

# Contents

<b>Introduction</b> .....	1
<b>1. Staffing Services Defined</b> .....	3
1. Temporary and Contract Staffing.....	3
a. How Staffing Firms Operate .....	4
b. Nature of Temporary Work.....	4
c. How Temporary Employees Are Assigned and Paid.....	5
d. State Regulation of Temporary Staffing .....	6
e. Temporary Distinguished from Part-Time .....	6
2. Long-Term Staffing.....	6
3. Employee Leasing (Professional Employer Organizations) .....	7
a. Tax Status of PEO-Defined Contribution Plans .....	8
b. Employer Status of PEOs for Employment Taxes .....	9
4. Payrolling.....	11
5. Managed Services .....	11
6. Search and Placement Services.....	11
7. Temporary-to-Hire.....	12
8. Independent Contractors.....	13
<b>2. Co-Employment Issues</b> .....	15
A. Compensation and Benefits .....	16
1. Workers' Compensation.....	16
a. General Employers and Special Employers .....	16
b. Client as Employer—Alternate Employer Endorsement .....	17
c. Fellow Employee Rule .....	18
d. Waivers of Client Liability.....	19

e. Special Rules for Employee Leasing Firms .....	19
2. Unemployment Insurance.....	19
3. Employment Taxes .....	20
a. Independent Contractor Issues .....	21
b. Application of Section 530 to Technical Services.....	22
c. IRS Classification Guidelines .....	22
4. Wage and Hour Issues.....	23
5. Health and Pension Benefits .....	25
a. Coverage Tests .....	25
Leased Employee Rules .....	26
Definition of Leased Employee .....	27
b. Control Test .....	28
c. Benefit Plans Affected by the Leased Employee Rules.....	29
d. Record-Keeping Exemption .....	29
e. Safe Harbor Plans.....	29
f. Coverage Testing of Leased Employees—Consequences of Failing the Tests .....	30
g. Credit for Benefits Provided by Leasing Organization.....	30
h. Prior Service Credit for Employees Hired by Client.....	31
i. The Microsoft Case .....	31
j. Operational Steps—Avoiding Control .....	33
k. Benefit Plan Exclusions Must Be Clear and Unequivocal.....	33
l. Employee Contracts and Waivers .....	34
m. Limits on Worker Assignments—Are They Necessary?.....	36
6. Family and Medical Leave.....	38
a. Eligible Employees .....	38
b. Primary and Secondary Employers.....	38
c. Duty to Restore Temporary Employee Returning From Leave .....	40
d. Application of 75-Mile Rule to Staffing Firms.....	41
B. Employment Practices.....	41
1. Equal Employment Opportunity Laws .....	41
a. Liability of Clients .....	41
b. Liability of Staffing Firms .....	43
c. EEOC Guidance on Contingent Workers .....	43
Head Count Issues Under Title VII .....	45
d. Affirmative Action, EEO-1 Reporting and Other Record-Keeping Issues.....	45
Affirmative Action Policy Under Executive Order 11246 .....	45

OFCCP Internet Applicant Rules.....	48
Exemption for “Recruitment Practices” Under EEOC and Department of Labor Rules .....	48
Client Requests for Race and Ethnic Data.....	49
Employer Obligations to Military Reservists and National Guard Members .....	50
e. Uniformed Services Employment and Re-Employment Rights Act.....	50
Internal Employees—Seniority and Position Upon Return.....	50
Hardship Exception .....	51
Temporary Employees—Reinstatement With Clients .....	51
Priority Consideration for Future Assignments .....	52
f. Job Listing Requirements Under the Vietnam Era Veterans’ Readjustment Assistance Act.....	53
g. Americans With Disabilities Act.....	54
When Medical Questions May Be Asked.....	54
Exceptions to the Rule.....	55
Clients Are Co-Employers .....	55
Undue Hardship .....	55
2. Labor–Management Relations .....	56
a. Inclusion of Staffing Firm Employees in Client Bargaining Units.....	56
b. Crediting Prior Service When Temporary Workers Are Hired by Clients.....	58
c. Liability for Unfair Labor Practices .....	58
‘Salts’ .....	58
d. Staffing Firm Liability for Unfair Labor Practices of a Client...	59
3. Work Site Safety.....	60
4. Wrongful Discharge .....	63
5. Plant and Facility Closings (WARN Act) .....	64
a. Staffing Industry Exemptions.....	64
b. Temporary Projects .....	65
c. Special Circumstances.....	65
6. Immigration and I-9 Verification .....	66
7. Privacy Protection.....	66
a. Health Information Privacy Rules Under HIPAA .....	66
Definition of ‘Business Associate’ .....	67
b. Argument for Not Treating Staffing Firms or Their Temporary Employees as Business Associates.....	68

Who Decides Whether a Staffing Firm Is a Business Associate? .....	59
c. Financial Information Privacy Rules (Gramm-Leach-Bliley) ....	70
Federal Trade Commission Privacy Rules.....	71
Federal Trade Commission Safeguard Rules .....	72
Who Is the Service Provider Under the Safeguard Rules—the Staffing Firm, the Temporary Employee, or Both?.....	73
d. Background and Reference Checks Under the Fair Credit Reporting Act.....	73
Consumer Reports Obtained From Third Parties .....	74
Routine Reference Checking—Communications of Information to Clients .....	74
<b>3. Maintaining the Staffing Firm’s Employer Status .....</b>	<b>77</b>
<b>Conclusion .....</b>	<b>81</b>
<b>Appendices .....</b>	<b>83</b>
<b>Case Index.....</b>	<b>255</b>
<b>Subject Index.....</b>	<b>263</b>