

# EC RISK REVIEW

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## Staffing Levels Can Impact Your Liabilities

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

Overworked staff and backlogged workloads are key red flags when it comes to professional liability dangers. As your professional staff juggles multiple projects, details often fall through the slats. Documentation may be missed, observation may be lessened and junior employees may be assigned to tasks better left to seasoned veterans. The demands of keeping up with too many projects can lead to critical errors and omissions – along with unwelcome disputes and professional liability claims.

Hiring more full-time employees is not always a viable solution. Beyond having financial constraints, environmental firms may find it difficult to locate qualified and experienced staff on a moment's notice. What's more, bringing in inexperienced or under-qualified staff can actually worsen the problem. Senior managers can become distracted from their environmental work as they spend hours training and retraining new hires, some of whom may never succeed.

So what's the answer to this dilemma? Obviously, turning down attractive projects due to a lack of qualified staff is not the solution that environmental firms are looking for. Instead, firms should take a proactive approach to locating and hiring qualified professionals. In addition, they should investigate alternative employment options that can help

companies keep up with workloads without committing to a long-term increase in headcount.

### Perpetual Recruiting

Environmental firms should maintain a consistent recruiting mode whether they are currently hiring or not. This does not mean running non-stop help-wanted ads in local newspapers and professional trade journals. Rather, it means keeping your eyes and ears open to available talent that may add to the quality of your staff.

For example, management should regularly network through professional associations. Word of mouth can often unveil talented environmental consultants looking for a new challenge or a change of scenery. Brazenly headhunting your competitors' key employees may lead to retaliation, but a low profile and an open ear can bring existing opportunities to light.

Another low-cost and effective recruiting tool is your company Website. Many firms have created extensive "career opportunity" sections, with prominent buttons on the home page linking prospects to this section. They provide a succinct description of the company and its culture, and list any positions currently available. A contact e-mail address for inquiries is a must; a mechanism for prospects to submit cover letters, resumes and work samples is even better. Be sure to provide the company address, as well as the names and phone numbers of key contacts so that prospects can make direct calls.

Intern programs continue to be a popular way to bring junior talent into an environmental firm. But keep in mind that interns are rarely prepared to take a prominent role in a practice and, therefore, are not always an effective solution for alleviating heavy workloads.

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## Alternatives to Traditional Staffing

A drawback to hiring during times of heavy workloads is the potential for layoffs should the practice cool off. Firms that repeatedly grow and shrink often suffer decreased morale and lowered performance as employees become distracted by the apparent instability. You may want to look to alternative staffing methods.

**Contract professionals** or **contingent employees** are becoming increasingly commonplace in the environmental consulting industry. In fact, across all industries, professional and technical workers have been a growing segment of a flexible work force once known as “temporary employees.” Highly qualified professionals can be hired through national agencies and specialized staffing companies.

Indeed, it’s not just those who can’t find a steady job filling the ranks of contract professionals. This employment option is proving attractive to skilled consultants looking for professional challenge, diversity of assignments, travel, and the ability to increase skills for heightened marketability. Plus, should an opening become available, a contract professional who likes your company and decides it’s time to set roots may accept your offer to stay on as a full-time employee.

The benefits these contract workers provide are many. They allow flexibility with staffing as job skill requirements and project load fluctuate. Contract workers are typically paid hourly and the employment agency often handles administration, payroll taxes and benefits. Plus, you enjoy lower recruiting costs compared to hiring employees.

Disadvantages include potential higher turnover and reduced job loyalty – although this is not always the case. Plus, you usually have to pay overtime.

**Independent contractors** are another alternative to permanent staff. These are essentially the same types of workers as contract professionals, but you deal direct with the individual rather than going through an agency. The advantage is that the per-hour cost is generally lower since you don’t pay a fee to an agency. The disadvantage is that you lose the administrative services often provided by agencies. (Some independent contractors work with a third-party

administrator that helps them handle payroll and benefits administration.)

**Loaned employees** are a less common but growing source of contract workers. With this approach, consulting firms “borrow” employees from another consulting firm to work on a short-term basis in exchange for a fee. This practice is proving effective between environmental firms with good working relationships. However, there are substantial gray areas here regarding professional liability. For example, if there is a claim arising from a loaned temp employee’s services on a project for the borrowing firm, the lending firm can easily be brought into the suit. Be cautious with this approach.

**Subconsultants** are certainly not new to environmental firms. Many have experience hiring subconsultants from a variety of environmental disciplines. However, it is becoming more common to find environmental firms subconsulting with other environmental firms to help handle large workloads. Rather than hiring subs to perform functions where a firm lacks expertise, companies are subcontracting work they would typically perform themselves if they had adequate staff.

When considering any alternative staffing method, be sure to check state labor laws regarding what qualifies a worker as an “employee.” Sometimes, the number of hours worked, duration of hire, or scope of work requirements may inadvertently cause an alternative staffer to be qualified as an employee.

## Reducing Liability

What are some of the steps environmental firms can take to minimize liabilities while addressing staffing shortages?

When seeking to hire an employee, establish strict job criteria to meet your needs. Make sure recruits possess the skills, licenses and other requirements necessary to perform the functions they will be called upon to perform. Be ready to provide new hires with close supervision, mentoring by senior staff members and ongoing training from effective instructors.

Make sure all of your recruiting, interviewing, hiring and firing policies and procedures are in compliance with the many state and federal laws prohibiting discrimination. A detailed human resource manual and

a professional recruiter can go a long way to avoiding potential employment practice liabilities.

If you can't find qualified job candidates or are hesitant to commit to a long-term employment relationship, look to the alternative employment options discussed previously. Develop a short list of qualifications for these firms or individuals. Look for those with track records of delivering high quality and who demonstrate client-service and work-ethic philosophies similar to those of your company. Look for professionals experienced in providing the specific type of services you need performed, preferably for the same type of projects. Ask about their current workload – you don't want to hire a contractor or sub who is just as overbooked as you are.

### **Work Agreements with Alternative Staff**

Put your alternative staffing agreements in writing. You can start with one of the professional association forms. (Both EJCDC and the AIA have consultant agreements you and your attorney can likely adapt to your situation.) Or, develop a form of your own. Your goal is to arrive at an agreement that is reasonable and fair and allows each party to reach its objectives.

Here are three critical points you need to address in the work agreement:

1. Draft a clear scope of services that spells out the functions to be performed and the working relationship to be established.
2. Include a fair and insurable indemnity. We suggest a mutual indemnity that gives both parties equal protection. By providing for mutual indemnity based on comparative fault, the party found most responsible for the error or omission will bear the bulk of the liability. This comparative fault clause only comes into play legally if the claim ultimately is decided in court. However, it can also serve as a valuable guide should a dispute be resolved prior to a lawsuit through mediation or some other dispute resolution technique.
3. Have each party maintain and furnish proof of insurance. Your agreement should require each of you to provide to the other certificates of insurance showing all coverages.

Other issues you will need to address include:

- Who will retain ownership of documents?
- How will you handle payment?
- Will the subconsultant/independent contractor perform construction observation?

If you are the prime consultant, we recommend that you pass through to your subconsultant or independent contractor any liability protections (such as indemnities and limitations of liability) that you are able to obtain from your client. If you loan your employees to (or borrow employees from) other consulting firms, you should have a contract that sets forth who will take responsibility for claims that arise from the employee's services. Probably the best solution is to have the "borrowing" firm assume the responsibility and indemnify the other firm.

### **Employment Practice Liability Insurance**

As previously mentioned, you must make sure your recruiting, hiring, training, management and firing procedures are in full compliance with state and federal laws and are evenly and consistently applied by all members of management. One false move that could be perceived as discriminatory or as harassment could lead to a long and expensive lawsuit. We can assist you in finding proper coverage with an Employment Practice Liability Insurance (EPLI) policy.

### **Be Picky**

A final consideration for lowering liability is to limit the amount of additional work your firm takes on. This doesn't necessarily mean having to say no to the next great project that arises. Rather, you can raise your standards for the types of work you will accept. That could include raising your fees, limiting the types of projects you will accept, or raising the standards you demand in a new client. That way, you can continue to accept the cream-of-the-crop new clients and possibly weed out troublesome ones. Although your total revenues may remain constant or rise more slowly, your profit margins could increase substantially while your exposure to risk is reduced.

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**Conclusion**

A high demand for your services should be a blessing, not a curse. By choosing your new hires and your new projects wisely, controlled sustainable growth becomes a more realistic goal. Work force flexibility through the use of alternative staffing options can be an important solution to position your firm for success today and tomorrow.

**Can We Be of Assistance?**

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*