




On the Frontlines—Legal Issues for Sales Personnel



2015 ASA

Staffing Law
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On the Frontlines—Legal Issues for Sales Personnel

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Hiring Staff—Contractual Issues

- Always check if your candidate comes with a noncompetition and/or a nonsolicitation agreement
 - Check if lawful in state domiciled (or set forth in choice of law provision)
 - Be prepared to honor (or litigate)
 - Consider negotiating with competitor upfront
 - Be sure candidate is worth it

Hiring Staff—Contractual Issues

- Always check if your candidate comes with a noncompetition and/or a nonsolicitation agreement
 - Go over their obligations explicitly
 - Put those obligations in writing
 - Biggest pitfall—sending files to themselves at home through work email right before they leave
 - Verify candidates have not retained any prior employer documents or equipment on start date

Hiring Staff—Contractual Issues

- Social Media

- Be cautious about referencing former employer in publicity materials
- Personal LinkedIn/Facebook accounts are fair game—can show résumé type listing on LinkedIn/Facebook
- Be sure candidate doesn't violate noncompete with InMails or other “social” communications to old clients (or through use of personal cell phone)

Hiring Staff—Contractual Issues

- Onboarding—Have a Strong Nonsolicitation Agreement at a Bare Minimum; Noncompete if Allowable in Your State
 - Be consistent in approach with how you have them uphold their prior employer obligations (e.g., don't ask for a nonsolicit but have them violate their prior nonsolicit)
 - Resist separate deals for different employees
 - Exception might be if individual comes (lawfully) with major accounts

Paying Staff—Wage and Hour Laws

- Federal Fair Labor Standards Act
 - Limits exemptions to overtime pay: administrative, professional, and managerial
 - Salespeople and recruiters may not qualify
 - Degree of judgment and discretion in role matters, as does proportion of clerical and routine duties
 - Agreements with employees about status are not controlling and waivers are ineffective

Paying Staff—Wage and Hour Laws

- State Wage and Hour Laws
 - Several states have separate pay standards that may differ materially from federal law
 - Federal compliance is not a defense to state pay laws
 - California is particularly complicated and potentially expensive

Paying Staff—Wage and Hour Laws

- Staffing Industry Special Considerations
 - Bonus and commission may be included in the base rate to factor overtime pay
 - Blended desk, or sales and recruiting at same time, may be disqualified from all exemptions
 - Trainees or newly hired producers can be an exposure
 - Arbitration agreements and class action waivers are under assault by plaintiff's lawyers and the NLRB

Paying Staff—Compensation Issues

- Some Compensation Issues to Consider
 - Defining the business for which the salesperson will be paid
 - Determining timing of payments and when they run out
 - Clarifying what happens upon termination

Departing Staff—Contractual Issues

- Your agreement likely applies if employees are terminated or resign
- Remind them of their obligations prior to departure
- Mirror what you told them on hire
- Closely monitor your accounts/candidates following departure
- Review their email for the past 60-90 days
- Remove their password rights to your system

External Issues—Contracts

- How comfortable are you signing something that isn't true?
- Indemnification
- Business associate agreements
- Confidentiality
- We'll pay you only if and after we get paid
- Other contract issues?

External Issues—Difficult Conversations

- Having a difficult discussion early on may avoid an even harder one later
 - Discriminatory placement requests
 - ADA accommodations
 - FMLA and other leaves
 - Whistleblowers and complaints
- Carefully steering clients to a better path may save everyone much greater frustration and expense

Sales Roles vis a vis ACA Compliance

- Help clients understand the law
- Understand how the staffing firm is complying itself

Sales Roles vis a vis ACA Compliance

- Help Clients Understand the Law
 - Which of their employees need to be covered
 - Distinction between full time, part time, and seasonal
 - Why clients should resist changing hours to avoid ACA
 - Types of coverage required (MEC vs. MV)
 - Potential penalties for noncoverage

Sales Roles vis a vis ACA Compliance

- Understand How the Staffing Firm Is Complying Itself
 - Difference between variable-hour and nonvariable hour employees
 - Use of the 1,560 hour look-back test
 - Methods for cost recapture (spread of hours markup or fee vs. direct pass-through)
 - Contract language including special rules for payrolling

Sales Roles vis a vis ACA Compliance

- Understand How the Staffing Firm Is Complying Itself
 - MEC plan vs. MV plan
 - Details of each program
 - Or just paying penalties (and if so, how recapturing nontax-deductible cost)

Questions?