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LEGAL SCENARIOS AND COMPLIANCE STRATEGIES



## **SPECIAL REPRINT**

as seen in *Staffing Success*, a collection of legal case studies specific to the staffing and recruiting industry.



# Steering Clear of **Federal Telemarketing Fines**

By Ronald M. Jacobs, Esq., and Annie H. Lee, Esq.

In this scenario, a woman threatens to report a recruiter for calling her cellphone without her consent, per the do-not-call laws. What do these laws entail? Do these rules apply to staffing companies? Will the recruiter and his firm be held legally responsible if a complaint is filed?

**R**obert Ransom, a search and placement professional at a Missouri, KS-based staffing firm called FreshStart, has been a top recruiter at the company for more than eight years.

While making calls to potential candidates one day, Ransom calls Trisha Tinsley, who submitted her résumé to FreshStart about a year earlier.

“Hi, Ms. Tinsley, this is Robert,” he says. “I’d like to talk to you about your résumé and potentially working for one of FreshStart’s clients.”

“You have the wrong number,” the voice on the line responds. “And I’m very happy in my current position. How did you get my number?” As it turns out, Ransom had dialed the correct number, but the woman he reached was Melissa Mikelson, not Trisha Tinsley.

“Your number is on a résumé that was submitted to our company,” Ransom replies.

“Clearly there’s been a mistake,” Mikelson retorts. “And I did not give you permission to contact me. In fact, I talked to one of your colleagues about this same situation just last week.”

“I’m sorry, ma’am, I didn’t...,” Ransom starts before Mikelson cuts him off.

“There are do-not-call laws in place for exactly these types of situations,” she blurts. “And if I hear from you or anybody at your company again, I will report you.”

Mikelson hangs up, and Ransom wonders: “Could my staffing firm actually get into legal trouble for a call like this? What else should I know about making these kinds of calls?”

To get his answer, Ransom turns to his most trusted source on laws affecting the industry—the American Staffing Association. ASA has just published an issue paper called “Know the Laws That Govern Phone Calls, Faxes, and Emails.”

He learns that there are many federal rules that apply in these type of situations: The Telephone Consumer Protection Act regulates calls and faxes; the Telemarketing Sales Rule regulates calls; and the CAN-SPAM Act regulates commercial email messages. The TCPA is enforced by the Federal Communications Commission and through private lawsuits and class actions, while the TSR and CAN-SPAM Act are enforced by the Federal Trade Commission as well as through private lawsuits and class actions.

These rules fit atop myriad state do-not-call laws, which have similar operable definitions to the federal rules. Numerous petitions have been filed with the FCC asking that these state laws be preempted, but the FCC has ignored these requests for years.

Fortunately for Ransom and other staffing professionals, many of their communications with potential job candidates are not subject to all of these restrictions—though some do apply.

## What Is the Purpose of the Call?

The TCPA and TSR impose different restrictions on calls depending on the purpose of the call. Calls that are “telephone solicitations” or “outbound telephone calls” are subject to more restrictions than calls that do not fit these definitions. The definitions of these terms are similar.

The TCPA defines a telephone solicitation as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” The

## The Telephone Consumer Protection Act regulates calls and faxes; the Telemarketing Sales Rule regulates calls; and the CAN-SPAM Act regulates commercial email messages.

TSR defines an outbound call as “a telephone call initiated by a telemarketer to induce the purchase of goods or services.” For this article, we will refer to both as “telemarketing.”

It has always been fairly clear that calls to job seekers are not telemarketing because there is no sale of a good or service involved, and both the FTC and FCC have provided express guidance on this point as well.

In a letter to a firm that is a “recruiting company that calls consumers to offer them employment opportunities,” the FCC explained, “If you do not ask people you call to make a purchase or pay a fee, then your calls would not be subject to” the do-not-call rules.

Thus, calls to job candidates, including initial calls to schedule screening interviews and later calls when positions become available, are not “telemarketing.” We will refer to these as “staffing” calls. Since Ransom was calling a candidate to talk about employment opportunities and not to sell anything, his call would be considered a staffing call, and thus not subject to the do-not-call rules.

However, it is important to remember that calls to sell career placement services to individuals are telemarketing. For example, a call to provide counseling services or to edit a résumé would be covered if the person you are calling will be paying for those services.

### How Are the Calls Made?

**Autodialed Calls to Cellphones:** Calls placed to cellphones using an autodialer require consent from the called party. As long as the content of the calls is not for telemarketing (e.g., staffing calls), then consent may be obtained orally. If someone submits a résumé or fills out a job application with his or her cellphone number written on it, then this should be sufficient to constitute “prior express consent” to receive job-related calls because it is clearly that person’s expectation that by providing the number, he or she will receive calls related to employment opportunities.

**Manually Dialed Calls to Cellphones:** If a company manually dials calls to cellphones—that is, it does not use an autodialer—then no special consent is needed. If the call is made for staffing purposes, nothing further is needed; if it is a telephone solicitation, then the do-not-call list must be checked.

**Prerecorded Message Calls to Landlines or Cellphones:** The TCPA also prohibits making

prerecorded message calls (commonly called robocalls) to landlines and cellphones without express consent. If the calls are for telemarketing purposes, then prior written consent (as described above) is required. For nontelemarketing robocalls to landlines (e.g., staffing calls), no consent is needed. For nontelemarketing robocalls to cellphones, consent, as discussed above, is needed.

**Text Messages to Cellphones:** The FCC views text messages as a form of autodialed call. Therefore, prior express consent is required before sending a text message. If the text message is for telemarketing purposes, then consent must be in writing. Other text messages do not require written consent.

Since Ransom manually dialed Mikelson’s cellphone, no consent from her was required.

### Whose Number Is It?

Finally, the FCC has discussed what happens when a person changes numbers, as was the issue for Ransom. He had a phone number for Trisha Tinsley, who provided consent to contact her by putting the cellphone number on her résumé, but when he called the number it no longer belonged to Tinsley, but to Mikelson.

The FCC’s guidance on this topic applies only in cases where an autodialer or prerecorded message is used to place a call to a person who has not given consent. Callers in this situation (which would include text messages) must take steps to ensure that they are calling the right person, based on suggestions from the FCC. The FCC also says that companies have one free pass at calling a reassigned number, which should, in the agency’s mind, be enough to learn of the change. Ransom is again safe from the law because he called Mikelson manually rather than using an autodialer or prerecorded message.

More information about the laws, as well as guidance on faxes and email messages, is available through an ASA issue paper, “Know the Laws That Govern Phone Calls, Faxes, and Emails,” on [americanstaffing.net](http://americanstaffing.net). ■

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# Steering Clear of **Background Check Blunders**

By Pamela Devata, Esq.

In this scenario, a **recruiter new to the industry posts a job ad from a client without first reviewing it.** The job ad makes a blanket “felons need not apply” statement, and a **fellow colleague warns the recruiter that it is unlawful.** Does the job ad need to be taken down? **What steps should the recruiter have taken to ensure the post was lawful?**

**C**arla Campbell, an accountant turned recruiter who recently started working with First Down Staffing in Chicago, has just been tasked with finding 10 temporary overnight janitorial workers for a longstanding client named Roadshow, which manufactures and distributes musical recording and production equipment. Due to the expensive and fragile nature of the equipment that the company stores and an incident of theft in the past, Roadshow requests that the job ad clearly state that no convicted felons will be considered for the position. The company also provides

Campbell with its job application, which has a section specifically asking whether a candidate has ever been arrested or convicted of a felony, so that Roadshow can easily highlight which applicants would not be a good fit. Campbell swiftly posts the job ad, wanting to prove herself capable of finding and filling the open job positions as quickly as possible.

Two days later, one of Campbell’s senior colleagues, Ronda Riley, comes storming over to Campbell’s cubicle and demands that Campbell take down the job ad immediately.

“Why?” Campbell asks in astonishment. “You’re putting our company at great risk by posting something so discriminatory against people with criminal histories,” Riley says. “The EEOC will have a field day with us.”

“EEOC—that’s the Equal Employment Opportunity Commission, right?” Campbell asks. “Yes, and you better read up on them and laws about background checks before you post any more job ads,” says Riley.

Equally confused and worried that she has put her company and her new position in jeopardy, Campbell sets out to identify where she went wrong in her job posting by learning everything she can about complying with antidiscrimination, background check, and ban-the-box laws relating to the use of criminal histories.

Remembering that she was often directed to the American Staffing Association, of which her firm is a member, and its bountiful resources when she had questions about staffing in the past, Campbell goes to the Law & Advocacy section of *americanstaffing.net* in hopes of finding what she’s looking for. In fact, she finds exactly what she is looking for—an issue paper titled “Background Checks: A Primer for Staffing Firms on Complying With Federal and State Laws.” The paper explains how staffing firms can properly conduct background checks, respond to clients that make unlawful hiring and placement requests, and efficiently use resources to meet client demands.

Campbell finds that the EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, gender, national origin, and other bases. Title VII, which prohibits both intentional discrimination and the application of neutral policies that have a disparate impact on a protected class, provides the basis for the EEOC to initiate costly investigations, and potentially litigation, against staffing firms for utilizing an overly broad criminal history exclusion.

In addition, the U.S. Federal Trade Commission and U.S. Consumer Financial Protection Bureau enforce the Fair Credit Reporting Act, the law that sets forth rules regarding what types of information can be provided to employers and the procedure for employers to follow when they conduct background checks. Finally, many states and local jurisdictions also have laws governing when employers

can ask about criminal or credit history. So how do these rules apply to the job ad that Campbell posted? And what steps should staffing firms take to ensure a job posting is lawful in the first place?

## Implement a Lawful Background Screening Policy

Campbell was not aware that her firm had a background screening policy to protect it from unlawful client requests such as the one from Roadshow. A staffing firm's criminal background screening policy should be tailored to the unique needs of the firm and the types of temporary assignments it fills. The policy therefore should address what background checks the firm will run (criminal, credit, employment verification, education verification, driving records, etc.). The specific types of checks should be based on the relevant position, the correlation or relatedness of a check to the person's ability to perform a job, and applicable legal limitations.

Moreover, to the extent a client sets forth parameters or criteria with respect to the types of temporary or contract workers it will accept for assignments, the staffing firm must ensure that

- The nature and gravity of the offense
- The nature of the job
- The time elapsed since the conviction or the completion of a sentence

Additionally, employers should conduct an individualized, case-by-case assessment to determine whether the conviction is job-related.

Having a fully developed, lawful background check policy that can be shared with clients can go a long way toward (i) educating them as to how or why their criteria are unlawful; and (ii) keeping both your firm and the client out of trouble. Sharing First Down's policy with her client in the beginning would have alleviated Campbell's risk of upsetting Roadshow and putting both companies in legal jeopardy.

**Consider Using a Hiring Matrix Within Any Policy.** A hiring matrix (which is basically a list of crimes and then additional information that needs to be reviewed) can be a helpful guide to assist staffing firms as a first step in determining whether to hire individuals with a specific criminal history. Properly implemented, a hiring matrix can account

When asking about or considering criminal records, for example, the greatest pitfall to avoid is having a blanket policy automatically prohibiting your company from hiring an individual convicted of any offense at any time. The job posting's language that any candidates ever convicted of a felony need not apply is certainly a blanket statement, and one that the EEOC would likely have issue with.

those parameters are lawful; otherwise, the staffing firm can face liability for implementing the client's unlawful criteria. When asking about or considering criminal records, for example, the greatest pitfall to avoid is having a blanket policy automatically prohibiting your company from hiring an individual convicted of any offense at any time. The job posting's language that any candidates ever convicted of a felony need not apply is certainly a blanket statement, and one that the EEOC would likely have issue with.

According to EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (the "EEOC Guidance," available at [eoc.gov/laws/guidance/arrest\\_conviction.cfm](http://eoc.gov/laws/guidance/arrest_conviction.cfm)), employers should consider the following factors in determining whether an exclusion is job-related:

for the nature and gravity of the offense, the nature of the job, and the time elapsed since the conviction or completion of the sentence. Be careful, however, about having bright line rules or exclusionary offenses without giving the candidate an opportunity to explain or provide mitigating circumstances. Similarly, be cautious about applying a client's criteria that have a bright line exclusion (such as the one given by Roadshow). Matrices can be utilized to streamline what convictions may not be concerning and therefore can be cleared easily versus those that need additional review and assessment.

**What About Arrest-Related Inquiries?** In addition, staffing firms should not ask about nonpending arrest records. For instances where a case is pending, an employer may ask the candidate about the underlying conduct that led to the arrest and assess accordingly. However, there are some states (such as Illinois

Staffing firms should allow individuals an “opportunity to be heard” to establish why their background should not bar their employment. The EEOC suggests this “individualized assessment” approach when reviewing an applicant’s criminal history.

where First Down Staffing does business) that prohibit asking about arrest records at all.

**When to Ask About Criminal History.** Multiple state and local “ban-the-box” laws prohibit including the question on an application. An Illinois law passed in 2014 prohibits employers from asking about a criminal background on the application or during the early stages of application review, so Roadshow is certainly in the wrong for adding such a question to its application. The best practice is to ask about criminal history after providing a conditional offer to the candidate because it lessens the EEOC’s or private litigant’s ability to establish a Title VII disparate impact violation.

**Conduct an Individualized Assessment.** Staffing firms should allow individuals an “opportunity to be heard” to establish why their background should not bar their employment. The EEOC suggests this “individualized assessment” approach when reviewing an applicant’s criminal history.

After reading the issue paper, Campbell realizes that her job ad, and the client’s application, are indeed unlawful. She takes the posting down, and works with her supervisor to approach Roadshow about the unlawful request and repost the job ad without the exclusionary language. She also recommends that the employment application be revised to remove the criminal history question until after a conditional offer is made.

Visit the Law & Advocacy section of [americanstaffing.net](http://americanstaffing.net) to read more about implementing a background screening policy at your firm, as well as obligations before and after running a background check. ■

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# Risky Business: Absolving Clients of Liability

By Stephen C. Dwyer, Esq.

In this scenario, a **staffing firm is close to winning a valuable new contract** with a quickly growing landscape design company—but now **the prospective client has asked the firm to sign a “standard” agreement** that would indemnify the client against various types of liability. **Bad idea? Or no big deal?**

**H**eather Hunter, an account executive with Grand Staffing Inc., has been working on a big prospective client for six months now. She knows her firm is the best fit for this company, CutPro Ltd., which is ready to launch its tree removal and architect design services verticals.

Hunter and her Grand Staffing colleagues have all but sealed the deal for providing the landscape design company with a wide range of employees, including tree removal specialists, architects, arborists, and truck drivers. But yesterday Hunter received an update from her contact at CutPro about signing an indemnity agreement. The client contact explained that the agreement is a standard document the company has its business partners sign—no big deal. But Hunter has been in the staffing business a long time, and she knows that, increasingly, staffing firms are encountering client requests to be indemnified against various types of liability—and doing that could potentially land them in hot water. What are the best next steps for Hunter and her firm?

## Staffing Firms Are Not Insurers

In cases like these, clients want the staffing firm to bear liability for their products and services, for damages to their businesses resulting from temporary employees' work, and for benefits they may be required to give to temporary employees—just to name a few. Clients often will cite joint employment concerns as necessitating broad indemnification language and argue that “every other staffing firm” signs their agreement.

Having talked with her company's legal counsel on this subject before, Hunter knows that it is

not true that every other staffing firm signs broad indemnification agreements, as staffing firms are not insurers. They should not be expected to cover risks beyond those inherent in the staffing business. Those risks include: risks related to being an employer, such as payment of wages and benefits, and payroll taxes; and liability for client loss or damage caused by the staffing firm's failure to properly screen or otherwise qualify the assigned employee for the job.

However, staffing firms should not assume risks related to the client's business, including liability for the client's own products and services. While contractors promise clients an end result—such as a repaved parking lot, a repaired electrical system, or a piece of software that will work according to specifications—staffing firms generally do not promise an end result and only provide assigned employees qualified to work among the other elements and tools of the business that clients control: management, equipment, materials, systems, finance, design, quality control, procedures, planning, marketing, distribution, etc. Therefore, staffing firms should not be responsible for results that depend on so many elements outside of their control.

Given these many elements, the risks associated with signing broad indemnity agreements are substantial and can have dire financial and other repercussions. For example, a broad indemnity can result in a staffing firm's liability for an assigned employee's actions even though the firm did not supervise the employee or have a presence at the worksite, and may even result in the firm having to indemnify the client for the client's own wrongful actions—such as workplace harassment or discrimination. Such liability makes no sense.

To help staffing firms and their attorneys deal with these issues, ASA has developed suggested contract language for its member companies that spells out the staffing firm's and the client's responsibili-

## Staffing firms should not assume risks related to the client's business, including liability for the client's own products and services.

ties. Price terms or other provisions of a competitive nature are not included in these model agreements.

### Model Agreements Require Legal Counsel

Hunter begins reviewing the ASA model contracts. Her firm has been an ASA member for years, but this is the first time she's referred to these documents, which are readily available on the ASA website, *americanstaffing.net*. ASA notes that these agreements are not intended as legal advice, and individual firms are strongly urged to seek the advice of their own legal counsel. The agreements provide suggested language only, and modifications may be necessary or desirable in particular cases.

There are three model agreements, each designed for a different situation.

- **General Staffing Agreement.** This agreement is intended for use where there is no existing written contract with the client and can be offered in lieu of the client's standard contract form. It is based on the simple principle of "Whose business is it?"—that each party is responsible for the risks associated with its own business, and that each party has a duty to indemnify the other only for those risks. Accompanying exhibits are sample formats for rate schedules, assigned employee benefit waivers, and assigned employee confidentiality agreements. Optional provisions are included that can be added to the basic document.
- **Amendment to Client's Staffing Agreement.** This document is intended for use where a written contract with the client already exists. It is designed to "correct" the existing agreement by overriding unduly broad or inappropriate indemnity language without affecting the basic provisions of the contract.
- **Time Sheet Terms.** This language is designed to be incorporated into an employee's time sheet. It contains abbreviated responsibility lists and a waiver of extraordinary types of damage recoveries, but does not contain an express indemnity clause, which could be added. The time sheet language can serve as a stand-alone agreement in situations where no formal written agreement is used and may be used in conjunction with the General Staffing Agreement.

ASA offers additional materials, developed to help firms explain to clients the staffing industry's contract philosophy and to answer client questions. Hunter downloads "Frequently Asked Client Questions About the General Staffing Agreement" and "Staffing Industry Risk Philosophy" to use in her next meeting with CutPro to show how risks should be allocated in a staffing relationship.

### Take Confident Next Steps

Discussing the entire scope of the situation with CutPro with her firm's legal counsel, Hunter feels confident about her next steps. Given all the information at hand, Grand Staffing Inc. will not sign the prospective client's agreement. Rather, Hunter and her colleagues will propose an alternative agreement that adequately and legally protects the staffing firm. The team of staffing professionals knows they still have an excellent chance of winning this prized contract—the firm's rates are competitive, its track record with another landscape company speaks for itself, and its temporary employees are top-notch.

And, even if Grand Staffing doesn't win this new client—its associates can walk away knowing they made a sound decision in the best interest of the company and its future. ■

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# Clearing the Smoke: Medical Marijuana and the Workplace

By Diane J. Geller, Esq.

In this scenario, a staffing firm manager is faced with the decision of **whether or not to fire one of his best recruiters** after the recruiter's **drug test comes back positive**, violating company policy. Does the state law **protect the use of medical marijuana**?

**D**avid Daniels, a senior recruiting manager at Highland Staffing Inc. in Washington, DC, was recently notified by the firm's outside drug testing company that one of his top-performing recruiters, Harry Hemp, tested positive for tetrahydrocannabinol (THC) during a random drug test administered several weeks prior. Given Highland Staffing's strict written policy banning the use

of any type of illegal substances (including marijuana), Daniels is shocked that Hemp would jeopardize his career in such a way.

When Daniels confronts Hemp about the test results, Hemp admits that he had used marijuana for medical purposes (and even presents a valid medical marijuana card), due to severe muscle spasms that had plagued him in the last couple of months. When told by Daniels that he faces termination of his job because of the company's written policy banning the use of illegal substances, Hemp argues that, because Washington, DC, recently passed a law legalizing the use of medical marijuana—and he is in possession of a valid medical marijuana card—it would be discriminatory for the company to fire him.

Daniels carefully considers what action he should take. Should he stick to the company's policy and fire his best recruiter? Or will that potentially bring a lawsuit against the company? After finding inconclusive advice online, he remembers that his company is a member of the American Staffing Association, and searches *americanstaffing.net*. He quickly finds a new ASA issue paper entitled "Clearing the Smoke: Medical Marijuana and the Workplace." Here's what he learns:

## Use a Detailed Drug Policy

Twenty-five states plus Washington, DC, and Guam have adopted some form of medical marijuana legislation, and four states plus DC have extended their statutes to legalize the recreational use of marijuana. Despite this trend, there is a lack of consistency in the statutes, adding to the lack of overall clarity. Added to that challenge are instances in which certain states have local laws that contradict federal law (which identifies marijuana as an illegal Schedule 1 drug under the federal Controlled Substances Act).

In all states, employers may adopt a drug-free workplace. However, considerations and decisions on policy and procedure must be based on state law, federal law, and the position being filled—as well as workplace safety. In designing a policy, the employer must make the initial decision as to whether medical marijuana is among the drugs for which it wishes to drug test. If the intent is to exclude marijuana use, then the company should use the definition of federally prohibited drugs, as defined under the Federal Controlled Substances Act, in its policy. Doing so will include marijuana (medical and recreational) in the list of prohibited drugs.

It is also recommended that the written policy clearly states that a positive test result for any illegal drugs, including marijuana, is a violation of the company's policy, and the employer reserves the right to take an adverse action to the full extent of the law based upon the test results. Employers can legally terminate the employment of any employee who violates the policy. Given Highland Staffing's detailed intolerance policy for the use of illegal substances, it is likely that Hemp's termination will be a protected act.

While no state law mandates that an employer permit use of medical marijuana in the workplace, employers in states where state law requires an

accommodation for use of medical marijuana will have to take other steps to try to address use. This may include adopting very clear and detailed job descriptions, and may require following guidelines similar to those for the Americans With Disabilities Act (if the employee tests positive and presents the required medical marijuana card, as was the case with Hemp).

## State Statutes Vary Widely

There have been a few court cases that have supported the employer's right to restrict use of marijuana even for medicinal purposes, even when the use did not occur in the workplace, and even if the state law made the use of medical marijuana (and recreational marijuana) legal.

California courts have also relied upon the federal prohibition of marijuana use to reject an employee's complaint of discrimination based on a medical condition. In that case, although the employee was using marijuana pursuant to the state's Compassionate Use Act to treat pain from injuries suffered while in the U.S. Air Force, the employer terminated its employee for testing positive for the use of illegal drugs. The court found the discharge legal, citing the fact that marijuana was illegal under federal law. Courts in Oregon, Montana, and Washington also have acknowledged the right of an employer to take an adverse employment action against employees with positive test results that violate company policies.

Other state statutes, such as New Jersey's, specify that the employer does not need to accommodate marijuana use in the workplace but are silent as to off-duty use. Still other state statutes—such as those in Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New Hampshire, New York, Rhode Island, Pennsylvania, and DC—prohibit employers from discriminating against an employee for possession of a medical marijuana card.

To date, employees have not been able to claim the protection of the federal ADA, and no state or federal law has required an employer to accommodate an employee by permitting use of marijuana during working hours. However, no court has determined that off-duty marijuana use is not a reasonable accommodation. Off-duty use of medical marijuana presents a slippery slope, because once the employer becomes aware of the medical marijuana use it is likely also aware of a medical issue that could signal that the employee may be disabled under the ADA definition, thereby resulting in protection for the employee due to his or her medical information.

Employers with federal contracts are generally under no obligation to accommodate medical use of marijuana related to compliance with the federal requirements; however, the issue has yet to be tested under the law of a state that requires accommodation.

## ASA Expands Legal Resources for Staffing Companies

For 50 years, the American Staffing Association has kept its members up-to-date on staffing law developments and has led advocacy efforts on behalf of the staffing industry. As part of this effort, ASA tracks hundreds of federal and state bills, court decisions, and agency rulings every year, and provides members with comprehensive legal information and resources to help them manage and protect their businesses.

Among those resources is a new monthly video series called the **ASA Legal Line**. These brief, but highly informative and timely, videos feature a member of the ASA legal team. In June, for example, ASA general counsel Stephen Dwyer addressed the financial and other risks staffing firms assume when agreeing to contractual indemnification, and the resources available to ASA members that face indemnification demands.

Go to [asacentral.americanstaffing.net/legalline](https://asacentral.americanstaffing.net/legalline) to view and comment on this video—"Indemnity Clauses in Client Contracts"—as well as other ASA Legal Line videos. Note that this ASA Central page also features a new "Ask Legal" button—giving you and your company one-click access to the ASA legal team. **Use the "Ask Legal" button to send direct inquiries about legal matters** and an ASA attorney will respond promptly.

The main ASA website, [americanstaffing.net](https://americanstaffing.net), features a wide range of legal information and resources, including timely issues papers, model contracts, state E-Verify laws, a sample social media policy, Affordable Care Act information, staffing industry best practices, advocacy updates, and much more.

You can also read more Law and You articles that have appeared in *Staffing Success* on **ASA Digital**, a mobile-friendly, searchable platform that makes it easy to read the magazine and other ASA publications on your smartphone or tablet. Go to [americanstaffing.net/digital](https://americanstaffing.net/digital) for quick access.

**Download the latest ASA issue paper, which addresses this issue's Law and You topic—medical marijuana in the workplace. Go to the Law & Advocacy section of [americanstaffing.net](https://americanstaffing.net) and click on Legal Publications in the left-hand navigation bar.**

In all states, employers may adopt a drug-free workplace. However, considerations and decisions on policy and procedure must be based on state law, federal law, and the position being filled—as well as workplace safety.

## Planning Reduces Liability

When faced with the issue of drug compliance in the workplace, it is important for employers to make an affirmative plan of action that includes the following:

- **Adopting a drug-free workplace policy.** Make sure that you clearly define what will be considered an illegal drug, including stating if the testing will include the use of marijuana. Make certain you are using a reputable laboratory with a medical review officer. Do not take disciplinary action for a positive test without a confirmatory test. Before terminating Hemp, Daniels should confirm the positive test with the laboratory, even though Hemp admitted to having used marijuana, or have otherwise obtained an acknowledgement from Hemp. In DC, the law prohibits employers from testing prospective employees for marijuana in the pre-employment stage—that is, prior to a conditional offer of employment. Important for employers, however, the statute does not prevent employers from requiring the prospective employees to submit to a drug test after a conditional offer of employment has been extended.
- **Taking affirmative steps to communicate your drug-free workplace policy to your employees.** Always follow your policies on a consistent basis.
- **Reviewing job descriptions and including in those descriptions all job duties and responsibilities**—not just the essential functions. State laws like Nevada's provide that the employer is not required to accommodate the use of medical marijuana if the employee cannot fulfill any or all of his or her job responsibilities.
- **Not asking about the possession of medical marijuana cards in the hiring process**, even in states where medical marijuana is permitted. Follow the same procedure as you do with regard to ADA questions. While the possession of a medical marijuana card or the use of medical marijuana is not protected by the ADA, the underlying medical reason is likely protected.
- **Training managers to recognize impairment.** Although using marijuana while on the job is never appropriate, neither is impairment that

results in the inability to perform job duties. Supervisors should not rush to judgment, but should seek direction from management and counsel, if appropriate, to determine a course of action. When taking action, make certain to document the reasons—including the observations.

Ultimately, while there are few reported cases regarding the implication of the use of medical marijuana in the employment setting, the law continues to develop. Therefore, employers must be cautious until more clarification is provided in states that permit the use of medical marijuana, including how the state law will be enforced in light of the federal law. In this case, Daniels will consult with his company's counsel to determine if the company's drug-free workplace policy is sufficient to justify the termination of Hemp. ■

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# Tackling Per Diem Compliance Issues

By Marc D. Freedman, Esq.

In this scenario, a health care staffing firm owner must determine **how to comply with the somewhat complicated IRS guidance** on how to reimburse travel nurses. **What conditions must be in place** before employees are **entitled to these reimbursements?**

**T**om Sunny, owner of Sunny Health Care Staffing based in Charleston, WV, is approaching the one-year anniversary of launching his business—which provides travel nurses to hospital systems throughout the state. As a member of the American Staffing Association, Sunny has quick access to valuable legal resources that help him run his business. He’s also preparing for the ASA Certified Health Care Staffing Professional® online exam.

But at the moment he has a couple of questions on the topic of per diem payments. One of the travel nurses who works for the staffing firm has turned in a questionable expense report, and he’s not sure what actually qualifies for reimbursement, and the regulations can often be confusing. Sunny’s go-to strategy is to search the Law and Advocacy section of *americanstaffing.net*. There he finds a new issue paper that quickly and conveniently addresses his questions on the topic of per diem payments.

## Focus on Specific Staffing Markets

Per diem payments to contract employees has always presented thorny issues for staffing firms, given the nature of the staffing industry and the lack of clear guidance from the U.S. Internal Revenue Service. The IRS and U.S. Department of Labor have recently focused on the staffing industry—especially in the marine, aerospace, and nursing markets. There are both income tax and wage-related issues inherent in per diem payments. The ASA issue paper Sunny downloads focuses on IRS enforcement and tax issues, especially as they relate to establishing a “tax home.”

A “per diem allowance” for expense reimburse-

ment is simply a way for an employer to reimburse its employees for expenses incurred while traveling—for a business purpose—while away from home on a temporary basis without the need to obtain expense reports or other documentary proof of expenses incurred.

Notwithstanding this perceived benefit, the IRS has taken the position that substantiation may require the employer to have procedures in place to verify that the traveling employees have spent the night or weekends at the assignment locations. A “payor” other than an employer may also qualify to make per diem payments (e.g., the client company). Per diem reimbursements also are available to self-employed individuals. In exchange for this convenience, the employer must meet the regulatory requirements of the IRS in order to substantiate expenses by means of an “accountable plan.”

Three requirements must be met in order to satisfy the accountable plan requirements.

- 1. Business connection.** The expense must be a bona fide business expense related to the employer’s business, and deductible by the employer under IRC § 161 to § 198. Per diem payments must be paid separately from wages and are not included on the W-2. (Treasury Regulation § 1.62-2 (d).)
- 2. Substantiation.** (Treasury Regulation § 1.62 (e).) The employee must submit documentation regarding expenses incurred to substantiate the expense as well as the business purpose. Such documentation includes an employee certification and documentation that evidences duplicate living expenses such as a lease, mortgage, or utility bill.
- 3. Return threshold.** Return of amounts in excess of expenses (Treasury Regulation § 1.62-2 (f)).

Unless all three requirements are met, the plan is considered nonaccountable, and all payments are “recharacterized” as wages and includable in the gross income of the recipient as wages subject to employment taxes. In essence, if the require-



ments are not satisfied then the per diem payments are “recharacterized” as wages.

The employer has the obligation to withhold income tax and pay FICA and Medicare payments on wages. A failure to do so will result in an assessment against the employer for a failure to withhold at a rate equal to 25% of the wages paid, employer FICA, employee FICA, and penalties at 23% where there is no reasonable basis to believe payments were made pursuant to an accountable plan, plus interest, or if there appears to be a “pattern of abuse.”

### Establishing a ‘Tax Home’ for Expenses

IRC § 162 (a) (2) permits tax-free reimbursement for travel expenses only when the employee is away from his or her “tax home” in pursuit of a trade or business. A tax home may be the “principal place of business” or residence as “place of abode in a real and substantial sense.” The determination of residence or place of abode is dependent on particular facts and circumstances.

A “per diem allowance” for expense reimbursement is simply a way for an employer to reimburse its employees for expenses incurred while traveling for a business purpose.

Rev. Rul. 73-529, 1973-2 C.B. 37, sets forth three objective factors used to determine whether an employee’s claimed tax home is the worker’s place of abode in a real and substantial sense, or whether the employee is an itinerant worker.

1. Whether the worker performs a portion of his business in the vicinity of his claimed abode, and uses said abode for lodging purposes while performing such business there;
2. Whether the worker’s living expenses incurred at his claimed abode are duplicated because his business requires him to be away therefrom; and
3. Whether the worker:
  - a. has not abandoned the vicinity in which his historical place of lodging and his claimed abode are both located,
  - b. has a member or members of his family (marital or lineal only) currently residing at his claimed abode, or
  - c. uses his claimed abode frequently for purposes of his lodging.

An employee satisfying all three of the above

factors is recognized as having a tax home at a regular place of abode. If only two of the three factors are satisfied, then all the facts and circumstances will be scrutinized closely to determine whether the employee has a tax home at a regular place of abode. If not, or if only one of the factors is satisfied, the employee will be treated as an itinerant and no travel expenses will be allowable. (See also Rev. Rul. 71-247.)

Reimbursement is permitted only when the employee is away from the tax home overnight and incurring duplicate living expenses. The IRS makes a distinction between the exigencies of business versus the personal necessities of the traveler.

### Factoring in Personal Choice

Although there is case law and other authority to the contrary, the IRS recently has taken the position that many staffing firm contractors have no regular or principal place of abode because of the nature of their trade or business. The IRS suggests that where

the principal place of employment is other than his residence and he chooses not to move his residence for personal reasons, his additional living and travel expenses are a matter of personal choice and not in furtherance of his business or deemed ordinary and necessary business expenses.

The IRS reasons that accepting an assignment offered by a staffing firm away from the residence is not the same as an existing employer demanding a temporary assignment. This position, if better supported by case law or regulations, could have a significant effect on the availability of per diem payments to contractors.

### Accounting for the One-Year Rule

The per diem allowance is only available for employees “temporarily” away from home. If the assignment is “indefinite,” then no per diem allowance is available and the employee will be considered “itinerant.” If the employee is away from home in a single location that is “realistically expected” to last for one year or less, then the assignment is temporary. However, if at some later date the employment

Where the employee is paid a taxable wage rate that is similar to the taxable wages plus the per diem that would be paid if the employee is traveling, it is evidence that the per diem amount could be recharacterized as wages.

is realistically expected to exceed one year then the employment will not be considered temporary (in the absence of facts and circumstances indicating otherwise) and per diem is not available from the date the expectation changed. (Rev. Rul. 93-86.)

If an assignment, despite the original realistic expectation, changes to one in excess of one year, there is no requirement to retroactively tax the per diem allowance.

Generally payments under an accountable plan are excluded from an employee's gross income and are not required to be reported on the W-2 as income. The employer can take a business deduction, subject to limitations for meals and incidental expenses, for the amount of proper reimbursements. Amounts in excess of the allowable amounts paid after the realistic expectation changes must be reflected as income on the W-2.

### Calculating Wage Issues and Split Rate

Subject to certain exceptions, an allowance that is computed on a basis similar to that used in computing wages or other compensation does not meet the business connection requirement and is not a per diem allowance. Accordingly, unless the employer can meet the limited exception—which includes a per diem plan in place as of Dec. 12, 1989—per diem should not be paid on an hourly basis. Remember that “per diem” means per day.

Where the employee is paid a taxable wage rate that is similar to the taxable wages plus the per diem that would be paid if the employee is traveling, it is evidence that the per diem amount could be recharacterized as wages. Likewise, if similarly skilled local workers are paid wages similar to the combined wages and per diem paid to traveling workers, the IRS will seek to recharacterize the per diem payments as wages.

The IRS also will look at BLS statistics to assist in determining what constitutes wages. If the traveling employee is paid significantly less wages, then the per diem payment may be considered disguised wages. In the IRS's view, per diem may not be a substitute for wages.

### Enforcing the FLSA

The comparison of wages earned by an employee working for the same employer near his tax home

and while away from it and comparative wages of local and traveling workers performing the same or similar jobs is also examined by the DOL in enforcing the Fair Labor Standards Act.

Per diem payments that are not “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable” will constitute wages and must be included in the regular rate of pay for purposes of calculating overtime (29 CFR § 778.216 - 778.224). ■

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# Making the Case for Conversion Fees

By Stephen C. Dwyer, Esq.

In this scenario, an information technology staffing firm owner, discouraged by losing one of his star temporary employees, must determine **how to protect his investment in his top talent. Are temporary employee restrictive covenants or conversion fee clauses** the answer?

**L**andon Hawthorne, owner of Hawthorne Staffing based in Camden, NJ, is pleased to offer specialized training, mentoring, and an excellent benefits package to the temporary employees he places through his firm's information technology staffing vertical. That's because he takes a great deal of pride in selecting and nurturing temporary candidates to make the best possible fit for his clients. One employee in particular—James McIntosh, a systems analyst working for

international client TechDemand—is a shining example of how Hawthorne Staffing provides the best matches. So when McIntosh suddenly tells Hawthorne that he will no longer be working for his staffing firm, Hawthorne is more than a bit distressed.

To Hawthorne's surprise and dismay, he finds out a month later that McIntosh has been hired directly by TechDemand for a permanent position. He wonders if he has a way to prevent TechDemand from stealing his top talent. In talking with a lawyer, he realizes that he has no contractual remedy against TechDemand and had no contract with McIntosh.

Vowing to never again let a client (or competitor) steal his placements, Hawthorne turns to the American Staffing Association to research temporary employee restrictive covenants. He quickly finds an article in the Law and Advocacy section of *americanstaffing.net* that ASA has recently published, "Courts Rule on Enforceability of Temporary Employee Restrictive Covenants."

Hawthorne learns that an Ohio appellate court recently held that a staffing firm's noncompetition

agreement with temporary employees was unenforceable under its explicit terms, since the staffing firm—and not the employees—ended the assignment.

In *Drone Consultants v. Armstrong*, the staffing firm assigned temporary workers through a managed service provider (MSP) arrangement. After termination of the firm's contract, several temporary workers went to work for a competing staffing firm, which assigned them to the same client through the MSP arrangement. After sending an email to its current staff publicizing the temporary workers' departure and accusing them of breaching their noncompetition agreements, the staffing firm filed suit. The temporary workers filed a counterclaim, alleging that the staffing firm's email defamed them.

In declining to enforce the noncompetition agreement, the Court of Appeals of Ohio, 12th District, held that, by its terms, the agreement was applicable only in cases in which temporary employees vacated their assignments. The court ruled that, because the staffing firm terminated its contract with the MSP and client, and because the temporary workers worked on their assignments until the end of the contract, they did not vacate their positions. As a result, the court refused to enforce the noncompetition agreement. The court also held, however, that the staffing firm did not defame the employees, ruling that the firm's email did not constitute an actionable false statement but rather the firm's opinion that the workers had breached their contract.

In consulting with his attorney, Hawthorne further learns that restrictive covenants with former employees must be reasonable with respect to time and geographic boundaries, and that, as a general matter, many if not most courts are reluctant to enforce restrictive covenants against temporary workers given the transient nature of

Many, if not most, courts are reluctant to enforce restrictive covenants against temporary workers given the transient nature of temporary workers' assignments and the fact that such workers generally cannot harm their former staffing firms by sharing trade secrets or confidential information with competitors.

temporary workers' assignments and the fact that such workers generally cannot harm their former staffing firms by sharing trade secrets or confidential information with competitors.

However, Hawthorne's attorney advises him to consider including conversion fee clauses in client contracts and time sheet agreements, pursuant to which clients will owe a fee if they continue to utilize the firm's temporary workers—either directly or through another staffing firm—within a certain period of time after their assignments end. According to the attorney, such clauses' enforceability will depend on the applicable jurisdiction, but they have been upheld by courts in New York, Georgia, and Missouri. He further advises that many staffing firms include such clauses in client agreements and that, of course, it is a business decision as to whether to try to enforce them against clients.

Though the news that courts generally do not enforce restrictive covenants against temporary workers is disheartening, Hawthorne realizes that conversion fee clauses are his potential remedy and once again turns to ASA. He downloads ASA's model general staffing agreement and time sheet terms, which include conversion fee provisions, as a starting point for revising his client agreements going forward. ■

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Stephen C. Dwyer, Esq., is general counsel for the American Staffing Association. Send your feedback on this article to [success@americanstaffing.net](mailto:success@americanstaffing.net). Follow ASA on Twitter @StaffingTweets.

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