American Staffing Association

Policy Agenda

Temporary and contract staffing is one of America's largest service industries, employing more than 14 million people each year and playing a major role in the nation's job growth. The industry's policy agenda is focused on laws and regulations that affect staffing firms' ability to create jobs and serve their clients.

As employers, staffing firms are subject to myriad federal and state laws, including equal employment opportunity, workplace safety, wage and hour, workers' compensation, unemployment insurance, and other labor and employment laws and regulations designed to protect workers. The ASA code of ethics reinforces the importance of rigorous compliance with those laws, and ASA has developed labor and employment law certification and other education programs to help staffing professionals understand their obligations.

ASA supports the vigorous enforcement of existing labor and employment laws but opposes regulatory efforts that would reduce labor market flexibility, stifle job creation, unnecessarily increase staffing firm costs, and increase unemployment.

Workplace Safety

Employee safety is a top priority of staffing firms. To that end, ASA has formed an alliance with the U.S. Occupational Safety and Health Administration to help raise staffing firm and client awareness of their respective responsibilities for temporary and contract workers. At the same time, ASA is working to make OSHA regulators, at both the federal and state level, aware of the constraints staffing firms often face in their efforts to monitor and control their clients' work sites.

OSHA has developed, with the association's input, recommended practices to help delineate staffing firm and client obligations. ASA has developed a model staffing agreement, which includes provisions based on those recommendations that are particularly suited for construction, industrial, and other safety-sensitive areas of the staffing industry.

The agreement includes provisions requiring clients to provide site-specific safety training and protective equipment, keep records of work-related injuries and illnesses, and get the staffing firm's consent before changing a worker's job duties. Staffing firm provisions include inquiring about work site conditions and confirming that employees received the proper training and equipment; they also give staffing firms the right to inspect the client's work site and conduct post-incident inquiries.

Health Care Reform

ASA members are committed to compliance with the Affordable Care Act, but the law presents major operational and cost challenges for staffing firms because of the unique nature of the temporary workforce and the scarcity of minimum value health plans that are affordable for their employees.

To help address these unique issues, ASA helped establish the Employers for Flexibility in Health Care (E-Flex) coalition, a group of leading trade associations and businesses in retail, restaurant, hospitality, supermarket, construction, staffing, agriculture, and other service-related industries. The

coalition represents employers that create millions of jobs each year, employ a significant percentage of the U.S. workforce, offer flexible working environments for employees, and are leading contributors to the nation's job growth.

ASA and the E-Flex Coalition have worked with federal agencies on the development of regulations to ease the burden of the employer mandates on coalition members and will continue to do so. ASA and E-Flex also are working with the U.S. Congress to change the definition of full-time employment to better reflect traditional work patterns, simplify and streamline employer reporting, and eliminate the provision requiring some companies to automatically enroll full-time employees in a company health plan.

Employer Status of Staffing Firms

Since the foundation of the modern staffing industry after World War II, a central industry operating premise has been that staffing firms are employers of the workers assigned to clients for purposes of employment, tax, and employee benefits laws.

Properly determining employer status is essential to the application of a broad range of federal, state, and local laws governing employment, taxes, benefits, and other subjects with a wide range of policy objectives. Laws governing workplace safety, for example, tend to define the terms "employer" and "employee" broadly, as do state laws governing workers' compensation. For these and other purposes it is not uncommon for more than one entity to be the employer under concepts such as "co-employment" or "joint employment."[1]

But for federal tax benefits and other purposes, Congress and the courts generally do not recognize joint or co-employment. Instead, common law principles are used to identify a single employer. The common law employee test is applied to determine whether an entity is obligated to comply with a host of tax and benefit requirements, including whether a worker must be considered for nondiscrimination testing under a tax-qualified retirement plan, which entity is responsible for withholding and reporting payroll taxes, and, more recently, to determine which business is the responsible employer under the Affordable Care Act.

Temporary and contract staffing firms have long qualified as common law employers not only because they pay the employees' wages and benefits and withhold and pay employment taxes, but also because they recruit, screen, and hire the employees; establish employment policies governing employees' job performance and conduct; have the right to terminate or reassign employees; and retain the right to control employees' conduct at the work site—although the law does not require that such right actually be exercised. The ASA model general staffing agreement spells out the staffing firm's and the client's responsibilities, including language expressly stating the staffing firm's right to control.[2]

Immigration Reform

Americans across the ideological spectrum generally agree that the current immigration system is not working and must be reformed. As a member of the Essential Worker Immigration Coalition, ASA

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[1] For a discussion of co-employment issues in the staffing industry, see Stephen C. Dwyer, "Less Than Meets the Eye: Potential Liability When Using Temporary Workers," *ACC Docket* (December 2013).

[2] For a comprehensive analysis of the historical treatment of staffing firms as common law employers see Alden J. Bianchi and Edward A. Lenz, The Final Code §4980H Regulations; Common Law Employees; and Offers of Coverage by Unrelated Employers, *Bloomberg BNA Tax Management Memorandum* (Sept. 8, 2014).

supports comprehensive reform that addresses the needs of both employers and today's workforce.

Staffing firms need a workable program for obtaining visas for guest workers to perform services and fill positions that currently can't be filled by U.S. citizens. ASA also supports proposals to reform the H-1B visa program—e.g., the Immigration Innovation Act (I-Squared Act)—to meet the growing need for highly skilled workers by professional, technical, and information technology firms that cannot find sufficient domestic talent.

Many aspects of immigration reform would uniquely affect staffing firms, including the process employers must use to verify the legal status of employees. ASA supports a verification program that does not charge employers fees to use the system, is limited to new hires, ensures that penalties are appropriate to the violation, and pre-empts state laws to ensure a uniform national verification process.

Mandated Leave Benefits

ASA supports policies that promote workplace flexibility. For example, compensatory time-off legislation such as the 2013 Workplace Families Flexibility Act would allow private-sector employers to offer their employees the choice of getting paid time off in lieu of cash wages for overtime hours worked. Such legislation would help American workers better balance the needs of family and the workplace and give private sector employees the same flexibility that public sector employees have in choosing between compensatory time and overtime pay.

In contrast, mandated benefits, such as paid sick leave laws, can hamper employers' ability to use flexible approaches to meeting employees' needs and can significantly increase employers' cost of doing business. Such cost increases often mean higher prices, less demand for products and services, and fewer jobs. Paid sick leave mandates impose an especially onerous burden on staffing firms, because they have to track the hours of large numbers of employees on short-term, intermittent job assignments for purposes of leave accrual and utilization.

Any paid sick leave legislation should require an employee to show at least some minimal commitment to the employment relationship. The jurisdictions that have adopted paid sick leave requirements require a minimum period of actual work (e.g., 30 days) before benefits start to accrue and at least 90 days of employment before accrued benefits can be used. For this purpose, "employment" should mean the time that an individual actually starts work or, if work has not yet begun, the time a specific job offer is made and accepted.

Labor Relations

ASA believes the current U.S. National Labor Relations Board has acted beyond the scope of its authority and issued rulings that are unnecessary and harmful to employers. Two recent rulings in particular could adversely affect staffing firm–client relationships and make it easier for unions to hold elections without giving employers sufficient time to communicate with their employees.

The first ruling, issued in July 2014, would broaden the legal standard for determining joint employer status of franchisors and franchisees, as well as of staffing firms and clients. ASA and other major trade groups oppose this because there is no compelling reason to change the standard—and the NLRB does not have the legal authority to do so. Although staffing firm clients historically have had

potential joint employer obligations in many areas of labor and employment law, broadening the standard could raise unwarranted client concerns regarding the use of staffing services, and that could result in fewer job opportunities for temporary and contract workers.

The second ruling, called the "ambush election" rule, would dramatically shorten the period between the filing of a union election petition and the election itself, thus reducing the available time that the parties can campaign and the amount of information employees can assimilate before casting their votes. The U.S. Chamber of Chamber of Commerce and other business groups have sued to block the rules, alleging that they violate the National Labor Relations and Administrative Procedure acts. The suit also alleges that the rules violate the U.S. Constitution by unlawfully restricting employers' right to communicate with employees about unionization. ASA supports the lawsuit on principle even though unions have historically shown little practical interest in organizing temporary and contract workers or in jointly bargaining with staffing firms and their clients regarding the workers' terms and conditions of employment.

Wage Notice Requirements

Federal and state wage and hour laws require employers to timely pay employees the wages promised for all hours worked, and to comply with minimum wage and overtime rules. Nonetheless, some employers fail to properly discharge those obligations. California, Massachusetts, New York, Rhode Island, and Washington, DC, have sought to address such issues by enacting so-called "wage theft" or "right to know" laws requiring employers to notify individuals of pay rates and other job-related information at the time of hire—or, in the case of Massachusetts and Rhode Island, at the time a job is offered. Such laws can cause severe operational problems for staffing firms.

Generally, when a person successfully completes a staffing firm's application process, he or she is considered "hired" (for purposes of completing the Form I-9) and then included in the staffing firm's database of available job candidates. But applicants are not usually offered specific jobs—and thus are not legally employed—until days or weeks after completing the application process (if at all). Hence, staffing firms rarely can provide individuals with specific wage rates at the time of hire or initial interview as required by the California and New York laws as enacted.

ASA and its affiliated chapters worked with regulators in these states and jurisdictions in an effort to enable staffing firms to practically comply with the law. Here are some of the helpful changes made by regulators thus far and some of the issues that remain to be addressed.[3]

California Department of Labor Standards Enforcement guidelines suggest that employers can leave the wage notice form blank if wage information is unknown. In such cases, staffing firms must notify individuals of the information within seven calendar days from the date it is known, either in a new notice or in an itemized wage statement or other notice.

New York has issued helpful guidance allowing staffing firms, at the time of hire or interview, to provide a reasonable range of wage rates that individuals are likely to earn based on their qualifications, their suitability for assignments, and the typical wage of similarly situated employees. New York recently further mitigated the reporting burden by repealing the requirement that

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[3] Rhode Island basically requires what most staffing firms already do—i.e., before each new assignment firms must provide employees with written job descriptions, estimated length of work, job hazard information, pay rates, benefits, and work schedules.

employers reissue the wage notice annually to all employees. Starting in 2015, the notice must be given only to new hires and to employees whose rate of pay changes.

Washington, DC, regulators acknowledged staffing firms' inability to provide specific wage information at the time of hire and to get employees to return signed copies of notices of subsequent job assignments. The law, as enacted, allows staffing firms to provide a reasonable, good faith estimate of the range of potential wages at the time of hire. Moreover, all subsequent written notices may be sent electronically and need not be signed by employees.

The Massachusetts law remains a work in progress. The law usefully exempts "professional employees, secretaries, and administrative assistants," but further guidance is needed as to how those exemptions will be applied. Recently published regulations allow staffing firms to provide job-specific information in person, in writing, electronically, or by telephone; but the information must subsequently be confirmed in writing and provided to the worker before the end of the first pay period. ASA will continue to work with the regulators to ensure that the rules are interpreted and enforced in a fair and practical way.

Sales Taxes

ASA opposes sales taxes on temporary and contract services because of their detrimental effect not only on jobs and wages, but also on businesses and state economies. Sales taxes on staffing services cause job losses that can have negative ripple effects throughout the state economy. Learn more

Studies show that raising the cost of temporary and contract labor reduces demand for temporary services. This, in turn, reduces aggregate employment and economic activity in the state. And because such taxes reduce the demand for temporary and contract workers, they increase the labor supply, causing average wages to go down.[4]

Sales taxes on staffing also have a negative economic effect on other businesses. Reducing the number of temporary jobs reduces the support services associated with temporary work, such as telephone service and other utilities, which reduces employment in those industries. Fewer temporary jobs also means less spending by those who are no longer working, causing declines in other sectors of the economy. Consumers also suffer because of the "pyramiding" effect of taxing services at various stages of production, resulting in multiple taxes on the same product or service.

Sales taxes as a revenue-generating measure are ultimately self-defeating because the resulting job losses reduce not only expected sales tax revenues, but also income tax and other tax collections. At the same time, state unemployment insurance payments and other social welfare costs tend to rise. Finally, sales taxes put the taxing state at a competitive disadvantage vis-à-vis other states. Because such taxes have a dampening effect on jobs and overall economic activity, states that tax business services are at a disadvantage with respect to their neighbors that do not.

Unemployment Insurance

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[4] See "The Economic Impact of Extending State Sales and Use Taxes to the Temporary Help Supply Services Industry," Gerald M. Godshaw, Ph.D., Office of Federal Tax Services, Economic Analysis Group, Arthur Andersen (1993); and "Sales Taxes on Temporary Employment Services: Economic Considerations," Sourushe Zandvakili and Nicolas Williams, Department of Economics, University of Cincinnati (September 1999).

As with other service businesses, staffing firms' labor costs are a large portion of their total costs; payroll taxes, including state unemployment taxes, are therefore a larger part of their total tax burden. Staffing firms' unemployment taxes tend to be even higher than most other service businesses because of the high turnover among staffing employees.

To ensure that state unemployment benefits are paid only to employees who satisfy the state's eligibility requirements, most states have adopted a "call-back" policy requiring individuals who complete an assignment with a staffing firm to contact the temporary services employer to see if a new assignment is available. This requirement is based on the legal requirement that individuals actively seek work as a condition of receiving benefits.

Thirty-one states currently apply some form of a call-back policy as part of their effort to reduce unjustified claims and lower their UI costs. Temporary workers also benefit, because calling back increases their chances of working and earning wages, gaining experience, and, in the great majority of cases, finding a permanent job. ASA data found that 99% of staffing employees who said that securing a permanent job was important to them achieved that objective.

A call-back requirement does not obligate temporary workers to accept any new temporary assignment. No worker would be required to accept temporary work that is "unsuitable" within the meaning of the state unemployment law. Nor do such policies limit people to temporary work. Individuals no longer interested only in temporary assignments have the option of either requesting direct placement into a permanent job, or requesting "temporary-to-hire" assignments that are specifically intended to lead to a permanent job. Virtually every temporary services employer offers such services.