

Name: _____

Phone: _____

Protecting Your Company Against Undesirable Indemnities, Confidentiality Clauses, and Business Terms in Client Contracts

Stephen Dwyer, Esq.
American Staffing Association
sdwyer@americanstaffing.net
americanstaffing.net

James A. Essey, CSP
The TemPositions Group of Cos.
jessey@tempositions.com
tempositions.com

Gregory D. Holland
Adecco Group North America
greg.holland@adeccona.com
adeccongroupna.com

Steven J. Whitehead, Esq.
Taylor English Duma LLP
swhitehead@taylorenghish.com
taylorenghish.com

Wednesday, Oct. 26
4–5 p.m.



Protecting Your Company Against Undesirable Indemnities, Confidentiality Clauses, and Business Terms in Client Contract

Stephen C. Dwyer, Esq.
General Counsel
American Staffing Association

James A. Essey, CSP
President and CEO
The TemPositions Groups of Cos.

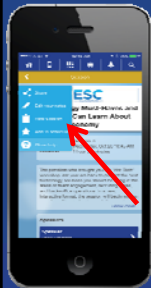
Greg Holland
Senior Vice President, General Counsel, and
Secretary
Adecco Group North America

Steven P. Whitehead
Attorney
Taylor English Duma

Wednesday, Oct. 26, 4-5 p.m.



Don't Forget to Rate the Workshops on the ASA Staffing World App



1. Click Session Descriptions on App homepage
2. Choose session to rate
3. Click "Rate Session" clipboard icon

Don't forget to hit submit at the end!

To download the app, search for ASA Staffing World in the iTunes store or Google Play store.



Contract Negotiation Process

- ▶ Read before you sign
 - ▶ Assume "no changes" is a client negotiating position
- ▶ If anything unclear, get clarified; understand what it will require you to do
- ▶ Compare to ASA model contract for reasonableness
- ▶ Make a list of your concerns, and rank order them
- ▶ Determine best person to work with on the client side
- ▶ Be prepared to walk away if worst case legal or business risk is too high

Issues in Negotiating Contracts

Areas of Concern:

- ▶ Definition of Services
- ▶ Vendor Responsibilities
- ▶ Client Responsibilities
- ▶ Indemnification
- ▶ Intellectual Property
- ▶ Acts and Omissions of Assigned Employees
- ▶ Background Testing and Adjudication
- ▶ Confidentiality
- ▶ Affordable Care Act
- ▶ Insurance
- ▶ Co-Employment
- ▶ Limitation of Liability

Definition of Services

- ▶ What are we providing?
- ▶ Staffing Services (recruiting, screening, employing, and assigning candidates)
- ▶ Client's operational supervision
- ▶ Not responsible for specific deliverables or outcomes

Appropriate: "Services" means recruiting, employing, and assigning certain of Provider's employees with the skills Client requests, to do Client's work under Client's operational supervision. This shall include: (i) establishing, calculating, and paying such employees' wages; (ii) withholding, remitting, and reporting payroll taxes; (iii) maintaining personnel and payroll records; (iv) obtaining and administering I-9 documentation; and (v) disciplining and terminating such employees.

Client Responsibilities

- ▶ What are the client's obligations?
- ▶ Supervise staffing company's Assigned Employees
- ▶ Provide Assigned Employees a safe work environment
- ▶ Monitor adequacy and quality of the services
- ▶ Provide accurate job descriptions

Appropriate: "Client's risks and responsibilities include: (i) maintaining a safe, legal, OSHA compliant workplace for Provider's employees, including meal and/or rest breaks required by law; (ii) providing adequate instructions, assistance and supervision to Provider's employees, including information, training, and safety equipment for any hazards present in Client's operations; (iii) ensuring that the duties actually performed by Provider's employees are accurately reflected in Client's job descriptions; (iv) the conduct of Client's officers, employees, and agents; and (v) protection and security of Client's property, including intellectual property and confidential information."

Indemnification

- ▶ When one party agrees to protect another party against certain future claims or losses.
- ▶ Breach, benefits, wage and hour, discrimination, etc.

Example: "Provider shall be liable to Client for damages directly resulting from Provider's breach of this agreement, or its gross negligence or willful misconduct."

Indemnification

- ▶ Triggers can include mistakes in:
 - ▶ Hiring process
 - ▶ Work eligibility process
 - ▶ Testing
 - ▶ Background screening
 - ▶ Wage calculation
 - ▶ Payment process

Indemnification

Staffing vs. Output Liabilities:

- ▶ Recruiting mistakes
- ▶ Versus errors and omissions of Assigned Employees

Staffing Liability	Output Liability
Recruiter:	Assigned Employee:
• Background check	• Property damage
• Qualifications	• Bodily injury
• Drug testing	• Breach of confidentiality
• Wages and taxes	• Theft of client property
• Workers' compensation	• Information security

Indemnification

Limit scope:

- ▶ Exclude acts of Assigned Employees
- ▶ Client's fault, you should not have to pay
- ▶ If you have to pay, it should be limited to actual damages caused
- ▶ Right to control defense

Bad: "Provider shall be liable to Client for all damages of every kind and character caused in whole or in part by: (i) Provider's failure to comply with applicable laws; (ii) acts or omissions of Provider or its Assigned Employees; (iii) Provider's breach of this agreement; (iv) claims made by Provider's Assigned Employees against Client; and (v) any third-party claim arising out of the use of any product, application, and/or service or work performed by Provider or its Assigned Employees under this Agreement, regardless of any contributory fault by Client."

Better: "Provider shall be liable to Client for damages resulting from: (i) Provider's breach of this agreement; (ii) the gross negligence or willful misconduct of Provider or its Assigned Employees; and (iii) FLSA claims by Provider's Assigned Employees."

Best: "Provider shall be liable to Client for damages directly resulting from Provider's breach of this agreement in providing the Services."

Cross Indemnity

- ▶ Reciprocal in nature
- ▶ Assigns liability to party at fault
- ▶ Client and Provider each liable to the extent of their respective fault

Appropriate: Client and Provider each shall be liable to the other for losses and damages for third party claims arising to extent of that party's gross negligence or willful misconduct to the degree of their respective fault.

Sensitive Topics

There are particular indemnity demands by clients that, if they cannot be avoided, can be addressed by operational terms.

Issue:	Mitigators:
• Confidentiality	• Decline to agree, but stipulate that Assigned Employees will sign NDA's
• IP breach	• Exclude if following client's directions
• Co-employment claims	• Exclude if caused by client
• Benefits claims	• Except where caused by client's benefit plans

Special Areas: Co-Employment

- ▶ Co-employment is inherent in the staffing relationship.
- ▶ Co-employment is very broad and extends to:
 - ▶ Benefits
 - ▶ EEO
 - ▶ Wage and hour
 - ▶ Affordable Care Act
 - ▶ Discrimination

Example: "Provider shall be liable for all co-employment claims."

- ▶ Encompasses virtually the entire employment relationship.
- ▶ Tagged by Client as much, or more, than staffing company.

Mitigate: Try to strike such provisions. But if not possible, suggest:
 "Provider shall be liable for all co-employment claims, except where caused by Client's acts or omissions."

Special Areas: Affordable Care Act

ACA carries penalties for failing to offer fulltime employees qualifying healthcare coverage.

Inappropriate: "Provider shall be liable for all costs and penalties arising from the Affordable Care Act."

- ▶ Regulations are ambiguous and untested.
- ▶ ACA is very technical and complex.
- ▶ Penalties can be significant.

Appropriate: Provider shall be liable for costs and penalties assessed for its temporary employees and related IRS reporting."

Insurance

- ▶ Client wants to be "additional insured"
- ▶ Versus "additional named insured"
- ▶ Coverage levels
- ▶ Claims-made versus occurrence-based policies

Appropriate: "Provider will have at least the following types and limits of insurance or other coverage: (i) Workers' compensation in amounts no less than required by law; (ii) Employer's liability insurance with a limit of \$1,000,000 per accident; (iii) Commercial automobile liability insurance with a \$1,000,000 combined single limit on vehicles owned, leased, or rented by Provider; (iv) Commercial general liability insurance, including personal injury, contractual liability, and property damage, with a \$1,000,000 combined single limit per occurrence; and (v) Umbrella liability insurance with limits of \$5,000,000. On Client's request, Provider will provide Client certificates of insurance coverage or, with the insurer's concurrence, include Client as an additional insured for Provider's Services, excluding Client's negligence."

Limitation of Liability

- ▶ Avoid potential unlimited liability
- ▶ Include liability cap
- ▶ Disclaim consequential damages

Appropriate: "Except for fees, neither party's liability under this agreement shall exceed \$1,000,000. Neither party shall be liable for any indirect, incidental, special or consequential damages arising under this agreement."

Look for Hidden Fees and Costs

- ▶ ACA Compliance
 - ▶ Contract/RFP requires coverage for all employees, not just FT
 - ▶ Adjust to comply with ACA which doesn't require you offer coverage at all
 - ▶ Contract/RFP requires NO COST to employee
 - ▶ Adjust to be affordable coverage under the ACA

Look for Hidden Fees and Costs

- ▶ Background/Drug Checks
 - ▶ Contract/RFP requires before submitting candidate
 - ▶ Consider pushing back with ban the box laws
 - ▶ Insure cost is factored into your rate
 - ▶ Consider type of worker and whether this will drastically reduce the pool
 - ▶ Look at client's policy for their own employees. If they don't perform, why must you?

Look for Hidden Fees and Costs

- ▶ Penalties for no-shows
 - ▶ Contract/RFP requires vendor pay full cost of coverage through another service.
 - ▶ At the most, propose only paying the differential in cost.
 - ▶ In return, set a minimum cancellation period (i.e. 24 hours) and a minimum shift length (4 hours).

Look for Hidden Fees and Costs

- ▶ Scrutinize VMS/MSP fees
 - ▶ These are negotiable in some cases
 - ▶ Try to increase your bill rate to include the fee
 - ▶ Norm is 2-3%; some are as high as 15%

Look for Hidden Fees and Costs

- ▶ Being responsible for cash shortages
 - ▶ If you are not supervising workers, how do you mitigate?
 - ▶ Why should client be in a better position with your employees than their own?
- ▶ Being responsible for client equipment provided to workers
 - ▶ Insure you at least know what is being provided
 - ▶ To understand risk, become familiar with state payroll deduction laws (in NY, no deduction allowed for non-returned equipment)

Look for Hidden Fees and Costs

- ▶ Right to hire provisions
 - ▶ Make sure time frame is reasonable
 - ▶ Consider different time frame for more skilled positions, perhaps even with a reduced fee at the end
 - ▶ Be sure it also covers "indirect hiring" (individuals being transferred to another staffing service or engaged as IC's)

Look for Hidden Fees and Costs

- ▶ Requirement that pricing be fixed for a period of time
 - ▶ Insert language to be able to increase pricing proportionately as a result of the imposition of any change in minimum wage, mandatory benefit program, unemployment or workers compensation increases or surcharges, etc.

Negotiating Strategies

How to get the client to say "yes" without surrendering!



Determine Your Negotiating Strength

- ▶ When and how did you receive the contract?
 - ▶ At the end of a long RFP process [strong]
 - ▶ At the start of an RFP process [weak]
 - ▶ After a long search by the client for a specialized staffing service [strong]
 - ▶ In a cattle call with multiple contract winners [weak]
- ▶ Do you offer something unique that others cannot? [strong]
- ▶ Do you have a good relationship with the client? [strong]

Determine Your Negotiating Strategy

- ▶ Degree of negotiation largely a function of your negotiating position
- ▶ Rank the points in order of importance
 - ▶ Determine which are must-haves vs. nice-to-haves

Determine How to Communicate Your Issues

- ▶ If in an RFP, use the Q&A period to raise issues publicly, so others will see the issue too
- ▶ If contract, mark up using notes in margin, redlining, or both features
 - ▶ Notes help explain your concerns
 - ▶ Redlining allows you to make suggested edits
- ▶ Consider substituting ASA model contract or using ASA addendum if wording is problematic in many places within the contract

Decide on a Spokesperson

- ▶ Strongest connection to the initial point of contact
- ▶ Should make initial brief call alone
- ▶ Supplement resources if necessary by calling jointly with that person and a company manager after markup is delivered
- ▶ Follow-ups to that call can be done directly by the manager once a relationship has been established

Education Is Key

- ▶ Review contract with salesperson
- ▶ Explain why certain issues could hurt your firm
- ▶ Give real examples to help the salesperson understand the issue

Evaluate Negotiation Results

- ▶ Compare your success with your list of must-haves and nice-to-haves
- ▶ If some must-haves are not given, gauge the risk against the size of the contract overall
- ▶ Don't be afraid to push back again if the only alternative is to walk away
- ▶ You can always not sign

It really works! Examples of changes:

▶ Q: XYZ has clearly put a lot of time into crafting an RFP to hopefully establish a relationship with a staffing firm or firms to service XYZ's needs. The RFP lays out a number of requirements for the vendor which increase cost over that which a vendor servicing XYZ currently experiences (such as background checks, penalties, absorbing OT, limiting gross size/size, despite wage mandates changing over the life of the contract, providing training programs, attending staff meetings, etc.). XYZ also appears to be looking for favorable pricing and other discounts. In this current environment, it is becoming harder and harder for our clients to find staff of their own. This, in turn, has caused them to value the services of a staffing partner even more than before. But should a client add additional costs to servicing its account, in the current environment a staffing firm could feel pressured to shift its resources to other clients who do not have additional costs, because there simply is not enough supply to meet everyone's needs. We respectfully request that XYZ revise many of the new increased service cost items included in the RFP over what it currently requires from its vendors.

▶ A: XYZ appreciates the feedback and has provided some additional clarification regarding some of the initially stated requirements.

It really works! Examples of changes:

▶ Q: The RFP indicates that pricing will be fixed for at least the first year of the agreement and that future price adjustments will be limited to 3% or the CPI, whichever is lower. However, it is possible that during the contract period, new government mandates are imposed. Examples of recent mandates include the federal Affordable Care Act, California Paid Sick Leave, or the new SF Family Leave employer reimbursement requirement. a. In cases where such mandates are imposed, will XYZ agree to allow bill rates to be adjusted proportionately to cover the impact of such mandates over which the vendor has no control notwithstanding the 3% limit per year?

▶ A: XYZ is willing to allow for adjustments due to mandated pay requirements with minimum 30 day written notice and backup documentation.

MSP/VMS Agreements

Differences between direct client service agreement and VMS Agreements

- ❑ VMS Agreement = typically an agreement allowing staffing company to use VMS software = limited risk.
- ❑ MSP = Managed Services Provider = intermediary between staffing company and the client.

MSP/VMS Agreements

Areas of Concern

- ❑ Indemnification: Obtaining indemnification protection from MSP virtually meaningless absent corresponding client obligations
- ❑ Must loop in client's acts or omissions when attempting to limit staffing company's indemnification obligation
- ❑ Invoice disputes: Ensure that agreement has procedure for dealing directly with client if invoices are not paid = MSP duty to facilitate discussions
- ❑ Protection of payments: Clarify that client's payments on staffing company's invoices are assets of staffing company and not MSP = shoot for escrow account for payment
- ❑ Compliance with laws: Ensure that all parties to agreement will comply with applicable laws and failure to do so is a breach = loops into indemnification obligations
- ❑ Client's responsibilities under MSP agreement: MSP represents and warrants that client will comply with those terms of the MSP agreement that are applicable to the client

Questions and Answers

Don't Forget to Rate the Workshops on the ASA Staffing World App



1. Click Session Descriptions on App homepage
2. Choose session to rate
3. Click "Rate Session" clipboard icon

Don't forget to hit submit at the end!

To download the app, search for ASA Staffing World in the iTunes store or Google Play store.



Thank You for Attending



Stephen C. Dwyer, Esq.
General Counsel
American Staffing
Association



James A. Essey, CSP
President and CEO
The TemPositions Groups of
Cos.



Steven Whitehead
Attorney
Taylor English Duma



Steven Whitehead
Attorney
Taylor English Duma