American Staffing Association

Key Legal and Legislative Issues

Temporary and contract staffing is one of America's largest service industries, employing more than 15 million people each year and playing a major role in the nation's job growth. The association's legal and legislative activities are focused on issues that affect staffing firms' ability to create jobs and serve their clients.

As employers, staffing firms are subject to myriad federal, state, and local 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 the association has developed 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 proposals 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. ASA maintains 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 OSH regulators at the federal and state levels aware of the constraints staffing firms 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. The association has developed a model staffing agreement, incorporating those recommendations especially for construction, industrial, and other safety-sensitive sectors of the industry.

The model agreement addresses clients' obligation to provide site-specific safety training and protective equipment, keep records of work-related injuries and illnesses, and obtain 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 Insurance

The Affordable Care Act presented unique challenges for staffing firms because of the transient nature of the temporary workforce and the inability of many smaller firms to obtain affordable health plans that meet the law's minimum value criteria. ASA and other employer groups worked successfully with federal agencies on the development of regulations to ease the burden of the employer mandate on employers with part-time, seasonal, and temporary workers. But significant issues remain.

Current employer efforts are focused on increasing the weekly hours employees must work to be considered full-time from 30 to 40 to better reflect traditional work patterns, simplifying employer reporting, and suspending the penalties that are being assessed in violation of employers' due process rights. Longer-term, ASA and other major employer groups believe the employer mandate imposes unnecessary costs and burdens and should be fully repealed.

Employer Role of Staffing Firms and Clients

Staffing firm employer role

A central tenet of the staffing industry is that staffing firms are employers of the workers assigned to clients for purposes of labor, employment, and benefits laws. Staffing firms pay the employees' wages and benefits and withhold and pay employment taxes; recruit, screen, and hire the employees; establish policies governing employees' job performance; have the right to terminate or reassign employees; and retain the right to control employees' conduct at the work site. For a comprehensive analysis of the legal treatment of staffing firms as 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)

Joint employment

Staffing firms and clients generally share employer obligations. Staffing firms pay the wages, benefits, and employment taxes, along with unemployment and workers' compensation insurance. Clients supervise the employee's work and provide a safe worksite, including information, training, and equipment as required. Clients have easily managed those responsibilities and have even enjoyed protection from certain kinds of liability because of their employer status. See, Stephen C. Dwyer, *Less Than Meets the Eye: Potential Liability When Using Temporary Workers*, ACC Docket (American Corporate Counsel Association, December 2013).

Although joint employment has historically not been a concern in the staffing industry, a 2015 ruling by the National Labor Relations Board in *Browning-Ferris Industries* has caused confusion and uncertainty. The ruling held that the mere exercise of indirect and future control over workers is enough to create joint liability, overturning decades of precedent requiring direct and

immediate control. The ruling was reversed by the current NLRB but has been reinstated based on alleged conflict of interest issues which are being contested. ASA strongly supports a return to the traditional standard.

Overall, *Browning-Ferris* has had little impact on the staffing industry, but staffing and other businesses operating under a franchise model are concerned that the ruling could be construed to hold franchisors jointly liable for the conduct of their franchisees—an unprecedented and unwarranted expansion of joint employment which is currently being litigated.

As *Browning Ferris* awaits judicial resolution, the U.S. Department of Labor has issued guidance restoring the traditional joint employer standard for purposes of enforcing federal employment laws. A more definitive resolution would be to codify the traditional standard in statute, which ASA and other employer groups are urging Congress to consider.

Immigration Reform

ASA supports immigration reform that addresses the needs of both employers and employees. ASA believes the H-1B visa program should be reformed to meet the growing need for highly skilled workers by professional, technical, and information technology firms that cannot find enough domestic talent. Reform efforts should focus on ensuring that the program is used as intended by combatting wage violations, unfair competition, and other abuses; promoting a "U.S. worker first" approach; and promoting the use of higher-skilled and educated H-1B workers by raising applicable wage floors and revising the lottery system to focus on merit.

To ensure that workers are lawfully permitted to work in the U.S., ASA supports a national employee electronic verification program that does not charge employers fees to use the system, allows voluntary retroactive verification of current employees, ensures that penalties are appropriate to the violation, and pre-empts state laws to ensure a uniform verification process that does not unduly burden employers.

Mandated Leave Benefits

ASA supports policies that promote workplace flexibility. Mandated benefits, such as paid sick leave laws, can impede 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 leave mandates impose an especially onerous burden on staffing firms, because they must track the hours of large numbers of employees on short-term, intermittent job assignments for purposes of leave accrual and utilization.

Any mandated paid leave legislation should require employees to satisfy a minimum work requirement (e.g., 30 days) before benefits start to accrue, and at least 90 days of employment before accrued benefits can be used.

Gig Economy

There is much debate and little consensus on how to define or measure the gig economy, and whether new laws are needed to protect individuals working in such jobs. Most of the policy discussion has focused on workers who are classified (or misclassified) as independent contractors and therefore do not enjoy the legal protection afforded to employees.

Staffing firms classify the great majority of their temporary and contract workers as W-2 employees and they are fully protected by labor, employment, and benefits laws. Thus, while temporary employment with staffing firms has certain "gig" attributes (i.e., flexibility and short-tenure), it does not raise the same legal and policy issues that involve workers, such as Uber drivers, who are classified as independent contractors.

ASA supports enforcement of laws designed to combat worker misclassification. Enforcement poses complex challenges, however, because the traditional legal tests for distinguishing between employees and independent contractors are far from clear or uniform. Without clear and objective rules for determining how workers should be classified, simply extending protection to a new category of "independent worker," as several states and others have proposed, will lead to the same fractious factual disputes over which workers are covered by the new definition, leaving employers, workers, and regulators in the same state of legal uncertainty as under current rules.

Wage and Hour

Federal overtime
Court rulings have overturned the overtime regulations issued in the prior administration that would have raised the salary level for so-called "white collar" overtime exemptions to $47,476 per year. The U.S. Department of Labor says it plans to issue new overtime rules and has solicited public input.

ASA has joined a broad coalition of leading corporations and trade associations that support a significantly lower salary test (the Secretary of Labor has said that $32,000 is under consideration) and allowing 100% of nondiscretionary bonuses and incentive compensation to be included for purposes of satisfying the test. ASA also submitted industry-specific comments, urging that any final overtime rules allow certain hourly temporary employees to be treated as exempt; that they include staffing firm recruiters and account managers as express examples of exempt administrative employees; and that the definition of exempt information technology employees be modified.

State wage notices
Federal and state wage and hour laws require employers to timely pay employees the wages promised for all hours worked. Some states have adopted so-called "wage theft" or "right to know" laws designed to ensure that employees get the wages promised. Such laws generally require employers to notify individuals of pay rates and other job-related information at the time of "hire."

Staffing firms, however, don't hire people in the usual sense. Individuals seeking temporary work who successfully complete a staffing firm's application process are considered "hired" for employment verification (i.e., I-9) purposes even though no actual job assignment is immediately available. In most cases, successful applicants are placed in the firm's pool of candidates eligible for assignment, but are not offered specific jobs, and thus are not legally employed, until days or weeks later, if at all. Hence, staffing firms cannot provide individuals with a specific wage rate or other job-specific information until an actual job offer is made. Special provision must be made to accommodate these operational constraints.

Several states have made such accommodations. California, for example, allows staffing firms to provide the required notice in an itemized wage statement, or other notice, within seven days after the wage rate becomes known. Another approach, adopted in New York, allows employers to initially provide a reasonable *range* of wage rates that individuals are likely to earn based on their qualifications and other criteria, followed by more specific information when the actual wage becomes known or is later changed. Massachusetts helps facilitate the provision of required job-specific information by allowing staffing firms to initially provide the information electronically, or verbally in person or by telephone—provided it is confirmed in writing before the end of the first pay period.

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's economy. 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.

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 computer 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, because such taxes have a dampening effect on jobs and overall economic activity, states that tax staffing services are at a competitive disadvantage with respect to their neighbors that do not.

For a discussion of how staffing services sales taxes affect sales and jobs, 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).

Unemployment Insurance

As employers, staffing firms pay federal and state unemployment insurance taxes (FUTA, SUTA) to help fund a temporary source of income for individuals who are out of work. Staffing firms' unemployment taxes tend to be higher than most other service businesses because of the extremely high turnover among temporary employees.

To ensure that unemployment benefits go to those in actual need and to manage costs, states have rules requiring individuals to make reasonable efforts to seek suitable work as a condition of benefits eligibility. Thirty-one states currently apply some form of policy requiring temporary employees to contact their staffing firm for a new assignment as part of their obligation to seek work. This benefits temporary workers because it increases their chances of working and earning wages, gaining experience, and finding a permanent job. ASA encourages all states to adopt such policies for temporary workers.