

100-ISSUE CHECKLIST FOR FIXING A STAFFING CUSTOMER’S CONTRACT FORM

The best strategy for staffing firms is to develop their own contract forms and to require their customers to sign those forms. However, when that is not possible and customers require the use of the customer’s contract forms, this checklist helps staffing firms to negotiate the most common issues that customer forms present.

The general solutions suggested in the following table must be translated into minimally disruptive, legally-correct language that fits the structure, terminology, and other requirements of the customer’s form. The language and structure of customers’ forms are too varied to permit recommended language here.

The author of this checklist, staffing attorney George Reardon, is available to help staffing firms develop their own forms, negotiate customer-proposed changes to the staffing firms’ forms, and to analyze and negotiate changes to the customers’ standard contract forms.

<u>Contract Issue</u>	<u>Problem in Customer’s Form</u>	<u>General Solution</u>
Overall:		
1	Definition of staffing firm’s “Services”	The term “Services” is defined or described to be or to include the work of the assigned employees.
2	Supervision responsibility	The staffing firm is required to perform all supervision of the assigned employees’ work.
3	Customer’s relationship to assigned employees	Assigned employees are declared to be 0% employed by the customer and 100% employed by the staffing firm.
4	Customer’s relationship to assigned employees	Assigned employees are declared independent contractors of the customer.
5	Common law employer of assigned employees	The staffing firm is simply declared to be the employer or the common law employer of the assigned employees.
6	Performance criteria	The staffing firm is obligated to adhere to schedules, standards of workmanship, a duty to redo bad work product, provisions about mechanic’s liens, and/or other features of pure independent contractors selling a result.
7	Customer’s right to have assigned workers removed	The customer has the unrestricted right to require removal of assigned workers.
Indemnity in general:		
8	Who gives indemnity?	Only the staffing firm has indemnity obligations.
		The best practice is for mutual indemnity obligations to be defined in detail according to the parties’ risks and responsibilities. However, if the staffing firm’s indemnity is proper, silence on the customer’s indemnity obligation is not fatal.

	<u>Contract Issue</u>	<u>Problem in Customer's Form</u>	<u>General Solution</u>
9	Subject matter of indemnity	The staffing firm must indemnify for all of the subject matter of the contract.	Limit indemnity obligations to breach of the contract, specific risks and claims based on fault, and the risks and responsibilities inherent in each party's business or operation.
10	Degree of indemnity	The staffing firm pays the full cost of losses if it has any degree of responsibility for them.	Responsibility and fault are often shared, so indemnity obligations should be comparative -- that is, proportional to the fault of the customer and the staffing firm, respectively.
11	Whose acts/omissions cause indemnity?	The staffing firm must indemnify for the acts and omissions of itself and <u>all</u> of its employees (or simply mentions "employees," without distinguishing inside staff from assigned employees.)	The staffing firm indemnifies fully for the acts and omissions of itself as an entity and for its staff employees but, for assigned employees, only to the extent that losses are caused by the staffing firm's failure in its staffing duties under the law or the contract.
12	What triggers indemnity?	Indemnity is triggered by all losses "arising out of or related to" the assigned employees or the staffing relationship.	The staffing firm indemnifies for losses only to the extent that they are directly or indirectly "caused" by the staffing firm (not including those caused by assigned employees without any staffing firm fault) and only losses caused by wrongful conduct or inherent staffing firm risks.
13	When does the customer's fault excuse indemnity by the staffing firm?	The staffing firm indemnifies for everything unless a court or arbitrator finds the customer solely negligent.	Liability and indemnity should track the comparative fault of the customer and the staffing firm.
14	When must the indemnifying party start to defend and pay for claims?	The staffing firm is assumed to be obligated to indemnify for all losses and must defend, pay, and reimburse the customer immediately.	Indemnity obligations start only after the facts and liability for the loss are known and agreed to or resolved by the authorities.
15	Extraordinary damages waiver – special, indirect, consequential, punitive, lost profits, etc.	Extraordinary damages are waived only by the staffing firm or waived by both parties, but with extraordinary damages arising from indemnity, confidentiality, intellectual property damages (which add up to virtually everything) not waived by customer.	Delete or rewrite this provisions for both parties to waive all extraordinary damages between themselves but not when such damages are owed to or claimed by third parties.
16	What customer-related parties are indemnified	The customer-related parties that would be entitled to indemnity from you may be too broadly defined.	Limit the list of indemnified parties to categories that already exist and make sense, and provide that all of them must share any legal defense that you provide. Do not indemnify attorneys, insurers, customers, shareholders, etc.
17	Control of the defense and settlement of claims	The customer may hire counsel and make settlements, both of which the staffing firm must pay for.	Condition indemnity obligations on the staffing firm's control of defense and settlement. If separate counsel are necessary, limit the cost to reasonable and necessary fees. Allow the customer to retain its own counsel at its own expense.

Specific kinds of indemnity:

18	Claims brought by assigned employees	The staffing firm must pay for all assigned employees' claims against the customer, even if the customer is at fault (for example sexual harassment of an assigned employee by the client's employee.)	Remove this provision. Staffing firms can't control assigned employees' claims, meritorious or not, and there is no reason to pay for claims that are the customers' fault.
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19	Claims by assigned workers for personal injury to them	The staffing firm is required to pay for all personal injuries to assigned workers. ("Personal injury" is much broader than "bodily injury" and is not fully covered by worker's compensation.)	Limit the staffing firm's indemnity to claims covered by worker's compensation. Also, it is OK to defend and pay for worker's compensation claims against the customer (but not for non-covered types or causes of injury, like the customer's gross negligence or willful misconduct.)
20	"Knock for knock" indemnity structure	The customer and the staffing firm both agree to pay for all physical injuries to their respective own employees, regardless of either party's fault, but not for injuries to the other party's employees.	This approach (customary in the oil patch) can be acceptable, but it exposes the staffing firm to liability when injury is due to the customer's gross negligence or misconduct.
21	"Retrobenefts" – assigned employees' claims for the customer's benefits	The staffing firm must pay all costs of assigned employees' claims for the customer's benefit plans.	Revise this obligation to apply only to the benefits offered by the staffing firm to its employees <u>as</u> its employees.
22	"Retrobenefts Plus"	The staffing firm must pay all costs of claims based on any finding that the customer is a joint employer, co-employer, special employer, or employer of the assigned employees as borrowed servants.	This is very dangerous, exposing the staffing firm to liability for retrobenefits, safety, discrimination, and other serious claims. Delete it or apportion the liability according to the customer's and staffing firm's respective co-employment roles.
23	Confidentiality breaches	The staffing firm must pay for all breaches of confidentiality, even those by assigned employees.	Add a statement that the knowledge or possession of information disclosed to or made available to assigned employees will not be imputed to the staffing firm itself.
24	Intellectual property – assigned employees' infringement of the rights of third parties	The staffing firm must pay all costs and recovery measures for infringements of third parties' intellectual property by assigned employees (for example, bringing software code belonging to another firm to the assignment.)	Delete this obligation for staff augmentation, because the staffing firm has no knowledge, control, or financial interest with respect to these items. True Statement of Work (SOW) deals might be different.
25	Scope of employment	The staffing firm's indemnity obligation is limited to the acts and omissions of assigned employees' within the scope of their employment.	"Scope of employment" is too broad, by covering the customer's business risks. Redefine the scope of indemnity so that the customer is liable for assigned employees' acts and omissions within the scope of their assignments.
26	Enhanced risks	The staffing firm's indemnity obligation does not include any exceptions for driving, operating industrial equipment, handling cash, handling valuable merchandise, working in unsupervised premises, possessing keys, etc.	Obtain indemnity from the customer for "enhanced risks," or at least exclude them from the staffing firm's indemnity obligation. Separately document such risks if they are involved in the assignments. Such documents usually have customers assume such risks.
27	Negligence only	The staffing firm must indemnify only for the negligence of the staffing firm or its assigned employees.	Negligence does not cover all modes of liability (for example, it excludes intentional conduct and strict liability). If the assignments do not carry much potential for negligence, it might be an acceptable risk, although it covers some of the customer's business risks.
28	Non-return of customer equipment	The staffing firm is required to "cause" its assigned employees to return all customer equipment or to pay for what they do not return.	The staffing firm should allow customers to use agreements with assigned employees and/or cash deposit systems and should agree to use its best efforts to urge assigned employees to return customer property, but do not agree to pay for replacement of the property. (In some cases, the staffing firm's dishonesty policy might pay for such items.)

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29	Losses caused by the staffing firms' subcontractors	The first tier staffing firm must pay for all losses associated with its subcontractors' assigned employees.	If subcontractors don't have direct contracts with the customer, it is OK as long as the first tier staffing firm gets full indemnity from subcontractors (and they are able to pay it).
30	Violations of law	The staffing firm is liable for all violations of law (implicitly, by anyone, including the customer and the assigned employees).	Limit indemnity to the staffing firm's violations of law. The customer must pay for its own violations and for those of assigned employees working under customer's supervision.
31	Environmental damage	The staffing firm must pay for all costs of environmental damage associated with assigned employees.	Delete this provision, since the staffing firm has no knowledge, control, or profit interest with respect to environmentally risky work.
32	Affordable Care Act	<i>[see the Affordable Care Act section below. This indemnity obligation is usually contained in a separate ACA contract section or amendment.]</i>	<i>[see the Affordable Care Act section below. This indemnity obligation is usually contained in a separate ACA section or amendment.]</i>

Insurance:

33	Customer as additional insured	The staffing firm must add the customer as an additional insured on certain coverages purchased by the staffing firm.	Usually, additional insured status for customers is OK but must be arranged with insurers. However, if the customer's rights as additional insured are aggressively detailed and too broad, there may be a need to limit them. Risk managers and insurance brokers can help determine this.
34	Insurance required for all staffing firm indemnity obligations	The staffing firm is required to insure all of its indemnity obligations to the customer.	Delete or limit this provision to specific risks. It is often impossible to comply with, since there is no insurance available for many indemnity obligations imposed by customer contract forms.
35	Deductibles and other gaps in coverage	The staffing firm must pay all deductibles and other gaps in insurance coverage when the customer uses the staffing firm's insurance as an additional insured.	Evaluate this provision financially. Deductibles and other insurance coverage gaps can be huge. Silence on the matter allows the customer to use the insurance as the staffing firm does – by paying for the gaps itself.
36	Purchase of missing insurance	The customer has the right to purchase insurance for the staffing firm at the staffing firm's expense when the customer thinks that the required insurance is missing or lacking.	Remove this right. Staffing firms shouldn't allow customers to spend money for them.

Alternate indemnity solutions:

37	Relationship of insurance to indemnity	The customer's form does not address the relationship between insurance and indemnity except to deny that insurance limits the staffing firm's indemnity obligations.	Propose that, if the liability is not insured, there is no staffing firm liability or indemnity. This provision is hard to get but is easy to draft.
38	Liability caps	The amount of the staffing firm's liability is unlimited and/or there are liability limits only on the customer's liabilities	Liability is capped as a set amount, a percentage of annual billings paid by customer, or (less desirable) a percentage of cumulative staffing billings. Caps may be also be set just on the customer's inherent risks that are assumed by the staffing firm.
39	State law relief	The staffing firm's indemnity obligation is stated without regard to state laws that sometimes make certain indemnities unenforceable or that require them to be stated conspicuously in contracts.	If applicable state law is clear and the indemnity provisions fails to satisfy it, the staffing firm may tolerate bad indemnity language, but enforcement of the state law in courts may be unreliable, and customer expectations may be offended if the staffing firm relies on this defense.

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40	No indemnity provision at all	Usually, some indemnity clause is included, typically obligating the staffing firm.	Leaving out all indemnity obligations is usually fine for the staffing firm, if there are no enhanced risks in the work. The law itself already allocates liability for everything, and the customer's supervision of the work is a powerful fact. There is no need to change or restate the law. Let the law do its job.

Work time, bill rates, payment, and expenses

41	Timekeeping system	The staffing firm's assigned employees must document their work time by using the customer's timekeeping system or that of its VMS/MSP.	When the customer's or its VMS/MSP's system is used, require the customer or its VMS/MSP to indemnify the staffing firm for assigned employees' claims for timekeeping violations. Also, require the system to have assigned workers sign off on or otherwise confirm the amount of their work time, as traditional timecards do.
42	FLSA exemption of assigned employees	The customer can require the staffing firm to treat certain assigned employees as exempt under the Fair Labor Standards Act and similar state wage and hour laws, thus avoiding overtime pay.	Usually, these provisions must be removed. Customer designation is not a defense to misclassification by the staffing firm, and customers are often wrong about classifications. Also, relief from overtime costs is a moral hazard for customers, who are incentivized to obtain free work from someone else's assigned employees.
43	Definition of overtime	Overtime may be defined differently from the way the law defines it (especially in California).	Remove attempts to state the whole overtime law in the contract, and define overtime as whatever the law requires to be treated as overtime.
44	Time that candidates for assignments spend interviewing with the customer	The staffing firm is required to send candidates for assignment to interview with the customer, with no provision for their interview time to be billed to the customer.	California staffing firms (and possible others) should pay candidates for customer interview time. A lower than usual pay rate (at or above minimum wage) for interviewing time can be paid if it is disclosed to the candidate in advance. There is no legal obligation to bill the customer for this time, but some billing can be required by contract.
45	Rate format	Rates are stated in terms of a percentage markup from pay rates to bill rates, sometimes with exact pay rates or pay rate ranges specified.	To minimize co-employment, joint employment, and common law employer risks, it is best for the customer not to set or even to know assigned workers' pay rates. Propose using dollar amount bill rates with provisions for future adjustments.
46	Overtime bill rates	No provision may be made for overtime rates, or an overtime bill rate multiplier of less than about 1.4 is specified.	Depending on burden variables, maintaining the staffing firm's gross margin dollars per overtime hour usually requires a regular to overtime bill rate multiplier of at least 1.4 for time and a half and 1.8 for double time.
47	Burden increases	No provision is made for adjustment of the bill rates when the staffing firm's labor costs and other burdens (minimum wages, living wages, FICA, unemployment insurance, FUTA, worker's compensation premiums, etc.) are changed.	Insert a clause that permits the staffing firm to bill the customer for increased government-mandated burden costs, without markup, until the markups or bill rates are renegotiated.

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48	Volume discount rate tables	Some volume discount rate tables are written so that they may be interpreted to apply higher level discounts retroactively from the first dollar of volume when the volume reaches higher volume discount tiers.	Revise the volume discount table so that the discounts of lower tiers of volume do not increase when higher tier levels of volume are reached. (This works like the federal income tax tables.)
49	Most favored customer	The staffing firm is required to lower the customer's rates to any lower rates that the staffing firm gives to its other customers.	Delete this provision, or limit it to situations that are identical in skill mix, geography, volume, tenure, and other pricing factors – which virtually never happens.
50	Payment to cover for "no-shows"	The staffing firm must pay for substitutes to replace "no show" assigned employees.	Delete this rule or revise it to allow the staffing firm to avoid replacement costs by covering the vacancy within a certain time after receiving the customer's notice of the no show. If replacement cost remains, it should be limited in time and pegged to the staffing firm's rates.
51	Annual cost and rate reduction	As a hangover from the "quality" and "continuous improvement" movements, this kind of provision requires the staffing firm to reduce its charges by a certain percentage every year.	Unless the initial margins are sufficient to endure shrinking rates over the term of the contract, such automatic rate reductions should be deleted.
52	Billing cycle	The staffing firm is required to bill monthly, instead of the typical weekly billing.	If, like most staffing firms, you operate on a weekly payroll cycle, delete this requirement in favor of weekly billing. Weeks don't fit neatly into months, so some work will be billed a whole month late on a monthly schedule, and the customer's payment time for what already constitutes an interest free loan will be prolonged.
53	Invoice due date	The customer must pay within XX days of invoice receipt, but only if the whole invoice is undisputed.	Revise this rule to require timely interim payment of all undisputed amounts. The staffing firm can not know when an invoice was received (unless it is delivered electronically), so place the payment deadline at a fixed date a reasonable time after the date of the invoice, which is usually in the week following the work.
54	Stale invoice forfeiture	The customer is not obligated to pay invoices that are not submitted to the customer within XX days after the performance of the assigned employees' work.	Delete this unfair forfeiture, since staffing firms pay most of the invoiced amounts out in cash shortly after the work is done and since the customer has fully enjoyed the value of the work. Or, change the forfeited amount to some estimate of gross or net margin.
55	Attorney's fees to collect unpaid bills	The staffing firm's costs of collecting unpaid bills from it are not an obligation of the customer.	Provide for customer payment of reasonable attorney's fees and other expenses of all kinds required for the collection of customer's unpaid invoices.
56	Interest on unpaid bills	No interest is required for invoices that are unpaid and overdue for payment by the customer.	Require interest from the invoice date for invoices unpaid within XX days; calculate interest as a fixed percentage per overdue day or per day after the invoice date (to avoid arguments about what a month is or how the annual rate applies).

Contract Issue**Problem in Customer's Form****General Solution**

57	Customer financial audits	The customer may audit the staffing firm's records to ensure proper billing. This provision usually also requires the staffing firm to retain records for at least a certain period.	This audit right is generally OK, except that reasonable conditions of access (time, place, notice, etc.) should be included; the audit should be by qualified accountants at presumptive customer expense (transferred to the staffing firm if overbilling over a certain percentage is confirmed); and the result should allow for payment to fix both customer overpayments and customer underpayments.
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Conversion fees:

58	Kinds of conversion covered	Conversion fees are triggered only by an assigned worker's hiring (direct or indirect) by the customer. This leaves several workarounds whereby the customer can take the workforce for free – such as “tempnapping” by a competitor of the staffing firm.	Conversion fees should apply whenever the customer obtains the worker's service through any arrangement other than through the original staffing firm, such as employment, contract, leasing, through a competitive staffing firm, consulting deal, etc. (Direct hire by the customer can be given a lower fee.)
59	Workers covered by conversion fees	The conversion fee covers whatever the contract calls the assigned employees – associates, field staff, temporaries, assigned staff, etc. This could limit the fee to conversion of people still on active assignment. One day of post-assignment layoff could avoid the fee language.	The conversion fee should be payable for conversion of any “person” who was an employee on assignment to the customer within the XXX days prior to the conversion.
60	Amount of conversion fee	The conversion fee is a percentage of the converted person's future compensation in the new job, which is available only from the customer and/or the converted person.	The conversion fee should be a function or multiple of an amount that is already agreed and a matter of record – like the bill rate. This eliminates doubt and delay in determining the person's compensation and facilitates immediate invoicing of the fee.
61	Conversion fee credit for “time served”	Conversion fees reduce as the converted person's cumulative hours worked on assignment increase, without regard to the kind of conversion.	The conversion fee is the same for any length of prior assignment, but this can be waived at the customer's request, or the “prior service” requirement can be waived or prearranged to apply for direct customer hire only.
62	Conversion fee refunds	The staffing firm must refund all or part of the conversion fee if the converted worker's employment ends within a certain time.	Remove refunds of conversion fees, since the worker's temporary service period provides review and approval time to the customer. It constitutes a “try before you buy” feature.

Affordable Care Act:

63	Compliance with ACA	The staffing firm is required to comply with ACA.	This general duty to comply with ACA is OK, but delete or revise any requirement for the staffing firm to comply with ACA for its assigned employees who may be deemed by IRS to be the customer's common law employees.
64	Assigned employees who must be offered staffing firm health coverage	All staffing firm employees assigned to the customer at any time must have been offered the required health coverage by the staffing firm.	Full ACA compliance still allows staffing firms not to offer coverage to several kinds of employees. Rewrite this rule to limit the coverage mandate to the law's requirements as applied to the staffing firm. Also, provide for relief from customer's coverage mandate if ACA coverage mandates are lifted by law, regulation, or executive order.

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65	Level of health coverage that staffing firm must offer	The staffing firm is required to offer minimum value, affordable coverage (as defined by ACA), which is very expensive to provide.	If the staffing firm indemnifies the customer for potential but unlikely §4980H(b) penalties, the customer's only serious ACA risk is the §4980H(a) penalty, which can be avoided by a staffing firm's offer of inexpensive or cost-free minimum essential coverage (MEC) coverage. Substitute a MEC offer requirement for the minimum value affordable coverage offer requirement.
66	Indemnity for penalties	The staffing firm must pay all penalties that the customer receives because of the staffing firm's assigned employees.	The staffing firm indemnifying for the customer's §4980H(b) penalties is OK, but limit the staffing firm's liability for the customer's §4980H(a) penalty to the part generated directly by the assigned workers, to avoid indemnity for all of the customer's full-time employees.
67	Differential billing	The staffing firm must bill the customer more for assigned employees enrolled in ACA coverage than it does for similar non-enrolled assigned employees.	This requirement is OK, but set up a very low additional charge and present it in the billing format as a single line item for the number of enrolled employees in the billing period, without identifying which employees were enrolled.
68	Audit of differential billings	The customer has the right to audit the staffing firm's records to confirm the charges for enrolled assigned employees.	This requirement is OK, but provide for any audit to be conducted by personnel who have no role in deciding assigned employee terminations (to prevent charges of discrimination against the enrolled employees).
69	Customer filings on assigned employees	The staffing firm must disclose information on its assigned employees so that the customer can file ACA disclosures for them as the customer's employees.	Delete this requirement. It is inconsistent with the staffing firm's common law employer role and reflects a misunderstanding of the ACA law and regulations.

Drug and background checks:

70	Automatic exclusion of assigned employees with criminal records	The staffing firm is forbidden to assign to the customer candidates with any criminal record or a criminal record containing certain offenses.	Blanket exclusion rules are illegal; individual follow up of bad results is required. Replace blanket exclusion rules with a duty for the staffing firm to apply its own exclusion criteria and evaluation process and to exclude candidates to the maximum extent permitted by law. The customer should avoid the risk of participating in this evaluation, and its illegal decisions could expose it and the staffing firm to liability for excluding candidates.
71	Automatic exclusion of assigned employees with positive drug tests	Forbids assignment to customer of candidates with any undesirable drug test results.	Modify this to require conformance to the law. State and federal laws require individualized appraisal of positive drug test results, which can be incorrect, caused by legitimately prescribed substances, or be otherwise unobjectionable.
72	"Ban the Box" laws	The staffing firm must submit only candidates whose criminal backgrounds have been cleared.	Add "to the extent allowed by law" to the requirement, or otherwise confirm that the law does not require a conditional offer of employment at the assignment level before backgrounds are checked or inquired about.
73	Disclosure of drug/criminal background check results	The staffing firm must show the customer all or all negative results of background checks of assigned employees.	Persuade the customer to delete this. The customer should avoid the risk of having this information, and its illegal decisions could expose it and the staffing firm to liability for excluding candidates.

Contract Issue**Problem in Customer's Form****General Solution****VMS/MSP issues:**

74	Customer's agent and customer's third party beneficiary status	The VMS/MSP contract with the staffing firm supplier may mention the customer but fail to obligate the customer to anything.	Clarify whether the VMS/MSP is acting as a principal or as the customer's agent (customer's agent is preferred by staffing firms). Confirm (possibly separately) customer's authorization for VMS/MSP to bind it legally (especially to payment and indemnity). Customer's stated third party beneficiary status in the VMS/MSP contract should be balanced by express customer commitments to the contract's obligations to the staffing firm.
75	VMS/MSP fees, actual and future	VMS/MSP fees, usually deducted from the staffing firm's receivables, may be excessive and open-ended.	Negotiate for fee reductions, volume discounts, and rate guarantees.
76	Status of customer payments to VMS/MSP	The VMS/MSP contract makes no mention of special protection for customer payments for the staffing firm's services that are in the possession of the VMS/MSP.	Provide that the customer's payments for the staffing firm's services (net of VMS/MSP fees) are held by the VMS/MSP in trust for the staffing firm.
77	Access to collection rights	The VMS/MSP is obligated to pay the staffing firm only after the customer pays the VMS/MSP. If the VMS/MSP has paid the staffing firm before the customer pays it, the VMS/MSP is entitled to repayment if the customer then fails to pay. The staffing firm is given no remedy against anyone for the customer's failure to pay.	Remove the staffing firm's obligation to repay the VMS/MSP (except for bankruptcy "preferential payment" backflows). Insert a process for the staffing firm to participate in collection efforts. If collection efforts fail, require the VMS/MSP to assign the customer receivable to the staffing firm and to provide all necessary documents and information for the staffing firm to collect directly from the customer.
78	Stale invoice forfeiture	The customer is not obligated to pay invoices that are not submitted to the customer within XX days after the performance of the assigned employees' work. Thus, the VMS/MSP is not obligated to pay the staffing firm for them.	Delete this provision as unfair, since staffing firms pay out most of the invoiced amounts in cash to third parties shortly after the work is done. Or, change the forfeited amount to some estimate of gross or net margin. If a forfeiture must remain, make it fault-based. If the VMS/MSP is to blame, it must still pay the staffing firm the entire invoiced amount.
79	Communication with the customer	The VMS/MSP contract forbids the staffing firm to have any direct communication with the customer.	Condition this rule with the introductory phrase, "Except as necessary to fulfill co-employment, contractual, and other obligations".
80	Customer bankruptcy	The VMS/MSP contract makes no provision for customer bankruptcy.	If a customer goes bankrupt, the VMS/MSP, not the staffing firm, will usually be the customer's creditor but the VMS/MSP has only a small percentage of the debt at stake and has no motive to be aggressive in the bankruptcy. The staffing firm should have the right to require the VMS/MSP to assign to the staffing firm its claim against the bankrupt estate.

Unions:

81	Deduction of payments to unions from assigned employees' pay	The customer, responding to demands from its union, may require the staffing firm to pay to the union fees deducted from the pay of assigned employees as a substitute for union dues. Alternatively, the payments might be required to be channeled through the customer to the union.	Delete such requirements. Such payments by the staffing firm or by the customer are violations of the National Labor Relations Act, which forbids the "buying off" of unions. It is also unfair to make assigned employees support unions to which they do not belong and from which they derive no benefits.
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82	Agreement to allow assigned employees in customer's bargaining unit	Unions may try to include assigned employees in the bargaining unit for the customer's direct employees during organizing or accretion efforts. The customer may require the staffing firm to acquiesce in such moves or to yield to the customer's decision at the time.	Some customers may expect assigned employees to help them oppose the union, but staffing firms are invariably opposed to combined bargaining units. Remove any provision that removes the staffing firm's independence on this issue.
83	Costs of response to union organizing	Customer contract forms usually do not address this issue or just say that the staffing firm must pay its own way and notify the customer of organizing activity. When organizing of the customer occurs, customers often require staffing firms to "educate" their assigned employees and to train their staff employees in labor law.	If union organizing of the customer is a likely risk, the staffing firm may want a provision that requires the customer to reimburse it for the costs of dealing with the situation.

Miscellaneous:

84	Safety	The staffing firm is required to be responsible for workplace safety, or the customer's duty to "maintaining a safe workplace" is denied or limited.	Insert the OSHA-required detailed rights and duties of the customer and staffing firm into the contract. Reject staffing firm duties that the staffing firm can not control.
85	Duty to "cause" employee behavior	The staffing firm is required to "cause" its employees to do things like observe confidentiality, turn over inventions, return customer property, follow customer policies, etc. The staffing firm's failure to cause these behaviors could trigger indemnity for breach.	Employers can not "cause" employee behavior. Substitute "instruct" "urge", "use best efforts to induce", "use all reasonable measures to cause", or similar realistic statements of the staffing firm's duty.
86	Quality guarantee	The staffing firm must repay all billings for assigned workers whose performance is deemed unsatisfactory by the customer. This guarantee may be unlimited with respect to notification time, amount of billings to repay or non-bill, and cause for the dissatisfaction.	Claims for refund are very rare, but they should be limited to misconduct or lack of represented qualifications (not bad job performance) that the customer reports during the first day or week. Making this the customer's sole remedy is also good.
87	Contract termination rights	The customer can terminate the contract for convenience, but the staffing firm needs cause to terminate it.	If the staffing firm is not obligated to continue assignments or to fill all of the customer's orders, the ability to terminate the contract does not matter. Otherwise, both sides should have the right to terminate for convenience.
88	Automatic contract renewal	The contract and its terms renew automatically, unless a party notifies the other party at least XX days prior to the expiration/renewal date.	If the staffing firm is not obligated to continue assignments or to fill all of the customer's orders, automatic renewal is tolerable. Otherwise, delete this feature, because it is too easy to miss the notice deadline and to be stuck with obsolete rates and other terms.
89	Government contract work	The customer's contract form may be silent on special and burdensome requirements for government contract work, even though the customer may expect such work to involve assigned employees.	Insert a clause that requires the customer to inform the staffing firm of any government contract work, to provide the staffing firm with all information necessary for compliance, and to amend the contract to adjust rates and processes for any financial differences and special requirements caused by the government rules.
90	Payrolled (customer-sourced) employees	Provides for lower bill rates, no conversion fees, lower benefits, and sometimes less staffing firm liability for payrollers (customer-sourced employees.)	This feature risks a finding that the staffing firm is not the assigned employees' employer. Treat payrollers exactly the same as other assigned employees, while giving overall credit for the customer's recruiting efforts when bill rates are amended.

	<u>Contract Issue</u>	<u>Problem in Customer's Form</u>	<u>General Solution</u>
91	Payroll cycle	The staffing firm must pay assigned employees according to the customer's bi-weekly or bi-monthly payroll cycle instead of its own payroll cycle.	Delete this if you use the typical weekly pay cycle. Conforming to the customer's pay cycle is a bad co-employment fact. It also prolongs customer's payment time and may cause administrative cost and disruption. And in California, not paying weekly deprives the staffing firm of relief from the state's immediate final pay law.
92	Non-competes for assigned employees	The staffing firm must require assigned employees to sign covenants against competition with the customer.	This is probably OK (subject to the staffing firm's policy on protecting the rights of its assigned employees), but limit the staffing firm's liability to obtaining the agreement, without being responsible for its observance.
93	Ban on assigning employees to customer's competitors	The staffing firm is forbidden to assign employees that have worked for the customer to work for the customer's competitors.	This provision carries potential antitrust liability, though it has not yet been enforced. Amend the ban to have reasonably short time limits and limited scope, or persuade the customer to rely on confidentiality agreements by the assigned employees.
94	Lost or unreturned keys and ID cards	The staffing firm is required to deduct from assigned employee's pay the cost of replacing customer keys and ID cards that they lose or fail to return.	If this provision must remain, shift the obligation to the staffing firm or allow customer to operate a refundable deposit system for such items, so that legally-sensitive payroll will not be affected.
95	Applicant tracking data	The staffing firm must track and report demographic data (race, sex, national origin, etc.) to the customer to satisfy the customer's affirmative action reporting requirements.	In general, staffing firms are not required to collect such data, but customers under court orders or subject to certain government contracting rules may have to keep these data, and staffing firms can help them comply. Also, temp-to-perm arrangements where the customer hires most candidates make the staffing firm's candidate pool the customer's candidate pool for reporting purposes, so that reporting is appropriate.
96	Ancillary privacy law contracts: HIPAA (health data) & Gramm-Leach-Bliley (financial data)	The staffing firm or its assigned employees, or both, must sign Business Associate Agreements that impose many irrelevant data management duties and liabilities.	Show the customer that, under both privacy laws, assigned employees are considered part of the customer's work force and therefore need not sign such agreements. The staffing firm should not sign them, either, because the staffing firm does not obtain data to which its assigned employees are exposed on assignment. If signing something is necessary, modify the standard agreements to cover only what the staffing firm can actually do in cooperation with the customer, which is only a small part of such agreements.
97	Access to personnel records of assigned employees	The staffing firm must allow the customer to access the personnel records of the assigned employees.	Customer access to these records can create problems with privacy and expose the customer and the staffing firm to potential liability for the customer's actions. Limit access, if any, to financial records for billing verification; limit access to reasonable times, places, access by customer personnel not involved in assignment termination decisions, and advance notice; and impose the costs on the customer.
98	Entire Agreement or Merger clause	The contract is declared to contain all terms of the deal, and it overrides terms in other documents, like the staffing firm's timecard terms and invoice terms.	If you want terms in other documents (like conversion fees on timecards) to survive, modify this clause to include the other documents' terms. This can be done with just a few words.

	<u>Contract Issue</u>	<u>Problem in Customer's Form</u>	<u>General Solution</u>
99	Codes of Conduct	The staffing firm is required to sign and observe various aspirational codes, as amended, that the customer has adopted (like the UN Global Compact.)	Delete such commitments, which often are vague and benign-sounding but are interpreted by adverse parties to require acquiescence to union organizing and other agenda items that the staffing firm may not support.
100	Incorporation of sales documents into contract	All representations in sales documents are incorporated as enforceable parts of the contract.	Delete this item or limit it to specific sales representations items built into the agreement with carefully written legal language.

22-ISSUE CHECKLIST: FIXING CUSTOMERS' DIRECT HIRE FEE CONTRACT FORMS

The best strategy for placement firms is to develop their own contract forms and to require their customers to sign those forms. However, when that is not possible and customers require the use of the customer's contract forms, this checklist helps placement firms to negotiate the most common issues that customer forms present.

The general solutions suggested in the following table must be translated into minimally disruptive, legally-correct language that fits the structure, terminology, and other requirements of the customer's form. The language and structure of customers' forms are too varied to permit recommended language here.

The author of this checklist, staffing attorney George Reardon, is available to help placement firms develop their own forms, negotiate customer-proposed changes to the placement firms' forms, and to analyze and negotiate changes to the customers' standard contract forms.

<u>Contract Issue</u>	<u>Problem in Customer's Form</u>	<u>General Solution</u>
1 "Representation" of candidates	Conditions the fee on continued agreement of the candidate to being "represented" by your placement firm.	The contract is between the customer and the placement firm. Candidates are not parties to it. Delete or revise this provision to require, if anything, no more than initial consent or cooperation by the candidate for your placement efforts.
2 Competing referrals of other placement firms	Negates or splits the fee obligation if the candidate had also been submitted to the customer by another placement firm.	Condition this fee relief on disclosure and proof of all prior submissions by the customer within a short time after you submit the candidate's identity, so that you do not waste resources.
3 Procuring cause	Conditions the fee on the placement firm's being the "procuring cause" or "efficient procuring cause" of the placement.	It can be difficult to prove these conditions. Replace them with a defined time period after the referral during which engagement of the candidate conclusively generates your fee.
4 Candidate already known to customer	Negates the fee obligation if the customer knew the candidate before your referral.	Revise this provision to allow avoidance of the fee only if the customer had formally and recently interviewed the candidate and only if the customer discloses the prior knowledge and interview within a short time after you submit the candidate's identity, so that you do not waste resources.

Background checking:

5 Selection tools and background/reference checks	Requires the placement firm to administer screening tools or to obtain references and background checks	These functions are best avoided, but if they are accepted, consult legal counsel for special duties as a third party reporting such information or making selection decisions.
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Definition of Placement:

6 Definition of hire	Defines a fee-generating placement only as a hiring of the candidate by the customer, presumptively as a W-2 employee.	Replace the "hire" concept with a more general term, like "engage," which is defined to include all ways of obtaining the candidate's services (direct employment, independent contractor, assignment by staffing firms, etc.)
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	<u>Contract Issue</u>	<u>Problem in Customer's Form</u>	<u>General Solution</u>
7	Job switch	Limits the fee obligation to the hiring or engagement of the candidate for the particular position described in the job order.	Provide that the fee is earned for the engagement of the candidate for any position with the customer.
8	Liability of customer affiliates and third parties	The fee obligation covers only an engagement of the candidate by the customer business entity that signs the fee agreement.	Define "customer" or "engagement" to include engagement by affiliates (defined by common ownership or control) and third parties to whom the customer refers your candidate. However, keep the main customer entity primarily liable for the fee.

Fee Payment:

9	Fee accrual timing	Delays the accrual or payment of the fee until the candidate has been employed for at least a certain time.	Follow the industry standard of fee accrual on the first day of engagement, with payment due very soon afterward.
10	Calculation basis of the fee	Limits the compensation on which the fee is based to the first year's "base salary."	To avoid game-playing on the stated base salary, define compensation broadly -- to include bonuses, stock awards, deferred compensation, and some kinds of benefits.
11	Compensation actually earned vs. projected	Defines fee-generating compensation very generally, permitting an interpretation that it is limited to compensation actually paid to the candidate over the year.	Base the fee on projected or expected compensation for the year, as defined to include various elements and as documented in offer letters, W-2s, employment agreements, etc. Optionally, provide a minimum assumed compensation for the job and base the fee on the greater of the minimum and the projected/expected amounts.
12	Timing of commissions and bonuses	Bases the fee only on compensation actually paid or projected to be paid during the first year.	Bonus and commissions may be earned in the first year but be paid later. Substitute the concept of "earned" or "accrued" for "paid."
13	Information on fee-generating compensation	Does not obligate the customer to share information on the placed candidate's fee-generating compensation.	Expressly obligate the customer to disclose all relevant facts about the placed candidate's projected/expected compensation and, if the customer does not disclose the information, obligate the customer to pay a presumptively binding invoice based on reasonable compensation assumptions.
14	Fee payment timing	Provides a long time for payment, possibly as part of a staffing contract that includes the traditionally longer payment terms (30-60 days) for contract staffing.	Appreciation of placement services fades quickly. Require payment within a short time, like 10 days after the invoice date.
15	Interest on unpaid fees	Omits interest on overdue fee payment obligations.	Provide for interest on overdue fee payments, stated as an express fraction of the unpaid balance for each late day and calculated from the date of the invoice until paid. This helps to prioritize the customer's payment of your invoices.
16	Collection costs	Omits an obligation for the customer to pay the placement firm's costs of collecting unpaid fees.	Provide for the customer to pay all costs, fees, and expenses of collecting its overdue fee payments, with contingent fees of lawyers or collection agencies added to the debt and other expenses, so that the placement firm recovers a net amount equal to the overdue fees.

Contract Issue Problem in Customer's Form General Solution

Guarantees:

17	Events that trigger the guarantee	Fee refund or candidate replacement are triggered when the candidate's customer engagement terminates, regardless of the reason for termination.	Carve out reasons for termination that will not trigger the guarantee (e.g., lack of work, termination by the customer not for cause, death or disability of the candidate, change of control, etc.)
18	Prompt payment as a condition for the guarantee	The guarantee is not conditioned on the customer's prompt payment of the fee invoice for the placement.	Condition all guarantee refunds or replacement obligations on the customer's payment of the fee within the contractual payment terms.
19	Guarantee of fee refund	Requires a refund of 100% of the fee regardless of when the termination of the candidate's engagement occurs during the guarantee period.	Provide for a pro rata refund of the fee for guarantee-qualified terminations of the engagement during a limited time period, typically 90 days. For example, one third of the fee would be refundable for termination on the 60 th day of the engagement.
20	Guarantee of candidate replacement	Does not offer candidate replacement as an alternative to a fee refund.	Provide for candidate replacement as the only remedy for qualified guarantee claims, or use it as the placement firm's first option for avoiding a fee refund.

Miscellaneous:

21	Ban on recruiting customers' employees	Forbids the placement firm to recruit from customer's workforce for a stated time after placements with the customer are made.	This is generally OK and traditional, as long as the time period and the scope of the ban are reasonable. Limit what is banned to active recruiting, carving out candidate responses to untargeted job postings.
22	Indemnity for placed employees	Requires the placement firm to indemnify the customer for all negligence or misconduct by candidates, often after placement as well as before it.	Delete such provisions as inappropriate in the direct placement context. Candidates are not employees or agents of placement firms, and placement firms have no knowledge, control, or economic interest regarding their actions.