

Contents

Preface	ix
Chapter 1: Equal Opportunity Laws	1
A. Federal Law Prohibits Employment Discrimination.....	1
1. Key Principles of Equal Employment Opportunity Law	1
2. Issues Commonly Faced by Temporary Service Companies	5
3. Classes Protected by the Equal Employment Opportunity Laws	8
4. Coverage, Enforcement, and Requisite Reports and Records.....	17
B. Federal Law and Affirmative Action	23
1. Executive Order 11246.....	23
2. The Rehabilitation Act of 1973	26
3. The Vietnam Era Veterans' Readjustment Assistance Act of 1974.....	28
C. State-by-State Analysis of Fair Employment Practices Laws	30
Chapter 2: Wrongful Discharge	57
A. Erosion of the Employment-at-Will Rule	57
1. The Public Policy Exception.....	57
2. The Express or Implied Promise of Job Security	58
3. The Implied Covenant of Good Faith and Fair Dealing	59
B. Other Claims Commonly Advanced by Terminated Employees in Wrongful Discharge Lawsuits	59
1. Fraud or Misrepresentation	59
2. Intentional Infliction of Emotional Distress	59
3. Defamation	60
4. Invasion of Privacy	60
5. Negligence.....	60
6. Interference With Contractual Relations	60
7. Interference With Prospective Economic Advantage.....	61
8. Promissory Estoppel.....	61
C. State-by-State Analysis of Wrongful Discharge Laws	61
Chapter 3: Wage and Hour Laws	95
A. The Fair Labor Standards Act	95
1. Who Is Covered by the FLSA?.....	95
2. Who Is Exempt From FLSA Coverage?.....	96
3. Child Labor Provisions	109
4. How Much Compensation Is the Temporary Employee Owed?	110
5. Record-Keeping Requirements	114

6. Enforcement	115
B. Government Contract Laws.....	115
C. Wage and Hour Investigations: What Should You Do?.....	116
D. State Laws Affecting Wages and Hours.....	117
Chapter 4: Employment Agreements, Employee Handbooks, and Restrictive Covenants	119
A. Express Employment Agreements	120
1. Advantages of Employment Agreements.....	120
2. Disadvantages of Employment Agreements.....	121
3. Illustrative Provisions	121
B. Restrictive Covenants.....	124
1. What Is a Restrictive Covenant?.....	124
2. Types of Restrictive Covenants	124
3. Legal Concerns	124
4. Business Considerations.....	126
5. Restrictive Covenants and the Prospective Employer	127
6. State-by-State Overview of Restrictive Covenants	127
C. Implied Employment Agreements	147
1. General.....	147
2. Employee Handbooks	147
3. Common Employee Handbook Topics	148
4. Provisions That Should Be in Every Employee Handbook.....	149
D. Arbitration Agreements.....	151
1. Advantages of Arbitration.....	151
2. Disadvantages of Arbitration	152
Chapter 5: Immigration Reform and Control Act.....	153
A. Employers Cannot Hire Unauthorized Workers.....	153
1. Effective Date.....	153
2. Unauthorized Aliens	153
3. Amnesty Program	153
B. Employers Must Verify That Employees Are Authorized to Work.....	154
1. Verification Procedures.....	154
2. Responsibility for Compliance in the Staffing Industry	156
3. Covered Employees.....	157
4. Time for Compliance for Temporary Employees.....	158
5. Repeated Verification	158
6. Enforcement.....	158
7. Penalties	158
C. Employers May Not Discriminate Based on National Origin or Citizenship.....	159
1. National Origin Discrimination.....	160
2. Citizenship Discrimination	160
3. Preference for Nationals and Citizens	160
4. Retaliation or Intimidation Prohibited.....	161
5. EEOC Policy Statements.....	161
6. Enforcement of EEO Laws Against Undocumented Workers	162
7. Local Laws	162
8. Penalties for Discrimination Under IRCA.....	162
9. Enforcement Proceedings.....	163

Chapter 6: Substance Abuse and Drug Testing in the Workplace	165
A. Nature of the Problem and Purposes of This Chapter	165
B. Legal Implications of Drug Testing	166
1. General.....	166
2. Federal and State Constitutional Provisions.....	166
3. Federal and State Antidiscrimination Laws	167
4. State Common Law Theories.....	169
5. State and Local Drug-Testing Laws	172
C. The Drug-Free Workplace Act of 1988.....	189
1. Requirements	189
2. Coverage	189
3. Penalties	190
4. Enforcement.....	191
D. Responding to Client Requests for Drug Testing	191
1. General Considerations.....	191
2. Why Should a Staffing Firm Have a Substance Abuse Policy?	192
3. Form and Components of a Substance Abuse Policy	192
4. Selection of a Laboratory	193
E. Must All Applicants and Employees Be Drug-Tested?	195
1. Applicants	195
2. Existing Employees	196
3. Authorization and Release Forms	196
4. Volunteers	196
F. Dealing With the Employee Who Tests Positive.....	196
1. Limitations on Drug Testing.....	197
2. Dissemination of Test Results	197
3. Common Employee Responses	197
4. Retesting	198
5. Dealing With the Confirmed Positive Test Result	198
6. Deciding How to Treat an Employee Who Has Tested Positive	198
7. Unemployment Compensation Issues	198
8. Workers' Compensation Issues	199
G. Current Drugs of Abuse.....	200
1. Alcohol.....	200
2. Amphetamines	200
3. Ice.....	200
4. Barbiturates	200
5. Cannabis	201
6. Cocaine	201
7. Crack.....	201
8. Heroin.....	201
9. Prescription Opiates	201
H. Drug-Testing Methods.....	202
1. Initial Screening Methods.....	202
2. Confirmation.....	203
3. Limitations of Drug Tests	203
 Chapter 7: The Pre-Employment Process.	 205
A. Recruitment	206
1. Word-of-Mouth Recruiting	206

2. Job Advertisements	206
3. Walk-In Hiring	207
B. Pre-Employment Inquiries.....	207
1. General Considerations.....	207
2. Americans With Disabilities Act	207
3. Other Restrictions on Pre-Employment Inquiries	211
4. Legitimate Areas of Inquiry	212
C. Polygraph Tests	214
D. Employment References.....	214
E. Protecting Against Negligent Hiring or Assignment Claims.....	215
F. Arrest and Conviction Records	216
G. Credit and Background Reports.....	216
1. Reports Prepared by Consumer Reporting Agencies	216
2. Reference Checks Conducted by Staffing Firm Personnel.....	218
Chapter 8: Measures Designed to Reduce the Likelihood of	
Employment-Related Claims.....	219
A. Policies and Training	219
B. ADA Compliance Measures	220
C. Employment-at-Will Policy.....	221
D. Employment Applications.....	221
E. Employee Handbooks	221
F. Job Descriptions	222
G. Interviewing and Evaluations	222
H. Offers of Compensation	223
I. Performance Appraisal Systems	223
J. Document Performance Problems.....	224
K. Progressive Discipline.....	224
L. Termination.....	224
M. Reductions in Force.....	226
N. Alternative Dispute Resolution	227
O. Discriminatory Client Requests	227
P. Protecting Against Negligent Hiring	228
Q. Insurance	228
R. Indemnification Provisions.....	229
S. Reducing the Risk of Violations of Wage and Hour Laws.....	229
T. Reducing the Risk of IRCA Violations.....	231
U. New Hire Reporting Laws	232
V. Conclusion	233
Chapter 9: The Occupational Safety and Health Act	235
A. Coverage of the OSH Act.....	235
B. Application of the OSH Act to Staffing Firms	235
C. Providing a Safe Workplace.....	236
D. Right-to-Know Law	237
E. Record-Keeping Requirements	238
F. Enforcement.....	238
G. Penalties	239
H. States With Approved Plans	240

Chapter 10: Family and Medical Leave Act	243
A. Leave Entitlements Under the FMLA	243
1. Covered Employers	243
2. Qualified Employees	243
3. Leave Entitlement Under the FMLA	244
4. Responsibility for Compliance in the Staffing Industry	249
B. Employee and Employer Requirements Under the FMLA	250
1. Employee Requirements	250
2. Employer Requirements	251
C. Remedies for FMLA Violations	253
1. Violations	253
2. Civil Suits by Employees	253
3. Action by the Department of Labor	254
4. Statute of Limitations	254
5. Arbitration	254
Chapter 11: Independent Contractor Versus Employee Status	255
A. Categories of Employees	257
B. Section 530 of the Revenue Act of 1978	257
1. Consistency Test	258
2. Reasonable Basis Test	258
C. Section 530 (d) (1706) of the Tax Reform Act of 1986	258
D. The Benefits to the Employee of Being Classified as an Independent Contractor	258
E. The Benefits to a Business of Classifying Employees as Independent Contractors	259
F. Internal Revenue Code Section 3509	259
G. Worker Status Under Other Laws	259
H. The Fair Labor Standards Act	259
I. State Unemployment and Workers' Compensation Laws	260
J. The ABC Test	260
Chapter 12: Per Diem Regulations	261
A. Business Connection	261
1. Temporary Versus Indefinite Absences	262
B. Substantiation	262
C. Return of Amounts in Excess of Expenses	264
1. Safe Harbors	264
2. Business Transaction Rules for Temporary Employees	265
Chapter 13: The H-1B Temporary Professional Worker	267
A. The Prevailing Wage Determination	267
B. The Labor Condition Application	268
C. Form I-129H	268
Appendix A: Directory of Federal and State Agencies	269
Appendix B: Record-Keeping Requirements of Selected Federal Laws	279

Appendix C: EEOC Guidelines on Application of EEO Laws To Contingent Workers	283
Appendix D: EEOC Enforcement Guidance on Pre-Employment Disability-Related Inquiries.....	299
Appendix E: Sample Policies, Forms, Contracts, and Language	311
1. Equal Employment Opportunity Policy.....	312
2. Employee Acknowledgment and Pledge to Comply With Company’s Equal Employment Opportunity Policy	313
3. Prohibition of Harassment Policy	314
4. Alcohol- and Drug-Free Workplace Policy.....	315
5. Release and Consent Form for Substance Abuse Testing.....	317
6. Applicant Authorization and Consent Form for Employment References and Education Verification.....	318
7. FCRA Compliance Letters and Documents.....	319
a. Notification of Background Check.....	319
b. Applicant Authorization and Release of Information	319
c. Letter to Applicant To Be Used Before Taking Adverse Action	320
d. Summary of Consumer Rights Under the Fair Credit Reporting Act	321
e. Letter to Applicant To Be Used After Taking Adverse Action	323
8. Arbitration Agreement.....	324
9. Application for Employment for Temporary Employee.....	325
10. Employment Agreement With Temporary Employee	330
11. Application for Employment for Regular Employee.....	334
12. Employment Agreement With Regular Employee	338
13. Family and Medical Leave Act Policy	342
14. Employer Response to Employee Request for Family or Medical Leave (U.S. Department of Labor Form)	344
15. FMLA Certification of Health Care Provider (U.S. Department of Labor Form)	346
16. FMLA “Poster” (U.S. Department of Labor Publication)	350
Appendix F: Summary of Selected State Employment Discrimination Statutes Relevant to Private Employers	351
Index.....	363