2002). This trend has been noted in Australia as well as overseas in Europe and North America – and it shows no sign of slowing (see, for example De Grip, Hoevenberg and Willems 1987; U.S. Bureau of Labour Statistics 1995; Brewster, Mayne and Tregaskis 1997; Quinlan 1998).

Research shows that contingent workers are at a greater occupational health risk than permanent employees, and labour hire workers – as part of this classification – are also at increased risk (Morris 1999; Quinlan, Mayhew and Bohle 2001; Underhill 2002; Underhill 2004b). Given this outcome, it is appropriate to examine why labour hire workers are at higher risk of occupational injury and illness, compared to full-time employees in similar roles or industries.

The hypothesis proposed in this paper is that the certainty regarding responsibilities in a two-party relationship (i.e. between an employee and their employer) is diminished in the tripartite relationship between the labour hire agent, the labour hire worker and the host organisation. Further, the level of prior understanding of the agent and host organisation, regarding their knowledge of legislation (especially OHS legislation), their intentions towards the use of labour hire workers and the type of relationship between agent and host can lead to increased uncertainty. This uncertainty is either latent or deliberate and causes each party – individually or collectively – to behave in a manner that results in relatively adverse OHS outcomes for the labour hire worker.

DEFINITION OF LABOUR HIRE

The definition of a labour hire worker continues to be the subject of debate for researchers, statisticians, organisations, legislators and the workers themselves (Polivka and Nardone 1989; Beard and Edwards 1995; Quinlan *et al.* 2001; Underhill 2004). Labour hire workers form one category of a labour classification known variously as ‘temporary’, ‘contingent’, or ‘precarious’ workers – terms that describe the short-term and insecure nature of their income. Despite confusion over the definition of contingent and labour hire workers, the main characteristics of the latter are: there is usually no explicit or implicit contract for on-going work (Polivka and Nardone 1989:11); the work provided is seen as transitory by the host (Rousseau and Libuser 1997:106); unfair dismissal protection for the labour hire worker is usually lower than that of a full-time employee (Davidov 2004:728); agents have little direct control over the work done by their employee at a host site (Beard and Edwards 1995:476; Morris 1999:474); the labour hire workers may produce their income through work for a number of different agents and hosts, sometimes concurrently (Hipple 2001; Quinlan 2004). Labour hire workers

are not direct employees of the organisation in which they do their work; usually known as the 'host' employer - or 'special' employer in the USA, (Underhill 2002). The host hires the worker on a term basis (anything from an hour to periods lasting from days to years) from a third party agent, who makes wage payments to the labour hire worker. Supervision and deployment of the labour hire worker is done by the host organisation – with minimal or no input from the agent.

Using these characteristics it is possible to formulate a definition specific of the labour hire worker:

A person engaged – through an agent - to work at a host organisation for a transitory term. The worker has no contractual commitment with the host for on-going work, which may end at any time without notice. The labour hire worker is supervised by the host organisation, but paid by the agent – who invoices the host for a service provided.

The agent may have an on-going contract of employment with the worker, but this is dependent on the ability of the agent to place the skills of the worker at one – or various – host organisations on a full-time, on-going basis.

UNCERTAINTY IN THE TRIPARTITE RELATIONSHIP

Legal Uncertainty

Given the definition of a labour hire worker, who is legally responsible for their occupational health, safety and well-being? In a bipartite employment relationship, the answer is generally straightforward – the employer has both overall responsibility and the control, and is held accountable for the health and safety of employees. However, in the triangular relationship, who is legally responsible and in control of the worker? Is it the agent who employs them; the host for whom they work; or neither; or both? A number of different methods have been used around the world in an attempt to resolve the issue of who has responsibility for the labour hire or contingent worker – not only for health and safety issues, but also for matters like setting rates of pay, access to workers compensation, and the setting of working hours (see Davidov 2004 for a summary). Australian labour laws have been written to be consistent with the paradigm of "...permanent, full-time employment in a single-entity employer and labour law as the regulator of employment relationships, with the contract of employment as the pivot." (Johnstone, Quinlan and Walters 2005:95). Hence, Australian labour hire workers in a

tripartite relationship may face confusion and doubt as to their actual employer, as well as feelings of isolation from both agent and host. The host is unwilling to take legal responsibility for the labour hire worker because they do not want to be considered the employer. The agent has limited control over the premises where the worker is placed and therefore feels limited responsibility for OHS outcomes. However, the issue of control remains fundamental to the argument of which party has responsibility for the OHS outcomes of labour hire workers. All Australian States have OHS legislation (see for example *Occupational Health and Safety Act 2000* (NSW) and *Occupational Health, Safety and Welfare Act 1986* (SA)) that imposes a duty of care on employers and the self-employed with respect to 'others' such as contractors, non-employees, visitors and volunteer workers. The category of non-employees covers labour hire workers in most cases. The State of Queensland has gone further in that it specifically defines the relationship between the agent, host and the labour hire worker in its *Industrial Relations Act 1999* (Qld). In that, the agent is specifically included in the definition of 'employer' under Section 6 (2) (d) (Australian Chamber of Commerce and Industry 2005:30).

Organisational Uncertainty

The use of labour hire workers creates organisational uncertainty for the agent, the host organisation and the worker. The agent has great difficulty in supervising labour hire workers, and may operate in an intensely competitive industry, with low barriers to entry and – often - blurred lines of responsibility. There may also be pressure to accept higher risk tasks that host organisations want to avoid, or permanent employees have refused (Quinlan *et al.* 2001). The agent is faced with reducing overhead costs to the minimum: training, on-site supervision, risk assessments, safety management systems and consultation mechanisms are frequently rudimentary or non-existent. However, there are some agencies of sufficient size that can provide training and skills development and a few claim to be making progress with the training and development of the workforce, resulting in improved safety outcomes for workers.

Quinlan *et al.* (2001) propose that the presence of labour hire workers causes increased management demands for the host: it becomes more difficult to coordinate decisions, manage risks, synchronize activities and work groups – especially where workers may be unfamiliar with the site and other personnel. Deliberate or inadvertent exclusion of labour hire workers from the host's OHS Committees – or other on-site OHS representation – coupled with the poor or conflicting OHS system of the agent can create serious disadvantages in managing the health and safety of labour hire workers (Underhill 2002). Rubery, Earnshaw, Marchington, Cooke and Vincent (2002) have summarised many of the human resources issues facing the organisation. Whilst supervision, control and OHS considerations are included, issues of discipline, grievance, pay, loyalty and union representation are also raised.

In the tripartite relationship, it is usually the host organisation that provides supervision and control of the labour hire worker. This leads to inter-organisational difficulties as the actual employer of the worker is rarely present at the workplace. Similar problems arise over the issue of discipline; in many cases, this is applied by the host organisation demanding that the worker be re-deployed to another host – often with no reason given to the agent or the worker (Underhill 2004). According to Beard and Edwards (1995), labour hire workers may feel disadvantaged compared to permanent employees – especially in terms of pay, security, 'belonging' and control. Clarke (2003) argues that the presence of a positive safety culture can prevent accidents and that the temporary nature of labour hire (contingent) work does not allow the development of such a culture. Further, the presence of labour hire workers may affect the existing culture built up with permanent employees because it can reduce trust between employees and management.

Labour hire workers themselves are often under increased pressure to continue working; they are in competition for placement with host organisations, are likely to be allocated higher risk tasks in the host's environment, and have less scope to decide how such work should be completed (Quinlan *et al.* 1997; Rousseau and Libuser 1997). The worker may be confused about who is providing their supervision and to whom they should report grievances: there is little doubt that this extends to the

reporting of OHS issues and concerns, as shown by Underhill (2004). The position of the labour hire worker is even more precarious than a permanent employee in this regard, as they are less protected by unfair dismissal legislation and can be moved on from one host to another – or simply ignored by the agent – if they are regarded as a troublemaker (Underhill 2004). In many cases, labour hire workers do not report either incidents (Aronsson 1999), hazards or personal injury for fear of being labelled as ‘troublesome’ (Morris 1999; Underhill 2004) – or simply because they are ignorant of their rights (Quinlan *et al.* 1997).

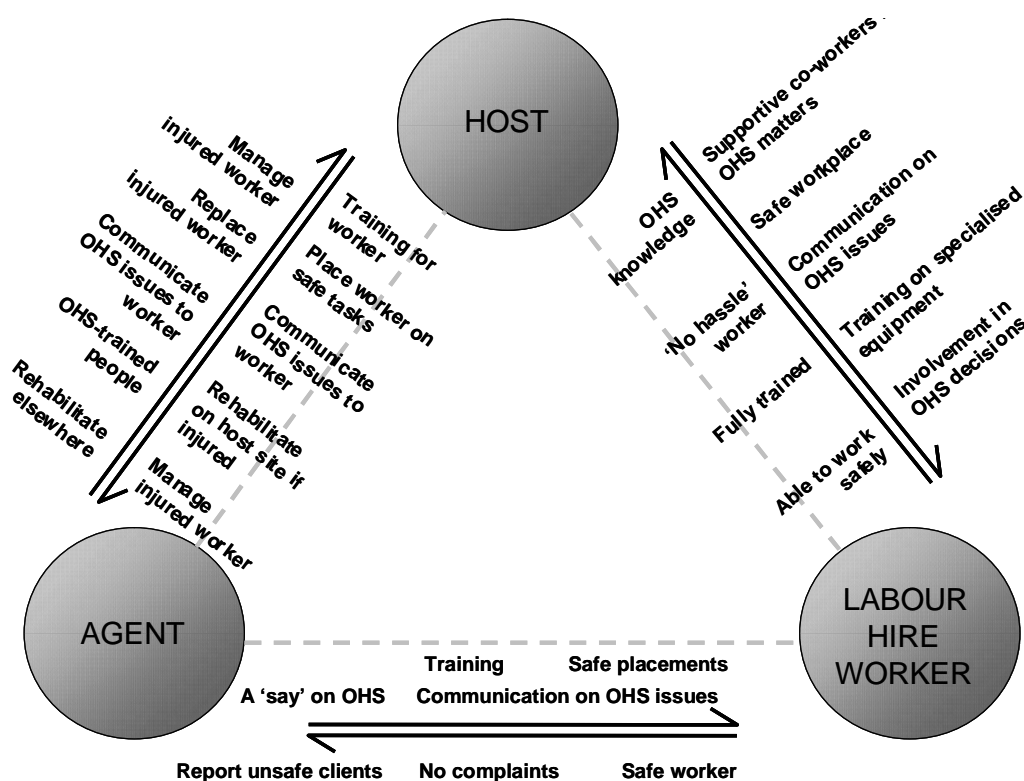
Representation by trade union organisations is problematic for labour hire workers. The nature of the industry is fragmented and leads to individuals and groups working across a broad range of host organisations, which may be in differing industries. This fragmentation severely restricts opportunities for representation in OHS matters (Quinlan *et al.* 1997). Deficiency of knowledge or care on the part of the host and agent; coupled with a lack of training, education, representation and control on behalf of the labour hire worker can provide such uncertainty that the safety of the worker is grossly overlooked, with increased illness and injury being the result.

THE UNCERTAINTY OF THE TRIPARTITE RELATIONSHIP.

The legal and organisational issues discussed above imbue the tripartite relationship with a complex suite of relational, legal, organisational, procedural and structural dynamics. The host exerts control over the labour hire worker, the workplace and the relationship with the agent. The agent has control over the worker, their income, ‘security’ and future placement; and the worker has apparently little control, attachment or representation at all. However, the relationships are interdependent and the balance of power can shift, allowing each party - under certain circumstances - to counteract the control exerted by the others. By way of example, the labour hire worker may have skills and experience that are in demand, providing a credible threat that they may leave the agent and remove a source of future revenue. This presents both a threat to the host (loss of skills to a competitor) as well as the opportunity that they may be able to offer permanent employment to a worker who is a known

quantity, trained and experienced in their business. Unfortunately, workers with basic skills, or those not in great demand, may not attract the same bargaining power and can be seen as a commodity.

It is usual that the host organisation has the most control in the tripartite relationship: it controls the workplace; task assignment for – and communication with - the worker; provision of supervision; performance monitoring; feedback to the agent; the ongoing relationship with the agency; and payment for services rendered. Whilst circumstances may alter the balance of power, ultimately the host exerts the most control over the labour hire worker and the agent. The significant legal and organisational uncertainty surrounding the relationship is exacerbated by the often temporary and intermittent nature of interactions between the parties. It is interesting to hypothesise what each party expects from the other in the triangular relationship. An attempt to do so is illustrated in the figure below:



The model is used to hypothesise what each party may want to receive from another. For example, the host and the agent may look to the other for provision of training to the labour hire worker; or to take responsibility for rehabilitation; or communication on OHS matters. The labour hire worker may be

expecting such communication from both the host and the agent – but receiving it from neither. An assumption is made that the worker desires a safe place of work – provided by the host – so they can remain physically able to continue work with that, or another, host. Whilst by no means covering the full range of health and safety concerns, this model indicates that there can be important areas of duplication (eg. communication with the worker on OHS matters) that one party may assume are being delivered by another, when in fact they are delivered by neither.

Behavioural Outcomes Caused by Uncertainty

The uncertainty with respect to OHS issues in the tripartite relationship drives certain behaviours for each of the parties in relation to supervision, injury management, training and OHS representation. Perpetuating the belief that the host is only responsible for on-site supervision leads to certain behaviour regarding management of any injured labour hire worker. The host believes that injured workers are the responsibility of the agent, who will provide workers' compensation payments and rehabilitation. Unfortunately, labour hire workers may not be sure of their rights and make no claim; or the agent may have no workers' compensation insurance and actively discourage a claim (Quinlan and Mayhew 1999; Underhill 2002).

Whilst the agent and the host may provide some rudimentary OHS induction training, an apparent lack of commitment to on-going training by either party leads to behaviour that allows workers to be allocated to tasks for which they have no specific training, with both the host and the agent believing (or hoping) that the other party will provide it. The host may not communicate the need for training to the agent; and the worker may just undertake the task to the best of their ability because they are concerned about their future prospects if they complain; unaware of their rights; or do not know with whom to discuss the problem.

The host generally sees no need for labour hire workers to be represented on, or by, OHS committees or elected OHS representatives. The resulting behaviour by the host is to assume that the OHS consultation is either unnecessary, or is carried out by the agent: in most cases it is carried out by

neither – a point made by Johnstone *et al.* (2005) in their study of statutory occupational health and safety arrangements.

Provision of adequate supervision for labour hire workers is difficult if not impossible for the agent as their employees are individuals or small groups, dispersed over multiple job sites, with many different supervisors. Morris (1999) reported that any communication between the agent and worker was restricted to weekly visits, evaluation at the end of an assignment, or feedback from the clients.

The agent's behaviour regarding injury management and workers compensation may be driven by ignorance, competitive pressures or disregard for the law. Agents may carry no – or insufficient – workers' compensation insurance because they use contractors as labour hire workers (and expect the contractor to underwrite their own insurance needs); are deliberately undercutting competitors by evading the cost of insurance; or are unaware of their legal responsibilities. Industry Commission findings cited by Quinlan and Mayhew (1999: 502) indicate that insurance coverage was “partial, ambiguous and inconsistent across different jurisdictions.”

The uncertainty surrounding their relationship with other agent and host in the tripartite arrangement leads labour hire workers to exhibit behaviours that differ from those of their permanently employed counterparts. Worker behaviour regarding incident or injury reporting and workers compensation underlines the uncertainty felt by labour hire workers. Knowledge about workers compensation cannot be regarded as good amongst this group as Quinlan and Mayhew (1999:496) reported that 50% of contingent workers surveyed felt they were entitled to workers compensation, 20% were sure they were ineligible, and the remaining 30% - although unreported – were apparently unsure. This uncertainty and lack of knowledge leads to under-reporting (or no reporting) of work-related injury, incidents and illness.

OHS OUTCOMES FOR LABOUR HIRE WORKERS

The uncertainty and behaviours of parties in the tripartite relationship generally leads to a less favourable OHS outcome for labour hire workers than their permanently employed equivalents.

Researchers propose that this is due to the factors of job insecurity, predicability, control, psychological contract, poor communication and social comparison having a negative impact on job satisfaction, involvement, commitment and well being (see Beard and Edwards (1995); Clarke (2002); Rousseau and Libuser (1997)). Other research supports serious adverse effects for labour hire workers – and all contingent work groups – who are less likely to report injuries and incidents (Aronsson 1999), lodge a workers compensation claim (Quinlan and Mayhew 1999) or avoid long-term exposure to hazardous substances (Quinlan 2004). The work of Underhill (2002) supports this with an analysis of actual workers compensation data in the Australian State of Victoria.

The behaviour of each party in the tripartite arrangement that is unique to the labour hire industry has some impact on the OHS outcome for the worker. The work of Morris (1999), Quinlan and Mayhew (1999) and Quinlan *et al.* (2001) suggests a divide in the understanding of the worker, the agent and the host regarding their legal and moral responsibilities.

GAPS IN EXISTING RESEARCH.

A considerable amount of research has been undertaken into the contingent or temporary workforce over the past fifteen years. Much of it has been directed at the contingent worker and the impact of this means of employment on their physical and psychological wellbeing, as well as their occupational safety (see Quinlan *et al.* 2001 for a review of the research) or the legal, regulatory and organisational context (Bronstein 1991; Davidov 2004; Johnstone *et al.* 2005). In recent research, there is increased focus on the inter-organisational issues involved in the tripartite relationship that is the basis of labour hire arrangements (see Rubery *et al.* (2002) and Davidov (2004)). It is in the inter-organisational area that gaps in the research appear, especially when related to the tripartite arrangements described in this paper and the OHS outcomes for the labour hire worker. Future research opportunities exist in analysing the dynamics of the relationships and reviewing the lack of clarity that surrounds each role and each relationship: such a holistic approach to analysing the industry has yet to be undertaken in depth. It would be informative to study not only the relationship between the worker and the agent, but also to examine what the labour hire worker desires in the relationship between the host and the

agent. A qualitative approach to understanding the issues around the triangle of interdependence is proposed, with a targeted quantitative survey to examine specific issues. Definition of the size and nature of the problems facing all parties in the temporary labour industry may make it possible to define the requirements for training, education, regulation and communication not only for each party, but for the relationships that exist between them.

CONCLUSION

The triangular relationship described here is unique in its complexity, and can result in uncertainty for the parties regarding legal and organisational responsibility for the labour hire worker. It is proposed that this uncertainty is the cause of a number of behaviour patterns that ultimately result in negative OHS outcomes for the labour hire worker; presenting as either psychological illness, increased injury rates, depression or long term health problems. There appears to have been little research into the entire tripartite relationship that is the foundation of the labour hire industry. Further work in this area is proposed by means of qualitative and quantitative study into the understanding, intentions, expectations, uncertainty and behaviour of the parties and the OHS outcomes for the labour hire worker.

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