ASA Certification Study Guide

Name

Company

The information provided in this guide is intended to serve only as a general overview of employment law issues. It is not intended to constitute legal advice. Issues involving legal consideration may vary by case, and from state to state. You should always consult with your company's legal counsel for specific legal advice.

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Introduction

What You Need to Know as You Prepare for ASA Certification Exams

Congratulations—you have taken the first step toward earning the Certified Staffing Professional®, Technical Services Certified℠, or Certified Health Care Staffing Professional® credential. These ASA certification programs offer professional credentials earned through the completion of in-depth self-study and a timed exam that tests your understanding of labor and employment law principles and ethical practices applicable to the staffing industry.

This study guide should be used as your primary text as you prepare for the federal portions of the CSP®, TSC℠, or CHP® exam. The CSP and TSC packages include state-specific workbooks that will help you prepare for the state-specific portion of each exam.

The federal exam topics are compiled into this condensed and easy-to-use text to help you identify which important aspects of employment law you are already familiar and which aspects you need to spend more time studying as you prepare for the exam.

Everyone studies differently. ASA certified professionals who have shared their study habits with ASA recommend the following process:

1. Read through this study guide and your state workbook from cover to cover, taking notes to help you remember details that are new to you.
2. Take and grade the practice exam to help you identify the topics you need to focus on.
3. Spend the remaining time reviewing those areas in this guide or your state workbook that you have identified as areas you need to study further.
4. Take the practice exam a couple of times again (ideally, online and timed), to see if you have gained a more thorough understanding of the areas you needed extra help on.
5. Set aside two hours of uninterrupted private time and take the certification exam from ASA. Sign into the exam by using the individual log-in information that was mailed to you when you ordered your exam materials.

Topics Found on the CSP and TSC Exams

The CSP and TSC exams cover the following topics. Essential information about these topics is included in this guide. Additional details are available in the 8th edition of *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements* and the 13th edition of *Employment Law for Staffing Professionals*.

- Pre-employment
- Equal employment opportunity laws
- Candidate screening
- Immigration
- Substance abuse and drug testing
- Employment agreements, employee handbooks, and restrictive covenants
- Wage and hour laws
- Family and medical leave
- Workplace safety

- Wrongful discharge
- Measures to reduce the likelihood of employment-related claims
- Labor–management relations
- Employee benefits
- Workers' compensation
- Co-employment issues
- Workplace discrimination
- ASA Code of Ethics and Good Practices

In addition to the topics covered in the CSP program, the TSC program covers per diem regulations, worker classification, and H-1B visas. Anyone earning the TSC will automatically earn the CSP.

Topics Found on the CHP Exam

- Malpractice issues
- Health care credentialing requirements
- ADA
- Issues related to required vaccinations
- Privacy issues/HIPAA
- *Locum tenens*
- Anti-kickbacks
- Affordable Care Act
- Pre-employment
- Candidate screening
- Immigration
- Substance abuse
- Family and medical leave
- Equal employment opportunity
- Wage and hour laws
- Workplace safety
- Co-employment issues
- Per diem rules
- Worker classification
- H-1B visas

The subjects covered in the study materials and on the exam were identified by leading staffing professionals as some of the most important elements of labor and employment law pertinent to maintaining high standards within the staffing industry.

Exam Materials

The complete CSP and TSC certification packages includes

- *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, 8th edition
- *Employment Law for Staffing Professionals*, 13th edition
- Certification Study Guide
- Federal employment law workbook
- State employment law workbook
- Video Module study tool
- CSP or TSC online practice exam
- CSP or TSC online exam, with questions on both federal and state labor and employment law (you will receive a unique identification number and a web address for the exam site)

The complete CHP certification package includes

- *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, 8th edition
- *Employment Law for Staffing Professionals*, 13th edition
- Certification Study Guide
- CHP workbook
- CHP online practice exam
- CHP online exam, with questions on federal labor and employment law (you will receive a unique identification number and a web address for the exam site)

The intent of the ASA certification programs is not to make staffing professionals into employment law attorneys, but rather to help staffing professionals recognize the potential employment law-related risks that they and their clients face daily. Knowing these potential risks will help you provide better service to your clients and distinguish your firm from your competitors. In addition, the books that come with the certification package can be used as desk references as you do your job every day.

Equal Employment Opportunity Laws

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 1)

Federal law prohibits most employers from discriminating against employees or job applicants because of race, color, sex, age, religion, disability, national origin, citizenship, genetic information, or veteran status.

Most states (and some municipalities) have also enacted laws prohibiting discrimination in employment. These state laws vary considerably. Such laws may reach employers not subject to federal law, are generally enforced differently than federal law, and may prohibit discrimination for categories other than those protected by federal law (e.g., marital status, arrest record). This chapter is intended to provide a basic explanation of the federal equal employment opportunity (EEO) laws.

A. Federal Law Prohibits Employment Discrimination

1. Key Principles of Equal Employment Opportunity Law

a. Disparate Treatment. A principal theory of prohibited discrimination is known as disparate treatment. Disparate treatment occurs when an employer treats an employee or applicant differently than another similar applicant or employee because he or she is a member of any class protected by the law (e.g., refusal to hire an applicant because of race, disability, national origin, sex, religion, or age). This is the most prevalent type of alleged discrimination a staffing firm is likely to encounter.

To prevail in a disparate treatment claim, the complainant must prove that the employer intended to discriminate. In order to successfully defend against a disparate treatment claim it is almost always necessary for an employer to establish that it had a legitimate, nondiscriminatory reason to have taken the complained-of action (e.g., discharge, promotion).

> **[ASA Tip:** Let us illustrate a disparate treatment claim. If a female employee is discharged for violating the company's policy on excessive absenteeism, she can file a charge alleging sex discrimination if similarly situated male employees with the same number of absences were not discharged. This would be a classic disparate treatment case. The focus of the case would be on comparing the treatment afforded to male and female employees—not whether the company's attendance policy was lawful or reasonable on its face.]

b. Disparate Impact. The second major theory of employment discrimination is known as disparate impact. Unlike disparate treatment, proof of discrimination under the disparate impact theory focuses upon the impact or consequences of employment practices, rather than the employer's motive or intent. Statistical evidence is frequently determinative in disparate impact cases.

Under the disparate impact rule, an employer may not use an employment practice (e.g., a pre-employment aptitude test) that, even though neutral on its face and applied to all applicants or employees, disproportionately excludes members of a protected category. An employer can defend its reliance on such an employment practice only if the employer proves that the challenged practice is job related for the position in question and consistent with business necessity.

The Equal Employment Opportunity Commission has long advocated the "80%" (or "four-fifths") rule to assess when a particular employment practice has an unlawful disparate impact. Some standard is necessary, because all employment criteria exclude some applicants or employees.

Essentially, the EEOC has determined that if the selection rate of a particular employment practice for a protected category is less than 80% of the selection rate for the relevant comparison group, that employment practice has a disparate impact. While the administrative 80% rule has not been incorporated into statute, the EEOC and the courts look to the rule as a guide in determining disparate impact challenges.

> **[ASA Tip:** To illustrate: Let us assume a staffing firm requires that all applicants for word processing positions have a high school diploma and one year of word processing experience. If these requirements exclude 10% of Caucasian candidates and 40% of African-American candidates, these requirements would have an unlawful disparate impact on African-Americans, because their "pass" rate of 60% is less than 80% of the Caucasian "pass" rate of 90% (i.e., 60% × 90% = 54%). The staffing firm could defend these requirements only by showing that they were job related and consistent with business necessity—a difficult standard to meet.]

c. Retaliation. Many federal and state statutes provide protection against retaliation. For example, Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act, the ADA, the Fair Labor Standards Act, the Equal Pay Act, and the Family and Medical Leave Act all prohibit employers from taking adverse action against an employee for having engaged in "protected activity." It is unlawful for an employer to retaliate (e.g., fire, demote, transfer to less attractive duties) against an employee, a former employee, or an applicant because that individual has engaged in protected activity, such as (a) opposing discriminatory practices by the employer; or (b) filing charges, testifying, assisting, or participating in any proceeding, investigation, or hearing concerning prohibited discriminatory practices. An employer that retaliates against an employee who has exercised his or her rights under the discrimination laws may be held liable for engaging in unlawful conduct—even if the employee's original discrimination claim proves to be without merit.

In order to prove a claim of retaliation, an employee must establish a causal connection between the protected activity and an adverse employment action (e.g., termination, demotion, transfer to a less desirable position, poor employment reference). Very often, this causal connection is established by showing that the adverse employment action occurred in close temporal proximity to the protected activity.

> **[ASA Tip:** A staffing firm that has been formally charged with discrimination by one of its employees may want to consider taking the following steps to maximize its protection against a subsequent retaliation claim by that employee:
> 1. Do not discuss the discrimination charge with the employee who made the charge or, unless absolutely necessary, with other employees. Any discussions concerning the charge should be limited to those supervisors and officials with a strong need to know. The decision maker's lack of knowledge that the employee had made a complaint is a strong defense to a claim of retaliation.
> 2. Do not take disciplinary action against an employee for making a complaint of harassment or discrimination that is ultimately found to be without merit.

3. If contacted by prospective employers concerning job references for the employee in question, do not inform the prospective employers about the discrimination charge. Because the antiretaliation rules also protect former employees, this "tip" also applies to job reference inquiries concerning former employees.
4. Treat the employee in question as if he or she had not made the discrimination charge. Do not, for example, instruct superiors to "watch" and "report on" the employee, deny the employee privileges (e.g., coffee breaks, personal telephone calls) that he or she had prior to making the claim, or penalize the employee for minor offenses that had previously been ignored.
5. If discipline or termination of the employee is justified by valid employment considerations, be sure to document thoroughly the employee's offense and the resulting disciplinary decision. Before taking adverse action against an employee who has engaged in protected activity, review and follow established disciplinary procedures.]

d. Harassment. While sexual harassment is perhaps the most notorious type of unlawful job-related harassment, it is also unlawful for employers to harass or condone the harassment of applicants or employees on the basis of race, age, religion, national origin, disability, or other protected class status. As a general proposition, it is unlawful for employers to harass applicants or employees on any of these bases or to permit such harassment by supervisory personnel. An employer is also likely to be responsible for harassment by nonsupervisory personnel if the employer knew or should have known about the harassment.

i. Racial Harassment. To sustain an unlawful racial harassment claim, the aggrieved individual must generally show more than an isolated or sporadic racial comment; rather, there must be a concerted pattern of harassment or a working environment heavily charged with racial slurs and epithets. In addition, provided that no managers were involved in the offensive conduct, most courts require the employee to establish that the employer failed to take reasonable steps to prevent and/or remedy the racial harassment.

ii. National Origin Harassment. Derogatory epithets based on national origin, like comparable epithets based on race, are illegal if made by management and occur with relative frequency. Where derogatory epithets are uttered by co-workers, the question of whether the employer has violated federal law generally depends on the frequency and egregiousness of the comments and upon whether a manager knew or should have known of the improper conduct.

As with racial harassment, isolated epithets or comments will not be sufficient to establish unlawful national origin harassment. The actions of the employer or the employer's failure to correct and prevent epithets or harassment on the basis of national origin will be relevant to assessing the employer's liability.

iii. Sexual Harassment. Sexual harassment in the workplace is a form of discrimination on the basis of sex. In 1998, the Supreme Court held that sex discrimination consisting of same-sex harassment is also prohibited by federal law. Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, prohibits discrimination "because of…sex" and therefore protects men as well as women harassed by members of the same sex. Sexual harassment is sometimes defined by the EEOC as unwelcome sexual advances, requests for sexual favors, and other verbal or

physical conduct of a sexual nature directed at an employee. Claims alleging sexual harassment fall into two broad categories:

> Quid Pro Quo Harassment. This type of sexual harassment occurs when (1) an employee suffers a job detriment (e.g., a termination or demotion, or loss of a promotion or raise) for refusing to accede to unwelcome sexual demands, requests for sexual favors, or other verbal or physical conduct of a sexual nature, or (2) a job benefit (e.g., a promotion or raise) is conditioned upon submission to such unwelcome sexual conduct. This type of harassment always involves a supervisory-level employee and a subordinate.
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> Hostile or Offensive Working Environment. This type of sexual harassment occurs when an employer creates or allows a sexually discriminatory or abusive work environment to exist. To be unlawful, the sexual harassment must be sufficiently severe and pervasive so as to alter the conditions of the employee's employment or create an abusive environment. This type of harassment can arise from the action of

iv. Liability for Harassment. Whether a staffing firm will be liable for harassment depends not only on the harassment alleged to have occurred but also on the type of position the alleged harasser holds. A staffing firm may be liable for (1) the acts of its supervisors and managers, (2) the acts of one employee toward another, and (3) the acts of a client, its employees, or both, particularly if the staffing firm knows or reasonably should know that one of its employees is being harassed and fails to take prompt action to remedy it and/or to insist that the client do so.

Supervisors and Managers. An employer is automatically liable for quid pro quo sexual harassment committed by its supervisors and managers. This means that a staffing firm will be responsible for unlawful sexual harassment by a manager or supervisor even though the senior management may not have known of such conduct.

In a "hostile environment" case, an employer is liable for a hostile environment created by a supervisor or manager. However, when no tangible employment action is taken against the employee, such as discharge, demotion, or undesirable reassignment, an employer may raise an affirmative defense to a hostile environment claim by proving (1) that the employer exercised reasonable care to prevent and correct the harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm (e.g., an internal corporate complaint procedure).

Co-Employees. An employer will be liable for a "hostile environment" created by its nonsupervisory employees if the employer knew or should have known about the offensive atmosphere, unless it took immediate and appropriate corrective action designed to eliminate and prevent further harassment.

Clients. A staffing firm may be liable for harassment committed by its clients, nonemployees, and other third parties if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

> **[ASA Tip:** As co-employers with potential joint and/or individual liability, staffing firms and clients need to cooperate with each other to resolve sexual harassment complaints.]

v. Preventive Measures. Establishing and enforcing a carefully drafted policy against harassment, including sexual harassment, is a good way for a staffing firm to help prevent harassment from occurring and to assist the staffing firm in defending any claims that do arise.

> **[ASA Tip:**
> Staffing firms should develop a written sexual harassment and discrimination policy to be posted, communicated, and distributed to all employees, including its office staff as well as employees assigned to work at client work sites. To maximize its effectiveness, such a policy should include
> 1. A prohibition against engaging in sexual as well as other conduct that could be offensive to other employees based upon sex, race, religion, age, disability, national origin, or other characteristics protected by law
> 2. Explicit notice that violation of the harassment and discrimination policy will result in discipline, including possible discharge
> 3. A detailed, user-friendly, internal complaint procedure that provides appropriate assurances of confidentiality and enables employees to report allegations of sexual harassment to designated management or human resource personnel without fear of reprisals]
> 4. Notice of the employer's intent to investigate such allegations**]**

> **[ASA Tip:** A staffing firm must act quickly when confronted with a complaint of sexual harassment. Once a complaint has been made, the most prudent course for a staffing firm to take is to consult with employment counsel and to investigate the allegation. The investigation could include one or more of the following:
> 1. Interview(s) of the alleged victim
> 2. Interview(s) of the alleged harasser, who should be advised of the prohibition against retaliation against the complainant or any witnesses
> 3. Interview(s) with witnesses or other persons who may have knowledge of the harassment or the parties' relationship
> 4. Interview(s) with the alleged harasser's supervisor
> 5. A physical inspection of the work site
> 6. An examination of relevant documents and records
> Investigations should be conducted expeditiously to maintain the credibility of the system and prevent lingering suspicions and damage to employee morale. They will also help an employer avoid accusations that it condones or is attempting to "cover up" harassment. Any investigation should be kept as confidential as the circumstances permit. Only those individuals with a "need to know" (e.g., witnesses and those who will make the decisions) should be informed. Each, in turn, should be advised not to speak with others about the investigation. Failing to maintain confidentiality could lead to claims by the victim or the accused, including claims of invasion of privacy, infliction of emotional distress, or defamation.]

vi. How to Proceed After the Investigation. If, upon completion of the investigation, the staffing firm determines that the complained-of harassment occurred, prompt remedial action reasonably calculated to end the harassment is required. Such action may consist of one or more of the following: (1) discipline of the harasser up to and including termination of employment; (2) counseling of the harasser, sending the harasser for EEO or sexual harassment prevention training,

or both; (3) remedying any loss of employment or tangible job benefit denied to the victim; and/or (4) reassigning the harasser to avoid reoccurrence or retaliation. It may be appropriate to advise the complainant that action was taken so he or she is aware that the employer is taking remedial steps to end the harassment.

> **[ASA Tip:** Staffing firms should follow these guidelines:
> - Train managers and supervisors about what to do in the event that they witness any incident or receive a complaint of sexual harassment.
> - Do not penalize or even give the appearance of penalizing the complainant under the guise of solving the problem (e.g., transferring the complainant).
> - Treat the matter seriously.
> - Avoid overbroad promises of confidentiality and/or anonymity.
> - Take steps to ensure the employee is not subjected to retaliation.
> - Scrupulously adhere to the "need to know" rule.
> - Safeguard privacy and documents.]

vii. Remedies for Sexual Harassment Claims. In quid pro quo sexual harassment cases, the aggrieved individual is entitled to back pay with interest, reinstatement or advancement to the position unlawfully denied, attorneys' fees, and costs. In addition, under the Civil Rights Act of 1991, victims of any form of sexual harassment may sue to recover compensatory and punitive damages. The availability of monetary damages for sexual harassment of the "hostile environment" variety has increased the number of such cases.

2. Issues Commonly Faced by Staffing Firms

a. Application of Equal Opportunity Laws in the Client Setting. In December 1997, the Equal Employment Opportunity Commission issued a "Policy Guidance on Contingent Workers" that explains how the EEOC intends to enforce federal equal employment opportunity laws that apply to contingent workers placed by temporary help firms and other staffing firms.

The guidance is not legally binding on the courts but, like any regulatory guidance from a federal agency, is instructive to courts in cases involving temporary workers. In general terms, the guidance concludes that in the typical temporary help assignment, where both the staffing firm and the client have the right to control the employee, they will be considered joint employers and both will be liable for unlawful discriminatory conduct directed towards temporary employees, provided they both have the statutory minimum of employees (i.e., 15 employees for Title VII and ADA coverage, and 20 employees for Age Discrimination in Employment Act coverage). As such, the EEOC disagrees with certain lower court rulings that staffing firms are not employers of temporary employees whom they hired and placed in job assignments.

Other key points emphasized in the guidance follow.

- Staffing firms must hire and make job assignments in a nondiscriminatory manner.
- Staffing firms have an obligation to take immediate corrective action if they learn that one of their employees has been discriminated against or harassed by a client, and to "insist" that their clients do so as well.

- Even if the client and the staffing firm do not qualify as joint employers of the temporary employee, either of them could still be liable under the EEO laws if it interferes with the employee's employment opportunities for an unlawfully discriminatory reason.
- A staffing firm is liable if it honors a discriminatory job order or if it knows the client is rejecting employees in a protected class.
- A staffing firm that replaces an employee who was removed from an assignment by a client for a discriminatory reason is viewed as participating in the discriminatory conduct and is liable for such discrimination.

In 2000, the EEOC Enforcement Guidance on Application of ADA to Contingent Workers was issued. The purpose of the 2000 Enforcement Guidance is to "address unique issues not addressed in the EEOC's 1997 enforcement guidance…" The guidance clarifies the following points:

- A staffing firm or client may not make pre-employment disability-related inquiries or require medical examinations.
- An offer to place an individual on a roster for future assignments is not an offer of employment, while giving an employee an assignment with a client is.
- A staffing firm or client may make disability-related inquiries and require medical examinations after the firm offers an individual "an actual work assignment with a client and before his or her duties begin," so long as the inquiry is made of all individuals within the same job category.
- A staffing firm or client may revoke an offer of employment if the results of a medical examination are not received before an assignment begins.
- A staffing firm or client may ask questions about a disability or require a medical examination after an employee is employed, so long as the questions or examination are job-related and consistent with business necessity.
- "Typically, only the staffing firm is an applicant's prospective employer during the application process;" therefore, the staffing firm is "obligated to provide a reasonable accommodation for the application process."
- Both the client and staffing firm "are obligated to provide a reasonable accommodation that the worker needs on the job."
- Either the client or the staffing firm may "claim undue hardship if a reasonable accommodation cannot be provided quickly enough to enable a staffing firm employee to begin, or to complete, a temporary work assignment in a timely manner."
- Both the client and staffing firm may claim undue hardship if an accommodation requires "significant expense," but if one entity's resources alone are insufficient to provide an accommodation and the other entity refuses to contribute, only the entity that made a good faith effort to obtain a contribution from the other may claim undue hardship. If the staffing firm can claim undue hardship and the client cannot, the staffing firm should offer the employee the next available assignment for which the employee is qualified, and an entity that refuses to contribute to the cost of a reasonable accommodation may be liable for a failure to accommodate even if the other entity has provided the accommodation.
- An entity that has the resources to provide a reasonable accommodation must do so even if the other entity refuses.
- A staffing firm and/or its client will be liable for violating the ADA if the entity applies a qualification standard, either directly or at the direction of the other entity, that tends to screen out individuals with disabilities and is not job-related and consistent with business necessity, or knows, or has reason to know, that the other entity is applying such a standard.

- Pre-employment tests used to screen applicants must accurately measure job skills and not the individual's disability

> **[ASA Tip:** If a staffing firm believes that a client has discriminated against one of the staffing firm's employees, it should take appropriate corrective measures, which may include the following:
> 1. Ensuring that the client is aware of the alleged misconduct
> 2. Asserting the staffing firm's commitment to protect its employees from unlawful discrimination and harassment
> 3. Insisting that prompt investigative and corrective measures be taken
> 4. Giving the employee the opportunity to take a different job assignment at the same rate of pay
> 5. Ensuring that the employee is not retaliated against for asserting concerns
> According to the EEOC, the staffing firm should not replace a temporary employee removed by a client for discriminatory reasons, and it should not assign other employees to that work site unless the client has undertaken corrective and preventive measures to ensure that the alleged discrimination does not recur. Otherwise, the staffing firm could be liable, along with the client, if an employee later assigned to that client is subjected to similar discriminatory conduct.]

b. Employment Qualifications. Federal discrimination law does not prohibit the use of employment qualifications or tests that are tailored for the job in question. However, employment decisions that are based on qualifications and tests that screen out a disproportionate number of members of a protected class may be unlawful. In addition, an employer cannot intentionally exclude a particular protected group (e.g., "no women need apply") from consideration for a job.

However, it is not unlawful for an employer to discriminate in hiring or promoting people on the basis of an employee's religion, sex, or national origin where such a factor is a bona fide occupational qualification (BFOQ) that is reasonably necessary to the normal operation of the employer's business. While this BFOQ exception for religion, sex, and national origin applies only to hiring and promotion decisions, in limited circumstances age also can be a BFOQ that employers may lawfully consider in making termination decisions, provided that the age of employees is reasonably necessary to the normal operation of the employer's business.

The courts have interpreted the BFOQ exception extremely narrowly and have placed the burden on the employer to demonstrate the existence of a BFOQ. Thus, while a sex-based BFOQ exists in the small number of cases where the job absolutely requires employees with the particular characteristics of one sex—an actor or locker room attendant—a BFOQ cannot be based on stereotyped characteristics of the sex (e.g., that women are less capable of aggressive sales work than men) or on client preference (e.g., the client states a desire to work only with persons of one sex or only with younger employees).

e. Hiring. It is unlawful under federal law to refuse to hire an individual because of his or her race, sex, religion, disability (if he or she is qualified for the job), national origin, age (40 years of age and over), or other protected category. (such as on the basis of genetic information). Discriminatory hiring claims often arise in one of three situations:

1. Several candidates apply for a particular position and the employer selects a nonminority candidate who appears to have paper credentials weaker than those of candidates who are members of protected classes.
2. An employer's existing workforce contains few members of a protected class, and qualified applicants from that class are rejected during a period when the employer is seeking new employees.
3. An employer relies substantially on subjective hiring criteria (e.g., personal interviews by supervisors) and the ultimate employment decision appears based on personal preference rather than job-related criteria such as skill or experience.

Moreover, certain hiring criteria, while nondiscriminatory on their face, have the effect of screening out a disproportionate number of individuals in a protected class. For example, an employer's rejection of applicants based on their height or weight or an English-language requirement may result in discrimination on the basis of sex or national origin. Unless the employer can show that these criteria are justified by strict business necessity—i.e., are related to the applicant's ability to perform the job—employers should avoid relying on such criteria in rejecting applicants.

> **[ASA Tip:** Care must be taken to avoid creating the impression that unlawful factors are taken into account in making assignment decisions. For example, do not record data about a temporary employee that could not be lawfully taken into account in making the hiring decision.
>
> Photographs of temporary employees are problematic. Photographs in personnel files or on a computer screen often reveal an employee's age, disability, race, sex, national origin, or religion. It is therefore unwise to review or rely upon photographs of temporary employees before making an assignment because that practice may be viewed as evidence of a staffing firm's intent to rely upon unlawful criteria in making employment or assignment decisions.]

f. Terms and Conditions of Employment. After an employee is hired, the prohibitions against discrimination apply to virtually every decision an employer makes concerning an employee's terms and conditions of employment. Thus, an employer is prohibited from discriminating when it trains, assigns, promotes, demotes, transfers, disciplines, terminates, pays, or provides benefits to employees.

g. Discipline and Termination. A basic test to determine whether an employer's disciplinary or termination decision is discriminatory is whether similarly situated employees engaging in similar conduct were treated in a similar fashion.

3. Classes Protected by the Equal Employment Opportunity Laws

a. Race. Employers are prohibited from discriminating against employees or job applicants on the basis of race by both Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991) and the Civil Rights Act of 1866.

b. Sex. Sex discrimination in employment, including sexual harassment, is prohibited by Title VII. In addition, the Equal Pay Act of 1963 prohibits wage differential on account of sex for equal work in jobs that require substantially equal skill, effort, and responsibility and that are performed under similar working conditions.

Three particular types of sex discrimination issues merit additional discussion because they are likely to be confronted by temporary help services: treatment of pregnant employees, state protective laws and compensation practices.

i. Pregnant Employees. In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA), which provides that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" is equivalent to discrimination on the basis of sex. Under the PDA, it is unlawful for an employer to differentiate between pregnancy-related and other temporary physical disabilities in making employment decisions (e.g., hiring, promotions, assignments) or in granting fringe benefits, including leave policies. Here are some examples of what this means:

- If a health insurance policy covers 80% of the costs of employee illnesses, it must cover 80% of pregnancy-related expenses.
- Any policy that is applied to pregnant employees, such as requiring a physician's statement, must be applied to employees with other disabilities.
- Subject to the Family and Medical Leave Act, if applicable, a nondisability-related child care leave should be granted or declined on the same basis as leave to employees for other nonmedical reasons.
- A uniform maximum length for a leave due to a pregnancy-related disability cannot be established, unless there is a maximum length of time for other medical disabilities.
- Employers must provide the same health benefits to the pregnant spouses of male employees as are provided to female employees.

ii. State Protective Laws. In the early part of this century, many states adopted laws intended to protect women from the perceived perils of industrial life. Those laws included restrictions on the number of hours a woman could work per day, or prohibitions on work by women for certain periods of time before and after childbirth. Courts have generally held that an employer facing a claim of sex discrimination cannot rely on these laws as a valid defense to the claim or as a basis for a BFOQ exception.

iii. Discriminatory Compensation. There are essentially two types of claims alleging sex-based discrimination in rates of pay: equal pay claims and comparable worth claims. Equal pay claims allege sex discrimination in pay between jobs that are substantially similar in the amount of skill, effort, and responsibility they require and that are performed under similar working conditions. Thus, equal pay claims have been successfully brought by female bank tellers whose wages were less than male tellers, female stock clerks paid less than their male counterparts, and female hospital aides paid less than male orderlies

iv. **'Glass Ceiling.'** An evolving issue in the area of sex discrimination is the claim that some companies decline to promote women to senior executive positions (i.e., they create a "glass ceiling" above which women cannot advance).

c. Religion. Title VII prohibits employers from discriminating on the basis of religion. This prohibition generally arises in two contexts. First, an employer cannot treat an employee differently as to his or her terms or conditions of employment because of religion.

Second, an employer is required to reasonably accommodate the religious needs of its employees. The question of accommodation usually arises in the conflict between religious practices and work schedules (e.g., an employee's religious beliefs forbid work on a day on which he or she is scheduled to work). An employer must attempt to reasonably accommodate the needs of an employee whose religious beliefs conflict with work, unless such an accommodation causes undue hardship to the conduct of its business.

Significantly, an employer need not incur more than minimal costs, in terms of lost efficiency or extra expenses, to accommodate the employee's religious beliefs. Thus, one court held that an employer met its duty to accommodate an Orthodox Jewish employee's religious needs by offering him the chance to work on nonreligious holidays in exchange for not working on his days of religious observance. The employer was not required to go so far as to hire a substitute employee, have a supervisor substitute, do without the employee, or direct other employees to trade with him. In addition, the Supreme Court has held that an employer meets its duty by offering any reasonable accommodation; an employer need not accept the employee's preferred accommodation.

> **[ASA Tip:** A staffing firm faced with a religion-based scheduling problem may consider attempting to reach a reasonable accommodation with the employee through the following alternatives:
> - Attempt to find a voluntary substitute to swap days off with the employee
> - Allow the employee to transfer or change the conflicting job assignment
>
> Institute flexible scheduling, which might include the use of lunchtime in exchange for early departure, or the use of floating or optional holidays]

d. National Origin. Discrimination on the basis of national origin is prohibited by the Civil Rights Act of 1866. Title VII also prohibits discrimination on the basis of national origin by employers of 15 or more employees. Employers of between four and 14 employees are prohibited from discriminating on the basis of national origin under the Immigration Reform and Control Act. An individual's national origin is defined as the country from which that individual came or from which that individual's forefathers came. Thus, national origin discrimination claims can be brought by foreign-born individuals (e.g., a person born in Hungary) as well as individuals who are born in this country but whose ancestors came from a foreign country (e.g., a person of Spanish descent).

National origin claims commonly arise in two contexts:

i. Hiring Criteria. Because of their effect of excluding a disproportionate number of members of a particular national origin group, some hiring criteria used by employers may be unlawful (e.g.,

minimum height or weight requirements) unless the employer can demonstrate that those criteria are necessary to the performance of the employee's duties.

ii. English-Only Rule. A rule requiring applicants to speak or write English fluently or prohibiting employees from speaking their native language on the job may violate the ban on national origin discrimination unless these rules are justified by business necessity.

Courts are more likely to uphold limited language restrictions. For example, work rules requiring sales personnel to speak English to clients or insisting that secretaries answer the telephone in understandable English would probably be sustained, whereas a rule prohibiting the use of another language between two employees in a private conversation on the employer's premises while on a break would be very difficult to sustain in light of the probable absence of any business need to justify such a sweeping rule.

A closely related problem is the termination of an employee because of the employer's belief that the employee was unsuitable for employment because of a foreign accent. Unless an employee's lack of English skills actually interferes with his or her ability to perform the job, an employer risks violating the ban on national origin discrimination if it relies on an accent as the basis for exclusion from that job.

> **[ASA Tip:** An English-only rule at the workplace may be found lawful if:
> - The rule is applied only at certain places and times (e.g., in areas open to clients or while the employee is on duty);
> - It is justified by business necessity (e.g., the clients speak English); and
> - The employer has notified the employees of the rule, preferably in writing.**]**

e. Age. Unlike the other previously discussed bases of discrimination, age discrimination is not prohibited by Title VII. Instead, age discrimination is proscribed by the Age Discrimination in Employment Act of 1967, which prohibits discrimination in employment against individuals age 40 years and older.

An individual may state an ADEA violation even if his or her replacement (i.e., the person who got the job or to whom his or her duties were reassigned) is also over the age of 40.

> **[ASA Tip: Age Discrimination in Employment Act**
> The closer in age the individual claiming an ADEA violation is to the replacement, the weaker the inference of age discrimination, even if the replacement is under 40 years old. However, if the individual claiming an ADEA violation is substantially older than the replacement, the inference of age discrimination is stronger, even if the replacement also is over the age of 40.**]**

i. Defenses. We will discuss six defenses to an age discrimination claim:

1. The employer's decision was based on "reasonable factors other than age" (RFOA).
2. Age was a bona fide occupational qualification.
3. The employer's compliance with the ADEA would violate the laws of a foreign country where the employer is located.
4. The employer observed the terms of a bona fide seniority system.

5. The employer observed the terms of a bona fide employee benefit plan.
6. The employer discharged or disciplined the individual for good cause.

ii. RFOA or Good Cause. The crux of both the RFOA defense and the good cause defense is that the employer's action was based not on the employee's age but on some other legitimate business reason. For example, an employer's decision not to hire a particular applicant aged 44 because he does not possess the necessary educational background is based on a reasonable factor other than age and does not violate the ADEA. Similarly, an employer's decision to terminate a 52-year-old employee for unsatisfactory job performance is not discrimination because it is based on good cause.

iii. BFOQ. The BFOQ defense is used by employers to justify blanket age limitations, such as a refusal to consider any applicant over age 50. To establish a BFOQ, the employer must show both of the following:

- An age limitation is reasonably necessary to the essential operation of the employer's business.
- There is a substantial basis for believing that all persons who are beyond the age limitation could not perform the job safely or efficiently, or it is highly impractical to deal with persons over or under the age limitation on an individual basis to determine if each has the necessary qualifications.

> **[ASA Tip:** A refusal to consider applicants over age 40 for interstate bus driver positions and a mandatory retirement age of 60 for private airline pilots have been upheld as BFOQs. Very few age-based BFOQs have been successfully established by employers, except when dealing with jobs involving public safety.]

iv. Bona Fide Seniority System. Actions taken by an employer in observing the terms of a bona fide seniority system are not unlawful. To be bona fide, a seniority system must meet the following requirements:

- The system must be communicated
- and applied to all employees regardless of age.
- It may take into account merit, capacity, and ability, but it must make length of service the primary criterion for making employment decisions.
- It should not give employees with longer service lesser rights.
- Importantly, even if a seniority system is bona fide, it cannot require involuntary retirement of any employee on the basis of age.

v. Bona Fide Employee Benefit Plan. Employers do not violate the ADEA in observing the terms of a bona fide employee benefit plan (such as a retirement, pension, or insurance plan) that is not a subterfuge to avoid the purposes of the ADEA. An employee benefit plan is bona fide if its terms have been accurately described in writing to all participants, and it actually does provide the benefits to participants.

> **[ASA Tip:** Employers desiring to maximize their chances of establishing that their early retirement plans are voluntary have taken the following measures in implementing a retirement plan:
> 1. Employees are clearly informed that the plan is entirely voluntary and a decision to reject the offer will not have an adverse effect on their employment.
> 2. The plan is presented to employees in individual counseling sessions by someone other than their immediate supervisor.

3. Employees receive a follow- up phone call or counseling session in which their concerns are addressed and the voluntary nature of the plan is reiterated.
4. The employer documents its efforts to ensure that the plan is entirely voluntary.**]**

vi. **Reductions in Force**. Where business considerations require an employer to reduce its workforce, care should be taken to avoid terminating or laying off only or primarily older employees. Before individual employees are selected for layoff or termination, the employer should ensure that it can defend its selection decisions by objective factors other than the employee's age (e.g., performance evaluations).

f. Disability. The Americans With Disabilities Act prohibits discrimination against any qualified individual with a mental or physical disability. The following is a summary of the major provisions of Title I of the ADA.

> **[ASA Tip**: On Dec. 17, 1999, the Ticket to Work and Work Incentives Improvement Act was signed into law. It allows disabled individuals to join the workforce without losing their Medicaid coverage for up to four and a half years even if their income exceeds government-imposed limits.**]**

i. Definition of Disability. A disability is defined as a physical or mental impairment that "substantially limits" one or more "major life activities." The ADA protects not only those who are actually and currently disabled, but also those individuals who have a record of disability, those who are regarded as being disabled, and those who are known to have a relationship or association with another who is known to have a disability.

An individual currently using illegal drugs is not disabled within the meaning of the ADA and, therefore, an employer may refuse to hire or terminate such a person without violating the act. However, a former drug addict or a current drug addict who is no longer using drugs and is participating in a rehabilitation program is protected by the ADA. In contrast, an alcoholic is considered an individual with a disability even if that individual is currently abusing alcohol and is not in a rehabilitation program. Homosexuality, bisexuality, transvestism, transexualism, compulsive gambling, pyromania, and kleptomania are not considered disabilities under the ADA.

> **[ASA Tip:** Staffing firms should expect that many clients will be resistant to utilizing disabled employees and will pressure the staffing firm to assign only able-bodied individuals. Such discrimination is illegal and should be avoided. Where you suspect that an employee has been rejected because of a disability, every effort should be made to reassign that employee, and the former assignment with the client should not be filled.]

ii. Psychiatric Disabilities. In 1997, the Equal Employment Opportunity Commission issued a guidance on psychiatric disabilities and the ADA. The guidance generally treats psychiatric and other mental disabilities no differently than physical disabilities under the ADA, but it has very broad definitions of those psychiatric conditions that the EEOC believes qualify as disabilities under the ADA. The guidance has been the subject of controversy, and it has not been overwhelmingly endorsed by the courts. For example, a mental impairment that causes an individual to have regular, high levels of hostility toward

co-workers or a supervisor is deemed a disability by the EEOC but not by a majority of courts.

> [**ASA Tip**: Workplace conduct standards should be job-related for the position and consistent with business necessity. Discipline for violence, threats of violence, theft, destruction of property, and the like may be imposed on all employees, with and without a disability.]

iii. Substantial Limitation of Major Life Activity. The ADA defines a major life activity as a basic activity that the average person can perform with little or no difficulty, such as walking, seeing, hearing, breathing, sitting, standing, lifting, and reaching. A major life activity is substantially limited if the individual is unable to perform it at all or can only perform it for a restricted period of time or in a restricted manner. In 1999, the Supreme Court broadly interpreted the term "major life activity" to find that an individual with asymptomatic HIV infection had an ADA "disability."

> **[ASA Tip:** The effect of the amendments is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA. Now, the determination of whether a person has a "disability" under the ADA must not take into consideration use of a mitigating measure, such as medication, a prosthesis, or a hearing aid. Thus, a person who experiences no substantial limitation in any major life activity when using a mitigating measure still may meet the definition of having a "disability."**]**

iv. Qualified Individual With Disability. In order to be considered a qualified individual with a disability, the individual must meet the employer's education and/or experience requirements and be able to perform the "essential functions" of the job with or without a "reasonable accommodation."

v. Essential Functions of the Job. The essential functions of a job are the primary, as opposed to marginal, duties of the position in question. In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and result to be accomplished, rather than the manner in which the function is currently performed. A function will be considered essential if it entails one of these factors:

- The position exists to perform the function.
- There are a limited number of other employees available to perform the function or among whom the function can be distributed.
- The function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.

> **[ASA Tip:** Employers are encouraged to prepare detailed position descriptions stating the essential functions of each job and including any physical requirements associated with the position (e.g., shipping and receiving requires lifting of boxes weighing approximately 20 pounds to heights of 5 feet). Staffing firms should request copies of these descriptions from their clients and review the essential job functions when assigning employees for work in order to ensure that the employees are able to perform those functions, with or without a reasonable accommodation.]

One federal court has held that regular attendance "is considered a minimum function of any job." Consequently, an employee who is unable to come to work may not be considered a qualified individual under the ADA, unless the employee could perform the essential functions of the job with a reasonable accommodation (e.g., working from home) or could regularly attend work with a reasonable accommodation (e.g., a special parking space).

vi. Reasonable Accommodation. An employer is required to provide a reasonable accommodation in three situations: (1) to ensure disabled individuals equal opportunity in the application process; (2) to enable disabled employees to perform the essential functions of the job held or desired; and (3) to allow disabled employees to enjoy equal benefits and privileges of employment.

Pre-employment: Examples of accommodations an employer may have to make at this stage of the employment process include ensuring physical access to interview sites and providing large print or Braille applications and pre-employment tests, readers or sign language interpreters, and a telecommunication device for the deaf (TDD) telephone number.

During employment: Reasonably accommodating a disabled employee so that the employee can perform the essential functions of the job and enjoy the benefits and privileges of employment may involve making physical alterations (e.g., installing ramps, rearranging furniture, providing access to lunchrooms and lounges) or providing employees with special instruments to perform their jobs (e.g., a magnification device for a computer screen or a TDD). Additional accommodations may include a part-time or reduced work schedule, or reassignment of the employee to a vacant position the employee is capable of performing. To satisfy this requirement, a temporary help company will have to work very closely with its clients. A thorough understanding of each client's requirements and environment will be necessary before an educated determination can be made as to whether an accommodation is reasonable. In certain cases, the temporary help company may be required to provide its employee with some forms of accommodation (e.g., a step stool for a dwarf employee), but it will not be required to make physical changes to its client's premises.

The client is obligated to provide access to its facilities to disabled individuals, including disabled temporary employees. In other cases, the client may be required to make more extensive accommodations (e.g., providing special equipment for the hearing- or sight-impaired), especially if some of its own full-time employees require such assistance; consequently, the client is already under an obligation to provide accommodation and may be able to spread the cost more economically than the temporary help company.

vii. Undue Hardship. Employers are required to reasonably accommodate an otherwise qualified individual unless to do so would cause the employer "undue hardship." Undue hardship is defined as action requiring "significant difficulty or expense." The U.S. Supreme Court has held that it would be an undue hardship on the employer and other employees to permit a reasonable accommodation request to trump an existing seniority system. Factors to be taken into consideration in determining undue hardship include the cost of the accommodation, the overall financial resources of the employer and the impact of the accommodation on those resources, the nature of the employer's operations and the impact of the accommodation on those operations, the overall size of the employer and the number of its employees and the length of the assignment. Factors that should not be considered include the relative cost of the accommodation as compared with the employee's salary and the effect of the accommodation on overall employee morale.

These factors may be taken into account in the temporary help setting:

- *Length of Assignment.* It may be considered an undue hardship for a client to provide an accommodation for a disabled individual on a three-day assignment, but not if the assignment is long-term or indefinite. The EEOC and the courts will certainly be willing to impose greater burdens on the client to make those accommodations for long-term or indefinite assignments.
- *Existing Accommodation.* The client will be hard pressed to deny a particular accommodation to a temporary employee that is already, or has in the past, been provided to its regular employees.
- *Nature of the Assignment.* Obviously, undue hardship will vary depending on the type of assignment.
- *Number of Temporary Employees.* If temporary employees comprise a significant proportion of the client's work force, courts are more likely to require accommodations by that client than in the case of an occasional temporary employee assigned to fill in for an absent employee.

viii. Direct Threat to Health or Safety. An employer does not have to hire an applicant or continue to employ an employee who poses a direct threat to his or her own health or safety or that of others. This determination must be based on an individualized assessment of the individual's present ability to safely perform essential job functions, and the "direct threat" standard must apply to all applicants or employees, and not just to individuals with disabilities. If an employer determines that an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level.

In order to establish that a direct threat exists such that an employer may refuse to hire or continue to employ a disabled individual, the employer must show:

- There is a significant risk of substantial harm.
- The risk is specifically identified.
- The risk is current rather than speculative or remote.
- The assessment of the risk is based upon objective medical or other factual evidence regarding a particular individual.
- The risk cannot be eliminated or reduced to an acceptable level by reasonable accommodation.

  [ASA Tip: Although the client's identification of the danger or risk of a particular job or work site would probably be considered as evidence in ascertaining whether there is a direct threat to health or safety, a staffing firm should familiarize itself with the risk factors of a client's job assignments and work site so that it can make an independent determination of whether a threat exists before rejecting an applicant or employee for a particular assignment.]

ix. Pre-Employment Inquiries. Employers are prohibited from asking job applicants about their health, medical history, or disabilities. An employer may ask an applicant if he or she can perform specific functions and ask the applicant to describe how he or she would perform them.

x. Medical Examinations and Inquiries. Medical exams and inquiries before a job offer is made are not permitted under any circumstances. After a conditional offer of employment is made, such examinations and inquiries are permissible under the circumstances discussed in Chapter 7.

xi. **Other Pre-Employment or Post-Employment Testing.** Tests that tend to screen out individuals with disabilities may not be used unless they are job related and consistent with business necessity.

> **[ASA Tip:** A staffing firm should ascertain a client's testing requirements for a specific job order and assess whether such testing appears to be job-related or may adversely affect a disabled applicant.]

xii. The ADA and Workers' Compensation Laws. An employer may not inquire into an applicant's workers' compensation history before making an offer of employment. After making a conditional job offer, an employer may ask about a person's workers' compensation history in a medical inquiry or examination if such inquiry or examination is required of all applications in the same job category. In addition, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future.

xiii. The ADA and the Pregnancy Discrimination Act. As discussed in the Title VII section of this chapter, the Pregnancy Discrimination Act requires employers to provide the same benefits to employees with pregnancy-related disabilities as they give to employees with other short-term medical disabilities. The PDA was broadened with the enactment of the ADA Amendments Act of 2008. Of particular relevance to pregnancy is that there is no requirement under the ADAAA that an impairment must last a particular length of time to be considered substantially limiting. Consequently, the EEOC predicts that it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even if they are only temporary. It is acknowledged, however, in 2014 guidance issued by the EEOC, that pregnancy itself is not deemed to be an impairment within the meaning of the ADA, and thus by itself is not a disability.

xiv. **The ADA and the Family and Medical Leave Act.** The coverage and eligibility requirements under these two laws are quite different, and employers should be careful to differentiate between them. For example, the ADA covers employers with 15 or more employees, whereas the Family and Medical Leave Act only covers employers with 50 or more employees. The ADA applies to qualified applicants and employees with a disability, whereas the FMLA only covers employees, and they do not have to have a disability.

An employee eligible for FMLA medical leave also may be a qualified individual with a disability entitled to reasonable accommodation under the ADA if the employee's "serious health condition" as that term is defined under the FMLA also meets the ADA's definition of a "disability." However, FMLA leave is an entitlement rather than an accommodation, and covered employers must provide the leave to eligible employees regardless of whether it causes the employer undue hardship. If an employee's serious health condition also qualifies as a disability under the ADA, the employer may have to do more to accommodate the employee than simply providing the leave required by the FMLA, and in some instances it may be required to provide additional leave as a reasonable accommodation.

Only injured employees who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether the employees satisfy the criteria for receiving workers' compensation benefits. Thus, not every employee injured on the job will meet the ADA definition, because work-related injuries do not always cause a physical or mental impairment severe enough to "substantially limit" a major life activity.

xv. **The ADA and Social Security Disability Insurance.** Although Social Security disability insurance (SSDI) provides benefits for "disabled" persons who are unable to work or who cannot engage in substantial gainful employment, an employee who qualifies for SSDI benefits may nevertheless pursue an action for disability discrimination under the ADA because the employee might be able to perform the essential functions of the job with reasonable accommodation. In 1999, the Supreme Court held that application for and receipt of SSDI benefits do not bar an employee from pursuing an ADA claim, although the employee will be required to explain the apparent inconsistency with the necessary elements of an ADA claim.

4. Coverage, Enforcement, and Requisite Reports and Records

a. Title VII

i. Coverage. Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, applies to all employers in the U.S. engaged in an industry "affecting commerce" that have 15 or more employees on payroll for each working day in each of 20 or more calendar weeks in the current or preceding year. As a practical matter, once an employer meets the size requirements, it almost always meets the "commerce" criterion.

"Employee" is broadly defined as an individual employed by an employer; thus, part-time and seasonal employees, as well as executives and supervisors, are included in calculating the number of employees for Title VII coverage purposes. Once coverage attaches, the employer remains subject to Title VII's coverage for two calendar years.

ii. Joint Employers. When a temporary employee alleges discrimination arising while on an assignment to a client (e.g., a client terminates the assignment because of the temporary employee's race or religion, etc.), the staffing firm and the client may be considered "joint employers" under Title VII. Thus, an employee may allege that a client exercises sufficient day-to-day direction and control so as to make that client his or her co-employer. If the employee can establish the joint employer relationship, both the staffing firm and the client will be liable for a discriminatory act taken against that temporary employee.

> **[ASA Tip:** Under the Equal Employment Opportunity Commission Guidance, the staffing firm and the client will be viewed as joint employers in the typical staffing arrangement.]

iii. Enforcement. The Equal Employment Opportunity Commission is the federal agency charged with enforcing Title VII.

a. The Discrimination Charge. The enforcement of Title VII begins with the filing of a discrimination charge with the EEOC by a charging party, who is generally the person claiming to be aggrieved. All charges must be in writing, signed, and verified. Within 10 days after the filing of a charge, the EEOC must send a copy of the charge to the employer.

b. Deferral and Time for Filing. The time within which a charge must be filed with the EEOC depends on whether the alleged discrimination occurred in a state or locality that has a fair employment practice law enabling an administrative agency to investigate a discrimination charge of the type prohibited by Title VII, and whether that agency has been approved as a "deferral" agency

by the EEOC. In states or localities without such a deferral agency, a charge must be filed with the EEOC within 180 days of the alleged violation.

c. Investigation. Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, provides that an EEOC representative shall "have access to" and "the right to copy" any evidence that "is relevant to the charge being investigated." Courts have interpreted the "relevancy" requirement broadly. Thus, for example, the EEOC may be permitted to investigate an employer's hiring practices when the charge alleges a discriminatory termination.

d. **Reasonable Cause Determination.** After the completion of its investigation, the EEOC issues a written determination as to whether there is reasonable cause to believe that the charge is true. If it finds no reasonable cause, the EEOC dismisses the charge; and if the EEOC finds reasonable cause, it then attempts to "eliminate the alleged discrimination by informal methods of conference, conciliation, and persuasion."

e. **Conciliation.** Once the EEOC has made a reasonable cause determination, the employer is notified that the EEOC will undertake conciliation efforts and that an EEOC representative will attempt to arrange a date for discussion. The EEOC representative will then attempt to secure, through these discussions, an agreement that the employer will eliminate the alleged unlawful employment practice and take any other appropriate remedial action.

f. **Notice of Right to Sue.** After receiving a "right to sue" notice from the EEOC, an individual who files a charge with the EEOC has the right to bring a lawsuit. The right to sue notice may be issued at any of three junctures in the administrative process:

1. At the request of the charging party or person aggrieved, but only after the expiration of the 180-day period following the date the charge was filed

2. Following dismissal of the charge by the EEOC

3. Following failure of conciliation, if the EEOC has decided not to file a civil suit against the employer

The lawsuit must be filed within 90 days of the receipt of the right-to-sue notice.

g. **Available Relief.** Federal courts possess broad power to remedy Title VII violations. Thus, in lawsuits brought by either the EEOC or individuals, the relief awarded may include back pay, back benefits, reinstatement, retroactive seniority, front pay, an injunction enjoining unlawful employment practices, attorney's fees, and litigation costs.

iv. Reports and Records. Employers must keep personnel and employment records, including applications and records pertaining to hiring, promotion, layoff, termination, salary, and selection for training or apprenticeship, for a period of one year from the date the record is made or the personnel action taken, whichever is later. Employers are now required to maintain employment records for a period of one year for all temporary or seasonal employees, also. When an employee is involuntarily terminated, records on the individual must be kept for a period of one year after the termination. Other federal laws, as well as state laws, may have additional record-keeping requirements for employee records. When a discrimination charge has been filed, records of both the charging party and others holding similar positions must be preserved until final disposition of the charge.

Employers with 100 or more staff or leased employees (50 or more for government contractors) are also required to file annually an Employer Information Report, known as an "EEO-1" report. The filing date for EEO-1 reports is Sept. 30.
This report requires detailed information of the racial, ethnic, and sexual makeup of the employer's work force.

> **[ASA Tip:** The EEOC's instruction booklet accompanying the EEO-1 form provides that the term "employee" shall not include persons (except leased employees) on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control. For the purposes of the EEO-1 reporting, the EEOC includes staffing firms under the term "employment agency."
>
> The EEO-1 instruction booklet defines "leased employee" as a permanent employee provided by a staffing firm for a fee to an outside company for which the staffing firm handles all personnel tasks, including payroll, staffing, benefit payments, and compliance reporting. Please note that this is not the same definition of leased employee that is used in the Internal Revenue Code.
>
> In short, a staffing firm must count its staff employees and leased employees, as defined in the EEO-1 instruction booklet, for purposes of determining whether it employs 100 or more employees (50 or more for federal government contractors) and must report information concerning those employees on the EEO-1 form. Temporary employees do not have to be counted for EEO-1 reporting purposes.]

b. Civil Rights Act of 1866

The Civil Rights Act of 1866 guarantees to all persons the same right to make and enforce contracts as is enjoyed by white citizens. The act has been interpreted by the U.S. Supreme Court to prohibit discrimination by private employers against all races and ethnic groups, not only African-Americans and Hispanics.

i. **Coverage.** In 1989, the Supreme Court limited the scope of the act, holding that it covers only the employer's conduct at the time of "formation of the contract"—that is, hiring or promotion to a new and distinct position—and the employer's conduct that interferes with the employee's right to enforce the contract through the legal process.

However, the Civil Rights Act of 1991 overturned that Supreme Court decision and amended the act to clarify that it applies to all employment decisions by public and private employers.

ii. **Enforcement.** Unlike suits brought under Title VII, individuals who believe they have been discriminated against need not first file a charge with the EEOC. Instead, they may file a lawsuit directly in court.

a. **Limitation Period.** The act does not contain a specific time limit in which lawsuits must be brought. However, the U.S. Supreme Court has found that a four-year statute of limitations applies.

b. **Available Relief**. In addition to the back pay, reinstatement, and injunctive relief, plaintiffs suing under the act are eligible to receive compensatory damages for pain

and suffering arising out of the alleged discrimination (i.e., embarrassment, humiliation, and mental anguish). A back pay award under the act is not restricted to the two-year period specified for back pay recovery under Title VII. In addition, punitive damages may be awarded where the plaintiff can show malice or reckless indifference by the employer. There is no cap on available damages.

Generally, plaintiffs seeking compensatory and punitive damages under the act are entitled to a jury trial. However, if the only relief sought by the plaintiff is back pay and reinstatement, a request for a jury trial may be denied.

iii. Reports and Records. There are no reporting or record-keeping requirements under the act.

c. Equal Pay Act

i. **Coverage**. The Equal Pay Act is an amendment to the Fair Labor Standards Act. Coverage under the FLSA is discussed in Chapter 3.

ii. Enforcement. Although responsibility for enforcing the EPA is vested in the EEOC, a person making an EPA claim is not required to file a charge with the EEOC before bringing a lawsuit. Thus, an EPA claimant has two options: file a discrimination charge with the EEOC or bring a lawsuit directly in court.

If an EPA claim is filed with the EEOC, it will investigate the charge. If it finds a violation, the EEOC issues a letter of violation and is empowered to institute a civil suit against the employer for the violation. If the EEOC brings suit, the individual loses the right to bring a private lawsuit.

a. **Limitation Period**. An EPA lawsuit must be filed within two years of the alleged violation; for a willful violation, however, a suit may be brought within three years. A willful violation exists if the employer either knew or showed reckless disregard as to whether its conduct was a violation of the EPA.

The running of these limitations is not stopped by the filing of a charge with the EEOC. Thus, if the EEOC fails to bring a suit on behalf of an individual within the prescribed limitation period, the individual loses his or her right to recovery under the EPA.

b. **Available Relief.** Under the EPA, employees can recover not only back wages owed as a result of the violation, but, if the violation is found to be willful, they also can recover an equal amount in liquidated damages. In addition, the EPA authorizes the recovery of costs and attorneys' fees as well as injunctive relief. Compensatory damages for pain and suffering and punitive damages are not recoverable.

iii. Reports and Records. The record-keeping and reporting requirements under the FLSA, of which the EPA is a part, are discussed in Chapter 3.

d. Age Discrimination in Employment Act

i. Coverage. The Age Discrimination in Employment Act applies to all employers engaged in an industry affecting commerce that have 20 or more employees on payroll for each working day in each of 20 or more calendar weeks in the current or preceding year.

ii. Enforcement. As with Title VII and the EPA, authority for enforcing the ADEA is vested in the EEOC.

iii. Reports and Records. Employers are required to keep records that contain the following information about each employee: name, address, date of birth, occupation, rate of pay, and amount of pay earned each week. These records must be kept for three years.

In addition, to the extent that an employer keeps other personnel records, it must keep records relating to hiring, promotion, demotion, transfer, training, layoff, recruitment, test papers, the results of physical examinations, and job advertisements for a period of one year. Copies of employee benefit plans and seniority and merit systems must be kept by an employer for as long as the plans and systems remain in effect and for at least one additional year after termination.

A special rule provides that application forms and other pre-employment records of applicants for jobs that are known to be of a temporary nature must be kept for a period of 90 days. It is unclear whether this rule applies to the staffing industry. The EEOC has informally advised ASA that because the relationship between a staffing firm and its temporary employees is often viewed as more than casual, this special rule might not apply.

The ADEA does not impose reporting requirements.

e. The Americans With Disabilities Act

i. Coverage. The employment provisions of the Americans With Disabilities Act apply to employers with 15 or more employees.

ii. Enforcement. Authority for enforcing the ADA is vested in the EEOC.

f. Notice Posting Requirements. Title VII, the EPA, the ADEA, and the ADA require that notices that clearly set forth the rights of employees and job applicants under these laws be posted in conspicuous places for all employees to read. The EEOC has consolidated on one poster the information that must be publicly displayed by employers under federal antidiscrimination laws. Copies can be obtained from local EEOC offices.

B. Federal Law and Affirmative Action

Many staffing firms that directly or indirectly do business with the federal government are required to do more than refrain from employment discrimination. Under Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the regulations implementing each of these laws, companies that enter into government contracts or subcontracts have dual obligations:

- Companies must not discriminate against employees or applicants because of their race, color, religion, sex, national origin, or their status as a qualified handicapped individual, a disabled veteran, or veteran of the Vietnam era.
- Companies must take affirmative action measures to ensure that all employees and applicants are treated without regard to such factors.

For 40 years, however, the American Staffing Association has taken the position that the affirmative action rules do not apply to temporary employees. This position is based on the express exclusion of temporary employees from the definition of "employee" in the guidelines for completing EEO-1 reports, thus relieving employers of any obligation to include temporary employees in their reports.

ASA takes the position that, because the OFCCP affirmative action rules expressly refer to the EEO-1 report as the basis for developing and monitoring employer affirmative action plans, staffing firms and clients are not required to include temporary employees in their affirmative action plans.

> **[ASA Tip:** Office of Federal Contract Compliance Programs field auditors have on occasion disagreed with the industry's position that the EEO-1 exclusion for temporary employees exempts temporary employees from affirmative action requirements. The government, however, has never challenged the industry's position in court or issued regulations that specifically apply affirmative action rules to temporary employees. In light of this lack of response, ASA believes that the exclusion of temporary employees for EEO-1 reporting purposes provides a basis for asserting that the affirmative action rules do not apply to temporary employees.**]**

1. Executive Order 11246

This Executive Order, issued by President Johnson in 1965, sets forth the primary affirmative action obligations of government contractors and subcontractors.

a. Requirements

i. Equal Opportunity Clause

Executive Order 11246 requires that all government contracts and subcontracts exceeding $10,000 must include an equal opportunity clause. If an employer enters into government contracts or subcontracts, each of which is less than $10,000, and if over any 12-month period the aggregate value of the contracts exceeds $10,000, the employer is considered to have met the $10,000 threshold and must include the equal opportunity clause.

ii. Affirmative Action Program

Although the equal opportunity clause requires government contractors and subcontractors to "take affirmative action," the regulations implementing Executive Order 11246 impose special affirmative action requirements on each government contractor and subcontractor that employs 50 or more employees and has either a government contract or subcontract amounting to $50,000 or more, or has government bills of lading in any amount. A government contractor or subcontractor that meets these criteria must develop, implement, and maintain a written affirmative action program (AAP) for each of its establishments within 120 days after commencement of the contract or subcontract. Under the regulations, an AAP is a set of "specific and result-oriented procedures" to increase employment opportunities for minorities (defined as blacks, Spanish-surnamed Americans, American Indians, and Orientals) and women.

There has been no definitive ruling whether the term "employee" includes temporary employees employed by a staffing firm, and therefore the exclusion of temporary employees for EEO-1 reporting purposes may provide a basis for asserting that temporary employees should not be counted when determining whether a staffing firm that contracts with the government employs 50 or more employees.

b. Enforcement

Executive Order 11246 is enforced by the Department of Labor through the Office of Federal Contract Compliance Programs. The executive order is enforced in two ways: through the OFCCP's compliance reviews, and through the filing of complaints with the OFCCP.

c. Reports and Records
Executive Order 11246 and its implementing regulations do not require that specific records be kept by government contractors or subcontractors. However as a practical matter, the development of an AAP entails the preparation of detailed records of the minority and female makeup of the workforce. Contractors and subcontractors are required to afford the OFCCP, during its compliance reviews and complaint investigations, access to such records "as may be relevant to the matter under investigation."

2. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 was enacted by Congress to prohibit discrimination against, and promote the employment of, otherwise qualified handicapped individuals by government contractors and subcontractors.

a. Persons Protected by the Act
The Rehabilitation Act protects the same persons to the same extent as the ADA. The term "disability" used in the ADA means the same thing as "handicap" under the Rehabilitation Act.

i. Accommodation. Under the Rehabilitation Act, government contractors and subcontractors have the duty to make a reasonable accommodation to handicapped individuals to enable them to perform the job—unless the accommodation would impose an undue hardship on the conduct of the business. Again, the requirements of the Rehabilitation Act in this regard are identical to those of the ADA.

ii. Affirmative Action Clause. All government contracts and subcontracts of $2,500 or more must include an affirmative action clause in which the contractor or subcontractor agrees to

- Refrain from discriminating against qualified employees or applicants on the basis of a handicap
- Take affirmative action to employ, advance in employment, and otherwise treat qualified handicapped individuals without discrimination
- Post government-supplied notices setting forth the provisions of the affirmative action clause
- Notify labor unions of its commitments under the act
- Include the affirmative action clause in every subcontract of $2,500 or more

c. Enforcement
Like Executive Order 11246, the Rehabilitation Act is enforced by the OFCCP through compliance reviews of contractors and subcontractors and the filing of complaints with the OFCCP.

A handicapped person who believes that a contractor or subcontractor has violated the Rehabilitation Act may file a written complaint with the OFCCP within 180 days of the alleged violation.

3. The Vietnam Era Veterans' Readjustment Assistance Act of 1974

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Vietnam Veterans' Act) is designed to promote employment of qualified disabled veterans and veterans of the Vietnam era by government contractors and subcontractors.

For purposes of the Vietnam Veterans' Act, a "disabled veteran" is defined as a person entitled to disability compensation for a disability rated as 30% or more, or rated 10% or 20% in the case of a veteran who has a serious employment handicap as defined by the act, or a person who was discharged for a disability incurred or aggravated in the line of duty. A disabled veteran is qualified if he or she is capable of performing a particular job with reasonable accommodation by the contractor or subcontractor.

A Vietnam veteran is defined as a person who served on active duty for 180 days or more, any part of which occurred during the Vietnam era, and was not dishonorably discharged; or who was discharged with a service-connected disability after serving on active duty for any period during the Vietnam era.

> **[ASA Tip:** The American Staffing Association has taken the position that client orders filled from a staffing firm's database of qualified employees who have already been screened and hired are filled "from within" the staffing firm's own organization within the meaning of the regulations and, therefore, do not have to be listed with the state employment service. However, the American Staffing Association believes that classified recruitment ads placed by a staffing firm for the purpose of filling a specific client's order that cannot be filled from the firm's existing list of qualified employees, or to replenish its inventory of qualified employees in certain job categories, could be construed as announcements of "employment openings" to which the job listing requirement would apply. In this situation, staffing firms should comply with the law by providing copies of those recruitment ads to the local state employment service in a timely manner.**]**

Wrongful Discharge

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 2)

Employment at will means that either the employer or the employee can terminate their employment relationship at any time, with or without cause, and with or without notice.

A. Erosion of the Employment-at-Will Rule

Numerous states have curtailed the employer's traditional right to discharge with or without good cause or notice. Courts and legislatures in these states have decided to permit employees to bring wrongful discharge lawsuits against their employers under a variety of theories. The three most common are discussed below.

1. The Public Policy Exception

This is the most common exception to the rule. Courts applying this exception have declared that the employer's right to terminate an at-will employee may be outweighed by important public policies. There are several distinct types of public policy violations:

a. Termination for Refusing to Perform an Unlawful Act. A public policy violation may occur when an employee refuses to perform an unlawful act and is terminated as a result. For example, if a bookkeeper is discharged because he or she refuses to make improper and inaccurate changes in the company's books, he or she may sue the employer for wrongful discharge in numerous states.

b. Termination for Exercising a Statutory Right. A second type of public policy violation may arise when an employee is discharged for exercising a statutory right. For example, if an employee is terminated for filing a workers' compensation claim or an employment discrimination claim, that termination is likely to violate public policy. Similarly, terminations due to the employee's performance of jury duty or military service may provide other bases for wrongful discharge claims founded upon public policy violations.

c. Termination for Whistle-Blowing. A third type of public policy violation recognized in some states is the termination for whistle-blowing. The term "whistle-blowing" generally encompasses situations where employees protest their employer's or co-employees' unlawful or immoral activity. Whistle-blowers are not asked to violate the law, but they are terminated for exposing the alleged violations of others. Examples of whistle-blowing discharges include terminations for disclosing illegal activities of the employer or for reporting a co-employee's criminal activities to the police.

d. Termination in Violation of Statute. Some courts have recognized a further limitation on an employer's right to discharge when an employer attempts to make an activity or requirement a condition of employment in violation of a statute. For example, where a state law makes it unlawful for an employer to require an employee to take a polygraph examination as a condition of employment, an employee discharged for refusing to submit to an examination may state a claim for wrongful discharge in some states.

2. The Express or Implied Promise of Job Security

The second common exception to the employment-at-will rule arises where the employer expressly or impliedly agrees that the employee has job security. Such agreements frequently involve an understanding between the employer and the employee that the employment relationship will continue indefinitely unless there is good cause for the employee's discharge. In many states, if the terminated employee can show that the employer made or implied a promise of job security, then it will be for a jury to decide whether there was good cause for the termination.

a. Express Promises of Job Security. Technically, employees who have been expressly promised, either orally or in writing, that they have job security and/or that they will not be terminated unless their job performance is unsatisfactory are not at-will employees. Accordingly, in one case in which an employee had been promised job security so long as he did a good job and was loyal to the company, the court required the employer to honor its promise. In another case, where an employee was expressly told that he would be given job security if he declined a competitor's offer of employment, the court enforced that promise and ordered the reinstatement of the discharged employee because there was no good cause for his termination.

b. Implied Promises of Job Security. Courts are increasingly finding that employers have impliedly promised continued employment to their employees.

Courts have inferred such implied promises from numerous sources, including offer letters, personnel policies set forth in a supervisory manual, commendations and promotions given to the employee, the employee's longevity of service, and, most frequently, employee handbooks. When an employee handbook states that employees will not be discharged unless they first receive a written warning, several courts have held that the handbook implies that employees cannot be terminated without good cause. In such circumstances, employees have been given the opportunity to prove in wrongful discharge lawsuits that they were, in fact, terminated without good cause.

> **[ASA Tip:** Because employee handbooks serve important purposes, employers are reluctant to eliminate them. At the same time, however, employers do not want to have their handbooks construed as contracts. One way out of this dilemma suggested by several courts is to include prominent disclaimers in employee handbooks.]

3. The Implied Covenant of Good Faith and Fair Dealing

Many courts have observed that every contract contains an implied covenant that each party will act in good faith and will not do anything to interfere with the right of the other party to receive the benefits of the contract. Courts in several states have applied this legal principle, known as the implied covenant of good faith and fair dealing, to the employment relationship.

In these states, the implied covenant may be breached when an employer discharges an employee because of malice or in bad faith. For example, a breach of the implied covenant was found when an employer terminated an employee to avoid paying him a large sales commission at the end of the year. Other factors that courts have considered to determine whether an implied covenant has been breached are longevity of service; the employee's past performance as demonstrated by prior raises,

bonuses, and promotions; the employer's assurances that employment would continue; and the employer's practice of not terminating an employee except for good cause.

Wage and Hour Laws

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 3)

As an employer, a staffing firm is subject to both federal and state laws governing wages and hours. At the federal level, the Fair Labor Standards Act ("FLSA" or "the Act") is the most important statute. The FLSA primarily concerns payment of minimum wages and overtime.

In addition, many states have adopted wage-hour laws that often differ in material respects from the federal laws. Staffing firms should be aware of their obligations under the laws in the states, cities and counties where they do business. Many states provide information regarding basic wage and hour requirements on state department of labor websites.

A staffing firm shares the problems encountered by all employers with respect to wage-hour matters. However, the nature of the employment relationship in the staffing industry gives rise to certain problems that are peculiar to our industry. This chapter summarizes the scope and coverage of federal wage-hour laws, with emphasis on the special ways in which they affect staffing firms.

A. The Fair Labor Standards Act

The Fair Labor Standards Act establishes a minimum hourly rate, and overtime must be paid for work in excess of 40 hours per workweek.

1. Who Is Covered by the FLSA?

The FLSA provides for two types of coverage: individual and enterprise.

a. Individual Employee Coverage. An employee is covered by the FLSA as an individual if at any time during the workweek that employee is engaged in interstate or foreign commerce, or in the production or handling of goods for transportation in interstate or foreign commerce. An employee of a staffing firm who performs work in interstate or foreign commerce is covered by the FLSA.

b. Enterprise Coverage. The act also applies to all employees in an enterprise, such as a staffing firm, with an annual gross business revenue of $500,000, if the enterprise has two or more employees engaged in interstate or foreign commerce or the production or handling of goods for such commerce. On the other hand, a minimum gross revenue amount is not required at all to be covered by the FLSA for certain other enterprises, including hospitals, nursing homes, schools, and government agencies.

c. Joint Employment Relationship. While a staffing firm is the employer of its temporary employees, on most temporary assignments the client also exercises day-to-day control and direction over the employee.

The Wage and Hour Division of the U.S. Department of Labor, which is responsible for administering and enforcing the FLSA, has adopted a policy of recognizing the staffing firm and the client as "joint employers" for FLSA purposes. Thus, the staffing firm and the client are responsible, individually and jointly, for compliance with all of the applicable provisions of the FLSA.

Being a joint employer has a number of other consequences for the staffing firm. One of these consequences is that an employee's entitlements under the FLSA may, in some circumstances, be determined by the client's status. For example, even if the staffing firm is too small to be considered a covered enterprise under the FLSA (i.e., its gross annual receipts are less than $500,000), the employee may still be covered by the FLSA for the entire workweek if a client for whom that employee performs work during any part of the workweek is a covered enterprise. A situation may arise in which an employee is subject to the act in some workweeks and not in others, depending upon the status of the client.

2. Who Is Exempt From FLSA Coverage?

Certain enterprises and occupations are exempt from some or all of the provisions of the FLSA. Exemptions also may be determined by the individual employee's activities or by the status of the employer. Certain exemptions are industrywide. Other exemptions provide complete relief from the minimum wage and overtime requirements, while some provide only partial relief.

a. Executive, Administrative, and Professional Employees. The executive, administrative, and professional exemptions are often referred to as the "white-collar" FLSA exemptions. To qualify as exempt from the overtime pay requirements of the FLSA under these exemptions, an employee must be paid at least $455 per week, or $23,660 per year (with the exception of outside salespeople for whom there is no minimum salary); be paid that amount on a salary basis; and perform certain exempt duties. The duties and salary basis tests are discussed below.

i. Executive Exemption. In addition to satisfying the salary basis test, to qualify as an exempt executive, an employee must meet the following requirements:

- Employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Employee must customarily and regularly direct the work of two or more full-time employees (or their equivalent); and
- Employee must have the authority to hire or fire employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

Under the FLSA, the determination of what constitutes an employee's primary duty is not limited to the duty he or she spends the most time performing. Instead, the primary duty is the "principal, main, major, or most important duty that the employee performs." Further, "concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption" if the employee otherwise meets the executive exemption

> **[ASA Tip:** If a staffing firm places an assistant manager in a retail establishment and the assistant manager spends more part of his or her working time performing work such as serving clients, stocking shelves, and cleaning the establishment, the assistant manager is still exempt if he or she has a "primary duty" of management, directs the work of at least two other employees, and has the authority in which to change the status of other employees.]

To maintain exempt status, the primary duty of the employee must be "management." "Management" includes, but is not limited to, activities such as

- Interviewing, selecting, and training of employees
- Setting and adjusting their rates of pay and hours of work
- Directing the work of employees
- Maintaining production or sales records for use in supervision or control
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status
- Handling employee complaints and grievances
- Disciplining employees
- Planning the work
- Determining the techniques to be used
- Apportioning the work among the employees
- Determining the types of materials, supplies, machinery, equipment or tools to be used or merchandise to be purchased
- Providing for the safety and security of the employees or the property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

With respect to the requirement that an exempt executive have authority to make hiring and firing decisions, merely because a higher-level manager's recommendation has more importance or the employee does not have authority to make an ultimate decision does not mean that an employee's suggestions and recommendations do not have "particular weight." To the contrary, according to the U.S. Department of Labor, whether an employee's suggestions and recommendations have particular weight depends on "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon." This requirement will not be met, however, by the mere authority to reprimand, suspend, or create a performance review—authority over a "change in status" is required.

ii. Administrative Exemption. To qualify for the administrative exemption, an employee must meet the salary basis test as well as the following requirements:

- The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers (sometimes this is called the "administrative-production dichotomy"); and
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

iii. What Is Work Directly Related to the Management of General Business Operations?
The DOL has provided specific examples of what type of work fits within this definition. The list, which is not exhaustive, includes work in functional areas such as

- Tax
- Finance
- Accounting
- Budgeting
- Auditing

- Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and health
- Personnel management
- Human resources
- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer network, Internet, and database administration
- Legal and regulatory compliance
- Similar activities

The administrative exemption is often the most difficult to apply. The exemption's "type of work" requirement can be particularly problematic for employers in the service industry, such as staffing firms. Some case law and opinion letters under the prior regulations held that employees of staffing firms who recruited temporary employees for placement with clients would generally meet this first element if they performed office or nonmanual work locating and evaluating employees to place with a client, matched the employee to the client, and oversaw and responded to concerns regarding the employee's performance for the client. However, at least one federal appeals court in California has suggested that administrative employees such as, perhaps, recruiters in staffing firms might not meet this element and thereby not be administratively exempt, on the grounds that recruiters might be "producing" the product the staffing firm sells (i.e., temporary labor). Although state courts in California and the DOL regulations attempt to downplay this "production" issue in the service industry, some courts, particularly federal courts in California, may be reluctant to fully embrace that view. In addition, some state laws may adhere to this stricter "administrative/production dichotomy" view. Thus, staffing firms should obtain legal advice regarding the law in the jurisdictions in which they operate before classifying their recruiter personnel as administratively exempt.

iv. What Constitutes Discretion and Independent Judgment Regarding Matters of Significance? To qualify for the administrative exemption, an employee's primary duty must include the exercise of "discretion and independent judgment" with respect to matters of significance. This generally involves comparing and evaluating possible courses of action and making a decision after consideration of the various possibilities. In addition, this decision-making process must relate to issues that are significant, substantial, important, or of consequence. This does not necessarily mean that the employee has the authority to make an independent decision that is unreviewable by others. The employee may, in fact, still exercise discretion and independent judgment, even if he or she only makes recommendations for action.

The DOL has provided a list of specific inquiries to assist employers in making a determination about whether an employee's primary duty involves the exercise of discretion and independent judgment including:

- Whether the employee has authority to commit the employer in matters that have significant financial impact
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval
- Whether the employee has authority to negotiate and bind the company on significant matters
- Whether the employee is involved in planning long- or short-term business objectives
- Whether the employee investigates and resolves matters of significance on behalf of management
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances

With respect to employees who may consult a manual or other technical materials for guidance, the DOL regulations provide that an employee may still be exempt even when he or she consults a manual. The regulations emphasize, however, that exempt employees may only consult manuals to assist them in using their discretion and independent judgment to decide on an appropriate course of action in response to a novel or unique circumstance. When an employee consults manuals or established procedures and guidelines, and those manuals limit the employee's discretion by essentially telling him or her what to do or how to solve a problem within closely prescribed limits, the employee is not performing exempt work.

The DOL had previously issued opinion letters regarding the discretion and independent judgment element as applied to recruiters and account managers in the staffing industry. Additionally, there have been some court decisions addressing these issues. In most of these cases, the individuals in question have been responsible for recruiting, screening, testing, and interviewing applicants, making personnel recommendations and other related tasks. Job titles offer little value in making exempt status determinations. Therefore, it is important to remember that, whether a person has the title of recruiter, account manager, technical consultant, personnel manager, or assistant branch manager, the duties that person performs—not the title—are the key factors in exempt status determinations. Individuals generally performing these types of duties will generally need to do the following as their primary duty in order to be considered as exercising sufficient discretion and independent judgment to come within the exemption:

- Exercise a high level of independence in performing these tasks (as opposed to simply responding to instructions or standard operating procedures and manuals developed by others)
- Selectively exercise their judgment in approving, hiring, or recommending a candidate to be hired and participating in the hiring decision-making process (as opposed to simply reviewing résumés to ascertain whether requirements are met or administering predeveloped tests and approving a candidate based on his or her numerical score on the test)
- Use their judgment to match a candidate's qualifications to the needs of a particular client (as opposed to simply "filling an order" for a generic position)
- Oversee the placement of the candidate with the client (as opposed to simply referring the candidate's name to someone else for placement)
- Evaluating the candidate and client's needs in an effort to provide the best possible candidate to the client (as opposed to simply referring several candidates to the client and leaving it to the client to evaluate them and make the decisions)

- Have the authority to approve higher rates of pay for candidates when, in their judgment, this is required to meet the client's goals
- Counsel and discipline placements when they fail to perform adequately for the client and participate in the termination of placements who do not perform adequately
- Serve as the primary liaison and/or account manager between the client and the staffing firm
- Evaluate client and market needs and develop comprehensive strategies for obtaining the best possible candidates
- Have the ability to make significant changes to policy without obtaining prior approval
- Have the ability to bind the staffing company
- Have relative freedom from *direct* supervision
- Have the ability to resolve client complaints on his or her own

Of course, each and every one of these elements might not exist in a particular case, and many employees will be exempt even though they may perform the majority, but not all, of these duties. However, the more of the foregoing factors a recruiter or account manager has and exercises, the stronger the case the staffing firm will be able to make that the employee is exempt under the administrative exemption.

Professional Employees. The professional exemption actually encompasses three exemptions: (1) the learned professional; (2) the creative professional; and (3) the computer professional exemptions.

Learned Professionals. To qualify for the learned professional exemption, an employee must satisfy each of the following requirements:

- Have a primary duty that is the performance of work requiring advanced knowledge, which is work that is predominantly intellectual in character and that includes the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning;
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; and
- Be paid on a salary basis of at least $455 per week.

"Work requiring advanced knowledge" means work that is predominantly intellectual in character. It usually involves analyzing, interpreting, or making deductions from various facts. The knowledge it takes to perform these tasks cannot be attained at the high-school level, and work that involves routine mental, manual, mechanical, or physical labor is excluded. This type of work requires the consistent exercise of discretion and judgment, a standard different from that used under the administrative exemption. As with the administrative worker, reliance by a learned professional, like a physicist or engineer, on a manual outlining certain procedures should not transform the employee into a nonexempt technician.

While the best evidence that a job is a learned profession is the requirement of an appropriate academic degree, the DOL has recognized that an employee may be in a learned profession after obtaining substantially the same knowledge level through a combination of work experience and intellectual instruction. On the other hand, the exemption will not apply if most employees acquire the skill through experience rather than through an advanced specialized intellectual instruction (such as the very occasional lawyer who did not attend law school). For example, no amount of military training can turn a technical field into a learned professional field.

Creative Professionals. To meet the creative professional exemption, an employee must be compensated on a salary basis of at least $455 per week and have as a primary duty "the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor," as opposed to routine mental, manual, mechanical, or physical work.

General examples of fields of artistic or creative endeavor include music, writing, acting, and the graphic arts. Creative professionals include actors, musicians, composers, conductors, soloists, painters and cartoonists (who are only given broad outlines of their subject matter), essayists, novelists, short-story writers and screenplay writers (who choose their subjects and submit finished work to their employers), as well as certain positions in advertising agencies.

Computer Professional Exemption. To qualify for the computer professional exemption, an employee must meet the following requirements:

- The employee's primary duty must consist of the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or systems functional specifications; or the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; or the design, documentation, testing, creation, or modification of computer programs related to machine-operating systems; or a combination of these duties; and
- The employee must be paid on a salary basis of not less than $455 per week, or, alternatively, if paid on an hourly basis, not less than $27.63 per hour. Again, it is important to be aware that some states, such as California, may require higher hourly rates of pay to qualify for the computer professional exemption. In California, the hourly rate of pay required for the exemption is $45.51 as of January 1, 2019 (or an annual salary of at least $94,603.25).

In considering the option to pay an exempt computer professional on an hourly basis, a federal court in Pennsylvania has held that the computer professional exemption requires that the employee be paid not less than $27.63 an hour for every hour worked, rather than an average of $27.63 for hours worked in a workweek.

The computer professional exemption does not require that the employee consistently exercise discretion and judgment, nor must the employee's job be limited to software functions. However, this exemption is not available to an employee engaged in the manufacture or repair of computer hardware, or engineers or drafters who use computer-aided design software, but are not otherwise engaged in computer systems analysis and programming. Help desk, network support, and other IT support employees are commonly misclassified as being exempt pursuant to the computer professional exemption. In addition, employees who perform maintenance or install computer systems will not satisfy the exemption.

Although the computer professional exemption may not apply, federal regulations provide that an employee who works in the computer field but does not meet the requirements of the computer professional exemption may meet the administrative exemption if the employee's primary duty includes planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific, or engineering problems at their employer or its customers. Also, according to the DOL, "computer network, Internet, and database administration" is considered

work that directly relates to management or general business administration for purposes of the administrative exemption.

Once again, state laws regarding the computer professional exemption may differ from the FLSA's definition. Employers must comply with the most stringent (and highest-paying) legal requirements to benefit from both federal and state overtime exemptions.

Highly Compensated Employees. To qualify for the highly compensated employee exemption, the following requirements must be met:

- The employee's primary duty must include performing office or nonmanual work.
- The employee must "customarily and regularly" perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee; and
- The employee's annual total compensation must equal $100,000 or more, which includes at least $455 per week paid on a salary basis.

Thus, an employee who customarily and regularly directs the work of two or more other employees (but does not have the authority to change another employee's status or provide recommendations that are given particular weight) may qualify as a highly compensated employee, although the employee does not qualify as an executive employee.

Concerning the $100,000 minimum compensation, an employer cannot count board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits. Commissions, nondiscretionary bonuses, and other nondiscretionary compensation may be included in determining whether the employee meets the $100,000 annual threshold, but employers still must be careful to pay a weekly salary (or fee) of at least $455 to qualify for the highly compensated exemption. In the case of an employee who works only part of the year, employers must prorate the $100,000. The prorating formula must be used for employees who terminate before a year ends as well as those who begin work during a 52-week year period that has already begun.

Outside Sales Employees. To qualify for the outside sales exemption, (i) the employee's primary duty must be making sales or obtaining orders for contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (ii) the employee must be customarily and regularly engaged away from the employer's place or places of business. Unlike the other exemptions, the employee need not meet the $455 salary level or be paid on a salary basis.

Work performed incidentally and in conjunction with the employee's own outside sales or solicitations (such as deliveries and collections, writing sales reports, planning itineraries, attending sales conferences, etc.) is regarded as exempt outside sales work.

In addition, to be engaged "away from an employer's business or places of business," the outside sales employee must make the sales physically at the client's place of business. Sales by phone, email, or the Internet can be activities adjunct to physically visiting the client, but such activities are not considered outside sales work if they are the principal vehicle for the sale.

The Salary Basis Test. With the exception of hourly paid computer professional employees who make at least $27.63 per hour, doctors, lawyers, teachers, and outside sales employees, an exempt white-collar employee must be paid on a "salary basis." The employee must "regularly receive" "a

predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Exempt employees "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." However, an employer need not pay an employee his or her salary in any week in which the employee performed no work; therefore, full-week deductions from salary do not violate the salary basis test. Even when no work is available, but the employee is willing and able to work, deductions may not be made in anything other than full-week increments because the employee's absence from work is not within his or her control. Nor may an employer deduct pay for absences occasioned by jury duty, attendance in a litigation proceeding as a witness, or temporary military leave, , although salary off-sets for jury fees, witness fees, and military pay received by the employee for the relevant week are permitted. Again, the absence from work is not within the employee's control.

Employers may make deductions from salary for "unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees."

This exception should not be read broadly, however, as the DOL takes the position that the term "workplace conduct" refers only to "serious" workplace misconduct, such as sexual harassment, workplace violence, drug or alcohol violations, or violations of state or federal laws." Thus, deductions in increments of less than a week for insubordination or attendance infractions, for example, would violate the salary basis test.

To satisfy the rules under the salary basis test, the disciplinary suspension must be imposed pursuant to a "written policy." "Such policy," according to the DOL, "need not include an exhaustive list of specific violations that could result in a suspension, or a definitive declaration of when a suspension will be imposed. The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension."

> **[ASA Tip:** The "written policy" requirement for this exception would be satisfied by, for instance, a sexual harassment policy, distributed generally to employees, that warns employees that violations of the policy will result in disciplinary action "up to and including unpaid suspension or termination."]

Deductions for personal absences within the exempt employee's control may occasion deductions from salary proportional to the time actually missed by the employee in full-day increments only, and deductions may not be made based upon the hours worked on a given day. An employer also may make full-day deductions from an exempt employee's pay for full-day absences occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability. Deductions may be made for such absences before the employee has qualified under the plan, policy, or practice, and after the employee has exhausted his or her leave allowance.

With respect to partial-day deductions, only three circumstances exist under which employers may make partial-day deductions from an exempt employee's salary without violating the salary basis rule:

- In the initial or terminal weeks of employment, the payment of an hourly or daily equivalent of the employee's salary for the time actually worked is permissible.

- For violations of "safety rules of major significance" (which is defined narrowly and for which employers usually would discharge an employee or suspend him or her for one or more full days).
- For intermittent leave taken under the Family and Medical Leave Act.

"Safe Harbor" Regulation. Under the DOL's "safe harbor" regulation, isolated or inadvertent deductions from an exempt employee's salary will not result in the loss of the exemption for employees subject to them if the employer reimburses the employees for such improper deductions. If the employer has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism, reimburses employees for any improper deductions, and makes a good-faith commitment to comply in the future, the employer will not lose the exemption "unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints."

f. Placement Counselors and Recruiters. In 1999, a federal court of appeals held that a recruiter for a staffing firm that places nurses qualified for the FLSA administrative exemption. The court confirmed that the recruiter qualified for the exemption because the recruiter's primary duty involved the performance of nonmanual work in an office setting and the recruiter exercised independent discretion and judgment in carrying out tasks such as recruiting and placing nurses, approving higher rates of pay, counseling and disciplining nurses, and terminating nurses' assignments. Another federal court ruled in 2017 that a staffing company's Account Managers and Senior Account Managers were exempt from federal overtime requirements for similar reasons. As noted above, however, some courts may take a more narrow view and reason that recruiters' work is more akin to "producing" the product offered by staffing agencies, and therefore conclude that the administrative exemption does not apply. Whether placement counselors or recruiters, can qualify as exempt depends on whether they are salaried and their duties closely adhere to the exemption's requirements including particularly the exercise of discretion and independent judgment as described above. These determinations are highly fact-sensitive, so advice of experienced counsel should be sought before classifying recruiters as exempt.

4. Who Is Liable for Paying Overtime That is Owed to Temporary Employees?

If the temporary employee performs work exclusively for one client during the workweek, that client will be jointly responsible with the staffing company for the payment of overtime. But when an employee works for more than one client in a given workweek, and the temporary employee does not work for more than 40 hours for any given client but works for more than 40 hours in the aggregate for all clients, the staffing company will be held solely responsible for paying any overtime. In addition, the Wage and Hour Division views the staffing company to be in the best position to know the total hours worked during the workweek.

a. Minimum Wage. All covered nonexempt employees must be paid the minimum wage. The Wage and Hour regulations describe in detail how commissions, bonuses, piece rates, and other forms of compensation are converted into an hourly rate. A growing number of state and local governments have adopted higher -- sometimes, considerably higher -- minimum wages, and nonexempt employees must be paid the highest applicable rate. For instance, the minimum wage in California (for employees of businesses employing 26 or more individuals) increased to $12.00 per hour effective in 2019, and that rate will automatically increase to $15.00 per hour by 2022.

[ASA Tip: In most states, it is unlawful to reduce an employee's hourly rate of pay retroactively. To encourage temporary employees to complete their assignments, a staffing firm may enter into an agreement before the assignment begins stating that the employee will be paid minimum wages unless he or she continues working on the assignment for each pay period until the assignment is completed, in which case he or she will be paid at a specified higher rate of pay.]

b. Overtime. The FLSA provides that all nonexempt employees must be paid at not less than 1½ times their "regular rate" of pay for all hours worked over 40 in a workweek. Determining the correct regular rate" of pay for temporary employees must be done carefully, because temporary employees may be compensated at varying rates within one workweek. Cases have upheld the U.S. Department of Labor's regulations providing that an employee's regular rate is calculated by dividing the employee's total number of hours worked by the total compensation the employee earned that week. Premium rates paid for less desirable shifts ("shift differentials") increase the employee's regular rate. Shift differentials will not be credited against the employer's overtime liability.

Court decisions have approved the following method of calculating overtime:

- First, determine the employee's "regular rate" for the week. This is done by dividing the total non-overtime compensation the employee earned in a week by the number of hours he or she worked, taking into account any shift differentials to which the employee may be entitled.
- Second, multiply the employee's "regular rate" by 40. This is the employee's base compensation for the week, without overtime.
- Third, multiply the remaining hours the employee worked in that week by 1½ times the "regular rate." Add this amount to the employee's base compensation. This is the total compensation the employee should receive for that week.

For example, an employee is sent to assignment A for 20 hours at a rate of $10 per hour and to assignment B for 25 hours at a rate of $20 per hour. The employee's overtime is calculated as follows:

- Employee's "regular rate" for the week = (20 hours × $10 per hour) + (25 hours × $20 per hour) ÷ (45 hours) = $15.55.
- Employee's base compensation for the week, without overtime = $15.55 × 40 hours = $622.
- Employee's overtime compensation for the week = ($15.55 × 1.5) × 5 hours = $116.63.
- Total compensation the employee should receive for that week ($622 + $116.63) = $738.63.

The act does not require overtime pay for hours in excess of eight per day or for hours worked on holidays or weekends, although many employers do pay overtime for such work and some state laws require such payments. Nor does the act require that an employee be paid each week; an employer may make wage and salary payments at other regular intervals, such as every two weeks. The act does require, however, that overtime pay be computed on the basis of hours worked during each workweek, and that all compensation earned in a particular workweek be paid on the regular payday for the period in which such workweek ends. An employer cannot average the hours of work over two or more workweeks. Here again, state laws might be different from the FLSA with regard to how frequently employees, or certain types of employees, must be paid.

c. Are Compensatory Time Arrangements Permissible? An employer cannot delay full payment of all compensation due in a given pay period until some later time. This means that many "compensatory time" or "comp time" arrangements, through which an employee accumulates paid leave time to be taken at some later point rather than being paid promptly for overtime, are impermissible under the FLSA. However, the act permits "comp time" to be granted by public employers to nonexempt employees pursuant to a collective bargaining agreement or individual agreement with the employee. Such "comp time" must be calculated at the rate of 1 ½ hours of comp time for each hour of overtime worked. Public employees must be permitted to use accrued comp time within a reasonable period after making the request unless doing so would "unduly disrupt" the operations of the agency.

d. Must Temporary Employees Get Meal Breaks? The FLSA does not specifically mandate employers to grant their employees a meal period during which employees are completely relieved of duties. Where employers grant meal periods (typically 30 minutes or more), such time need not be compensable, provided that the employee is not expected to perform any work duties during that period. Many states, however, have laws addressing when meal breaks are required. Requiring employees to perform any work during meal periods or cutting meal periods short without correcting time records has spawned many minimum wage and/or overtime lawsuits, often class actions, under both federal and state wage-hour laws.

e. What Is the Workweek? The basic measure of working time under the FLSA is the workweek. The FLSA requires that a workweek be established consisting of a fixed and regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not coincide with the calendar week or with the payroll period—though most employers find it administratively more convenient to make certain that it does. Once a workweek has been established for a given employee, it may not be changed unless the change is intended to be permanent.

The FLSA does not specify a particular beginning or end to the workweek, nor does it limit the total working time in any workweek. Furthermore, the FLSA does not preclude employers and employees from agreeing to a contractual workweek shorter than the statutory straight-time workweek or to the payment of overtime rates for hours worked in excess of the contractual number. Agreements for the payment of overtime for hours worked in excess of a stipulated daily number are also permissible. But no agreement can waive an employee's right to statutory overtime, nor extend the straight-time workweek beyond the maximum fixed by the FLSA.

f. What Hours Are Compensable? All hours worked in a given workweek that are compensable under the FLSA must be taken into account in determining when overtime pay is due. "Hours worked" includes all time in which the employee is required to be on duty or on the employer's premises or at a prescribed workplace, including all hours during which the employee is "suffered or permitted" to work, even though not requested to do so. Hours worked may include hours spent in idleness, in incidental or preparatory activities, or in working at home; they may also include time spent in activities that have been neither sanctioned nor expressly condoned by the employer, if the employer knows or has reason to believe the work is being performed. Some courts have been reluctant to refuse overtime compensation to an employee for work that the employer alleges was not authorized, even when the work was performed without the employer's knowledge.

Time spent performing certain activities prior to and at the completion of the employee's principal activities that are not an integral part of such primary activities need not be compensated for under the act (e.g., completing timesheets or walking from the plant gate to the employee's workstation). However, when an employer voluntarily obligates itself to compensate for such activities by adhering to contract, industry custom, or employer practice, the time expended must be counted as hours worked for purposes of calculating overtime. Furthermore, time spent performing pre- or post-work activities that are integral and indispensable to primary duties (such as starting and signing off from computers or other machinery, or donning and doffing required safety or protection gear at the job site) must be counted as hours worked. In addition, time spent by non-exempt employees reading or writing work-related communications on cell phones or computers constitutes compensable work time (and should be addressed in appropriate employer policies and reporting procedures). On the other hand, the act specifically excludes from overtime paid absences for vacation or illness.

Meal periods can be excluded when determining hours worked, but only if the employee is completely relieved of all duties during those times. The Wage and Hour Division takes the position that, ordinarily, 30 minutes is long enough for a meal period. Rest periods of short duration must be counted as hours worked and may not be offset against other compensable time, such as waiting time or on-call time. The Wage and Hour Division's regulations expressly take the position that employees must be paid for all short break time (typically 5-20 minutes), and one federal court accordingly has adopted a "bright-line" test that all breaks of less than 20 minutes count as hours worked, even if the employee was completely relieved of all duties during them. Importantly, some states' laws also regulate break times, so state and local law should be reviewed with experienced counsel for any applicable requirements.

g. Must Temporary Employees Be Paid Holiday Pay or Vacation Pay? The FLSA does not mandate that employers pay their employees for holidays not worked or vacation pay. An employer may at its own discretion provide such a benefit. State and local law should be reviewed for any applicable requirements.

h. When Is Travel Time and Waiting Time Compensable? Travel between an employee's home and place of employment is not compensable under the FLSA. The Portal-to-Portal Act of 1947, which amended the FLSA, makes travel by an employee to the job site and certain other activities "incidental" to regular work ("portal activities") noncompensable in the absence of a contrary contract, custom, or practice.

In contrast, travel during the workday and travel connected with the employee's regular duties is usually compensable under the FLSA. While travel to the job site at the beginning of the workday is generally not compensable, even when transportation is furnished by the employer, travel from job site to job site during the workday will be considered compensable work. If compensable under the act, it must be counted in determining hours worked for overtime purposes. If not compensable, hours spent in traveling need not be counted, though this result may be different if travel time is in fact compensated by contract, custom, or practice.

Similarly, time spent waiting before or after an employee performs his or her principal duties is expressly made noncompensable by the Portal-to-Portal Act. But if the waiting takes place during the workday, or when the employee is on duty or on call by the employer, guidelines laid down by the FLSA govern. The applicability of these guidelines may depend upon the employment contract

and the facts of each case. In general, however, all time spent by employees waiting while on duty must be counted as hours worked for purposes of paying minimum wages and calculating overtime. This sort of time is often referred to as time spent by employees who have been "engaged to wait," and it counts as compensable hours worked (as opposed to noncompensable time spent "waiting to be engaged").

Travel time and waiting time present special problems for the staffing industry. In recognition of these problems, the Wage and Hour Division has issued the following administrative guidance on travel time for temporary help firms.

"The typical temporary help firm… is engaged in supplying workers employed by the firm on an "as needed" basis to various establishments... For certain types of jobs [a] registrant usually voluntarily "shows up" at some central location where he or she awaits employment opportunity. If work is available or becomes available, or he or she sent or taken to the customer's establishment… At the end of the day, the worker is free to go home and collect his or her pay later or to return to the central location to be paid for his or her work... **If the employment understanding clearly is that the pay or the [working] time of the employee begins and ends at the customer's establishment, waiting for assignments at the central location or in travel to the customer's establishment and return would not be compensable worktime. In other words, his or her working time is computed in the same manner as if he or she had gone directly from his or her home to the customer's establishment and returned home from there at the end of the day.** This would be true even though he or she may be assigned to work at the same customer's establishment for more than one day." (emphasis supplied)

> **[ASA Tip:** Given the importance the U.S. Department of Labor attaches to "the employment understanding" in its enforcement guidelines on travel and waiting time for temporary employees, it may be advisable to inform employees in writing that travel and waiting time are not included in hours worked. Similarly, employees may be informed that they are not required to wait for jobs, nor are they required to wait for employer-furnished transportation, provided they can secure other means of transportation to the job site and arrive on time.
>
> To reinforce the fact that compensable hours are limited to those during which the employee performs work for the client, employees should not be required to report back to the office of the staffing firm when substantial time elapses between initial assignment and the commencement of a job, and they should not be required to return to the office of the staffing firm at the end of the day.]

5. Record-Keeping Requirements

Although both the staffing company and the client are responsible for complying with the act's minimum wage and overtime provisions, only the staffing company must comply with the record-keeping requirements.

Generally speaking, the more important records disclosing wage-hour information must be kept for three years, including payroll records, pertinent union agreements and any other employment agreements, government contracts, and general sales and purchase data. Supplemental records, such as timecards and piecework tickets, wage-rate tables, work schedules, billing and shipping records,

and records of pay deductions or additions, need only be kept for two years. Records must be kept readily available to wage and hour inspectors at each place of employment or at a centrally located record-keeping office.

> **[ASA Tip:** In the staffing industry, temporary employee timesheets are often the basis for calculating weekly pay. Staffing firms can lawfully require the timely submission of timesheets as a condition of continued employment, and can lawfully impose discipline on the employees who fail to comply. However, in most situations (e.g., the supervisor is out, or forgot to sign the sheet, or was dissatisfied with the temporary employee's performance), a client's failure to sign a timesheet would not be a basis for the staffing firm to lawfully refuse to pay the temporary employee for that workweek, unless the staffing firm is sure the employee did not work that week.]

Immigration Reform and Control Act

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 5)

Under IRCA, employers are prohibited from hiring anyone who is not authorized to work in the U.S. IRCA also prohibits employers from refusing to hire or from discharging anyone who is authorized to work based on national origin or, with respect to citizens, permanent residents, refugees, and asylees, citizenship status. In early 2003, in conjunction with the creation of the U.S. Department of Homeland Security, the administration and enforcement of IRCA were transferred from the former Immigration and Naturalization Service to two DHS components, U.S. Citizenship and Immigration Services and U.S. Immigration & Customs Enforcement, and to a unit within the U.S. Department of Justice's Civil Rights Division, the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

This chapter explains the key provisions of IRCA, with an emphasis on provisions that are especially relevant to staffing firms.

A. Employers Cannot Hire Unauthorized Workers

A staffing company may not lawfully hire an individual whom it knows or should know is not authorized to work in the U.S., nor may it continue to employ an individual hired after Nov. 6, 1986, upon learning that the employee is not authorized to work in the U.S.

B. Employers Must Verify That Employees Are Authorized to Work

In order to determine whether an employee is authorized to work, staffing firms must follow verification procedures specified by IRCA for all employees hired after Nov. 6, 1986, including U.S. citizens and nationals. IRCA applies to both employees hired for temporary assignments and those hired for regular positions with the staffing firm itself.

1. Verification Procedures

a. Pre-Employment Screening

Because some applicants for employment may be unauthorized for employment or may have time-limited employment authorization that could require employer sponsorship for employment-based immigration benefits in the future, staffing companies may wish to ascertain in advance of the hire date whether these conditions exist. Pre-hire screening for work authorization or for the need, at present or in the future, to be sponsored by the employer for a work visa or permit saves time, burden, and expense, and avoids later surprises. The OSC, a unit of the U.S. Department of Justice's Civil Right Division with authority over citizenship status discrimination and other discriminatory practices, has approved a variety of pre-screening questions that will flesh out in advance whether a candidate for employment lacks work authorization or will need employment sponsorship for immigration benefits. One formulation approved by the OSC states:

Are you legally authorized to work in the United States? __ Yes __ No

2. For purposes of the following question, "sponsorship for an immigration-related employment benefit means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status, and 'job flexibility benefits' (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer." (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification.) Will you now or in the future require "sponsorship for an immigration- related employment benefit?"
__Yes __ No

These two questions are proper because the first screens out unauthorized workers and the second, which applies only to individuals holding temporary visa status, does not trigger potential citizenship status discrimination.

b. Employer Must Decide Whether to Use Paper or Electronic I-9s

Employers may complete I-9s in paper or electronic formats. If a staffing firm decides to use a paper format, it is recommended to use the fillable PDF available on the USCIS website (https://www.uscis.gov/i-9), which contains error- and omission-prevention technology. This hybrid paper fillable PDF must still be printed and signed as appropriate. USCIS regulations allow for electronic signature and storage of Form I-9 as long as stringent conditions are met concerning the functionality of the electronic system, including its record-retrieval, indexing, and audit-trail features. Electronic I-9s offer many advantages. Virtually all commercial systems feature error-prevention capability, multi-location access, and reduction of storage space. Many vendors also provide an easy interface with the federal government's E-Verify program, a web-based tool to cross-check a new hire's documents against the records of the Social Security Administration and the Department of Homeland Security.

Staffing firms considering whether to use an electronic I-9 system should carefully evaluate the technical features for compliance with USCIS's detailed specifications for electronic signature and storage of I-9s. For example, some systems reportedly lack an adequate audit trail feature showing each time a particular individual accessed, entered, or deleted data. Without such functionality, federal immigration officials could well allege that the employer failed to maintain I-9s for all employees processed electronically. The staffing firm should consult its IT staff, outside experts, and legal counsel to determine whether particular electronic I-9 vendors' products comply with USCIS's requirements.

c. Employee Completes Section 1 of Form I-9

Employers may not require an applicant for employment to complete the I-9 unless and until he or she has accepted an offer of employment. USCIS regulations require that the employer cause each new employee to complete Section 1 of Form I-9 on or before the date of hire. The date of hire means the first day when the employment in exchange for wages or other remuneration begins. The employer should review the I-9 immediately upon completion of Section 1 by the employee and determine that he or she has completed it properly, legibly, and fully, pointing out any errors or omissions at that time for prompt correction. If the employer has assisted the employee in completing Section 1, the employer should so indicate in the Preparer attestation. (Note that, if an employer hires an individual for less than three business days, Section 2 must be completed no later than the hire date. Otherwise, a longer period is allowed for completion of Section 2, as noted below.

A special option applies to staffing firms. A staffing firm may arrange for the employee to complete Section 1 and for the firm to complete Section 2 of the I-9 when the individual is added to the staffing firm's placement pool. USCIS explains the procedure in this excerpt from its website:

> In the case of a staffing agency, acceptance of an offer and entry into the assignment pool can be considered equivalent to an offer and acceptance of employment, after which Form I-9 may be completed. The agency does not need to delay the verification until the worker actually has accepted a particular assignment. The date the staffing agency should put in Section 2 "Certification" of Form I-9 is the date of acceptance of an offer and entry into the assignment pool.

So, as a practical matter, "time of hire" for I-9 purposes can be the point at which, during the initial application process, the staffing firm determines that the individual is suitable for assignment. Alternatively, the staffing firm may wait until the first placement, treat that as the date of hire, and then follow the standard procedure applicable to other nonstaffing employers. Notwithstanding these two options, USCIS recently reminded employers on its website that they should not leave the form blank while awaiting the employee's first assignment; employers must choose one of the above two options. The decision of which day to use as the temporary employee's date of hire will have ramifications throughout the verification process and should be discussed with competent counsel. Employers must complete Section 2 of the I-9 within three business days of hire. For example, if the employee begins working on Tuesday, the employer must complete Section 2 by Friday.

d. Employer Examines Documents

Employees hired after Nov. 6, 1986, must present acceptable, original documentation of identity and work authorization. The newly hired employee has three days from the date of hire to provide such documentation for inspection by the employer. The employer need not examine the employee's documents of identity and employment authorization as a forensic document examiner might inspect this documentation but rather as a conscientious person might reasonably look at them. The employer must conclude that the documents relate to the individual presenting them and appear to be genuine.

The Lists of Acceptable Documents can be found on the last page of the instructions to the current Form I-9, which expires on August 31, 2019, and is accessible at *http://www.uscis.gov/i-9*. All documents proving employment eligibility must be unexpired. Previous versions of Form I-9 may no longer be used. All documents proving employment eligibility must be unexpired. Previous versions of Form I-9 may no longer be used. These versions included a wider array of List A documents, including the following, that are no longer acceptable: Certificate of United States Citizenship, Certificate of Naturalization, Unexpired Re-Entry Permit (Form I-327), and Unexpired Refugee Travel Document (Form I-571). Staffing firms should consult with their own legal counsel if they have questions.

i. List A. Documents that provide proof of *both identity and employment authorization.*
ii. List B. Documents that are acceptable *only to prove identity.*
iii. List C. Documents that are acceptable *only to establish employment authorization.*

If the employee does not have one of the documents in List A (i.e., a document that provides proof of both identity and work authorization), the employee must present one of the documents from

List B to establish identity and one of the documents from List C to establish employment eligibility. Documents that establish employment eligibility cannot be accepted to establish identity and vice versa.

> **[ASA Tip**: Care must be taken in requesting and relying on documents. A staffing firm should only accept documents that appear genuine and relate to the person presenting them. If a document appears to have been forged or altered or otherwise looks unreliable, it is advisable to require the person to present another form of acceptable documentation. If he or she cannot produce alternative documentation of the individual's choosing to confirm his or her identity and/or work authorization, the employer should decline to employ the individual. If the person cannot present, within three days, a receipt for appropriate documentation or an actual document that appears genuine, it is unlawful to hire or continue to employ such individual until he or she can comply with the document requirements. Nonetheless, staffing firms should bear in mind the following direction from the IER website regarding document examination: "Employers should not discriminate against workers during the Form I-9 and E-Verify processes. They should not request more or different documents than are required to establish a worker's identity and eligibility to work in the United States, tell workers which document(s) to present, or reject documents that appear to be reasonably genuine upon their face because of the worker's citizenship status or national origin."**]**

e. Employer Completes Section 2 of Form I-9

As noted above, employers must complete Section 2 within three business days of hire. In completing Section 2, the date of hire must be inserted where indicated. As with Section 1, Section 2 must be completed legibly, fully, and properly, with an immediate review and correction of any errors or omissions. Additional information on completion of the I-9 can be found at USCIS's website: *uscis.gov/i-9-central/questions-and-answers/*.

f. Employer Retains Forms I-9

Forms I-9 must be retained for the later of three years, or one year from the date of termination. This is known as the "retention rule." Thus, Forms I-9 must be retained for a minimum of three years. The I-9s should be maintained in a separate file, not in the individual's personnel file. The employer should calendar the date of destruction of the I-9, i.e., the date when the employer may lawfully dispose of it. Prompt destruction, assuming no government inspection or litigation has begun, allows employers to eliminate potential liability for paperwork errors that might be discerned from a review of the I-9 forms.

g. Employer Decides Whether to Photocopy the Documents Presented

IRCA permits, but does not require, an employer to copy the documents presented by the employee, provided the copies are filed with the Form I-9. Whether to copy or refrain from copying such documents is a topic that will vary with each employer's unique circumstances. If you do choose to retain copies of an employee's presented documents, you must do so for all employees, regardless of actual or perceived national origin or citizenship status, to avoid violating the anti-discrimination laws. Remember to copy both the back and the front of the documents and retain the copies with the Form I-9. A staffing firm should consult with counsel before adopting or changing its policy on this subject.

[ASA Tip: It might be prudent for staffing firms to make and retain copies of documents presented so that in the event an employee hired on or after Nov. 7, 1986, is in fact ineligible to work, the staffing firm can show that it relied in good faith on apparently genuine documents. Retention of copies might also be helpful as a means of making technical or procedural corrections to the Form I-9 and thus avoid fines for paperwork violations, e.g., filling in a document number based on the number appearing on the copy. On the other hand, a retained copy might reveal, upon later review, that the employer should have discovered that the document was false or fraudulent, e.g., a document that purports to have been issued by the former immigration agency, Immigration and Naturalization Service, after INS had been abolished in 2003.**]**

h. E-Verify

DHS through its component, USCIS, maintains an interactive database known as E-Verify containing records generated by USCIS, the State Department, and the Social Security Administration. ICE encourages employers to enroll voluntarily in E-Verify in order to make it harder for unauthorized workers to gain employment.

E-Verify is not a substitute for I-9 employment verification. It is an added check to verify eligibility for employment. With two exceptions, E-Verify may only be used to confirm the employment authorization of new employees (i.e., those hired after the employer has enrolled and gained access to the DHS database). Two exceptions that permit the verification of current employees are:

1. Federal contractors must use E-Verify to confirm employment eligibility of current employees who are assigned to a particular federal contract containing a mandatory E-Verify provision; and
2. Employers who receive from a current employee new identifying information that is different from the information previously provided in Section 1 of Form I-9, e.g., a different name, Social Security number, date of birth, or status attestation, must run an E-Verify query.

E-Verify changes the I-9 process in certain ways. It imposes a "photo matching" obligation. In particular, the employer must compare the document of identity and/or employment authorization provided by the employee to the document shown on the E-Verify screen. Photo matching is automatically activated if an employee has presented with his or her Form I-9 any of the following documents:

- I-551 (Permanent Resident Card)
- Form I-766 (Employment Authorization Document)
- U.S. passport or passport card

2. Responsibility for Compliance in the Staffing Industry

a. Contract Labor

USCIS's IRCA regulations adopt the definition of "employer" recommended by ASA. The regulations provide that in the case of contract labor or services, the contractor, and not the person using the contract labor or services, is the employer. As recognized in the USCIS Handbook for Employers (Form M-274), an agreement between a staffing firm and a client for the provision of temporary employees is an example of a contract labor arrangement. Therefore, a staffing firm, as

the contractor, must comply with IRCA with respect to all of its temporary employees, while its clients have no responsibility to verify the employment status of temporary employees.

b. Agents

USCIS regulations permit an agent or anyone acting directly or indirectly in the employer's interest to fulfill the verification procedures. Therefore, if a staffing firm receives a request for temporary services from a client located far from the staffing firm's office, the staffing firm may designate an agent to verify the employee's identity and work authorization on its behalf. However, liability remains with the staffing firm for any failure of a third party to comply with the verification requirements.

c. Recruiters and Referrers for a Fee

A 1991 amendment to IRCA relieves "recruiters and referrers for a fee" (i.e., permanent placement agencies) from complying with I-9 verification and record- keeping requirements, except for recruiting and referring agricultural workers for whom they must still satisfy these requirements. This amendment reflects the fact that permanent placement agencies are not the employers of the candidates they recruit or refer. Note, however, that recruiters and referrers for a fee are still precluded from knowingly referring unauthorized aliens.

On the other hand, because a staffing firm supplying temporary employees, not permanent placement candidates, is the employer, staffing firms providing temporary employees must still comply with the verification procedures and completion of Forms I-9. In specific instances where a staffing firm is acting as a "recruiter or referrer for a fee" on a retainer or contingency basis, such as in a situation where the staffing firm recruits or refers a candidate to another company for a permanent placement, a Form I-9 need not be completed by the referring party. Any staffing firm that has acted as a "recruiter or referrer for a fee" in the past must retain any previously completed Forms I-9 for the required duration under the retention rule.

3. Covered Employees

a. Employees Hired After Nov. 6, 1986

Employers must complete the verification procedures within three days after commencement of employment for all employees hired after Nov. 6, 1986. Under USCIS regulations, an employer will not be deemed to have hired an individual for employment (and thus need not complete a new I-9) if "the individual is continuing in his or her employment and has a reasonable expectation of employment at all times."

b. Employees Hired Before Nov. 7, 1986

IRCA provides that employers need not verify the work authorization of employees continuously in their employ since before Nov. 7, 1986 ("grandfathered employees"). Nor must employers complete the verification procedures for employees hired before Nov. 7, 1986, who return to work after Nov. 6, 1986, following a temporary leave of absence, approved by the employer, if there was a reasonable expectation of employment at all times.

If an employee initially hired before Nov. 7, 1986, is terminated (i.e., the staffing firm decides not to send the employee on any further assignments), the employer must complete the verification procedures if such employee is rehired after Nov. 6,
1986.

4. Time for Compliance for Temporary Employees

Because of the practical difficulties imposed if staffing firms were required to wait until after the commencement of employment (i.e., when the employee is on the payroll), USCIS, as noted above, allows the staffing firm to verify an employee's work eligibility upon the acceptance of an offer of employment, regardless of whether the employee will immediately commence employment. Thus, as noted above, after a staffing firm has invited an applicant to be available for temporary work and the applicant has accepted and been added to the assignment pool, the staffing firm may complete the Section 2 verification requirements at that time.

> **[ASA Tip:** Because IRCA requires employers to examine certain documents that may reveal the person's age, national origin, or other factors that cannot be taken into account in making employment decisions, employers should not have the applicant complete the Form I-9 at the same time the application form is completed (usually before any interview, testing, etc.). To avoid the inference that the I-9 data were taken into account in making the employment decision, the applicant should not be asked to complete Form I-9 until after a bona fide offer of employment is made and accepted. This generally does not occur until after the applicant has been tested and interviewed by a staff employee (who can ensure that Form I-9 is properly completed).
>
> Staffing agencies seeking to facilitate the verification of new temporary employees, should discuss best practices with a competent attorney to properly avoid claims of discriminatory screening.]

5. Repeated Verification (Reverification)

In some circumstances an employer may need to reverify an employee's work authorization. Reverification will be required if the individual attests in Section 1 that he or she is an alien authorized to work for a limited period of time, except certain asylees and refugees presenting documents other than employment authorizations may not need to be reverified. The employer's duty of reverification also applies to lawful permanent residents who present a temporary I-551 stamp or printed notation on a machine-readable immigrant visa in their passport as a List A document. If, however, a lawful permanent resident presents an alien resident card with a two- or 10-year expiration date in order to satisfy the List A requirement, the duty to reverify employment eligibility does not apply.

a. Limited Work Authorization. If an employee's work authorization is for a limited duration (e.g., some USCIS documents authorize an alien to remain in the U.S. for a fixed period of time), the staffing firm must repeat the verification process no later than the date on which the authorization expires. Employers must therefore create a calendar system to provide early warning to the firm and the affected employee that employment eligibility must be reverified on or before the date of expiration of employment authorization (or the expiration date shown on the temporary I-551 stamp or immigrant-visa notation in the passport). USCIS may take up to 120 days or longer to issue a renew employment authorization. Thus, the docket system should allow for adequate time to renew employment eligibility. Most electronic verification systems will include an automated process for this reverification. If the person lacks employment authorization on the date of expiration, he or she must be terminated or placed on leave of absence and not permitted to render on-site or off-

site services to the employer unless and until the individual presents a new form of unexpired employment authorization acceptable under List A or Lists B and C.

If the employee's work authorization is renewed by USCIS, the employer must update the Form I-9 to reflect the current authorization. Section 3 of Form I-9 is designed for this purpose. If Section 3 has been used, an employer may insert the name of the employee in Section 1 of a new Form I-9 and complete Section 3 on the new version even if the form has not been used. If the employee does not present documentation of currently valid work authorization, the employer may not lawfully continue the individual in its employ.

> **[ASA Tip:** For employees with work authorization for a limited duration, a staffing firm may consider noting on such an employee's personnel card that his or her employment authorization is for a limited time and the date of expiration. It would be prudent for the staffing firm to routinely check this information before assigning any temporary employee, rather than run the risk of inadvertently violating IRCA.**]**

b. Rehires. A staffing firm may rehire an employee within three years and complete a new Section 3 or complete a new Form I-9. However, upon each rehire, the employer must inspect the Form I-9 and determine that the form relates to the individual and that the individual is still authorized to work. The benefits and downsides to completing a new Section 3 should be discussed with competent counsel.

Substance Abuse and Drug Testing in the Workplace

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 6)

The primary purpose of this chapter is to provide legal and practical information to those staffing firms that are attempting to respond to client requests for drug testing, or that anticipate receiving such requests in the future.

B. Legal Implications of Drug Testing

1. General

At present, no state or federal statute completely prohibits a private employer from utilizing drug testing to address the problem of substance abuse in the workplace. The implementation of drug testing is therefore not per se illegal.

This does not mean that drug testing presents no legal issues or that employers have no fear of liability if they do drug-test. On the contrary, many states have enacted legislation regulating drug testing, and there are numerous constitutional provisions, statutes, and other legal rights that may be relied upon by employees or applicants who seek to challenge drug testing or decisions based on the results of a drug test. In short, drug testing of employees or applicants presents real risks of potential liability, and it is vital that care be taken to comply with applicable legal provisions and constraints before embarking on a drug-testing program.

3. Federal and State Antidiscrimination Laws

Legal challenges to drug testing may be derived from federal and state antidiscrimination laws, which prohibit employment discrimination.

a. Disability Discrimination Laws. Most states prohibit employers from discriminating against individuals because of their handicap or disability. Federal law also prohibits discrimination based on a handicap or disability. The Americans With Disabilities Act, enacted in July 1990 and applicable to employers with 15 or more employees, makes it unlawful for a private employer to discriminate against an individual based on that individual's disability. The ADA not only protects those who are actually and currently disabled under the ADA, but also those individuals who have a record of disability, those who are regarded as being disabled, and those who are known to have a relationship or association with another who is known to have a disability. An employee or applicant "who is currently engaging in the illegal use of drugs" is not protected under the ADA; however, when an employee or applicant is no longer engaging in illegal drug use and is participating in or has participated in a supervised drug rehabilitation program, he or she will be protected under the act.

i. Addiction as a Disability. Users of illegal drugs who have been successfully rehabilitated or who are participating in a supervised rehabilitation program and are no longer using drugs will be protected against discrimination in private employment by the ADA. People who are "erroneously regarded as engaging" in illegal drug use are also covered by the law, as are alcoholics who are adequately performing their jobs. However, the ADA specifically excludes, and amended the Rehabilitation Act to also exclude from coverage, alcoholics who are engaging in "unsatisfactory performance or behavior," as well as "any employee or applicant who is currently engaging in the

illegal use of drugs." In many states, an individual who is addicted to drugs or alcohol is considered disabled and is entitled to protection under the disability discrimination laws. Recreational or casual users of drugs or alcohol are unlikely to be found "disabled" or protected by either federal or state disability discrimination laws. In addition, many states protect an individual who is "perceived" to be disabled, regardless of whether he or she really is. For instance, the New York State Appellate Division has held that an applicant who was denied employment after testing positive for drug use on a pre-employment drug test could maintain a proceeding under the state's human rights law as an individual who was "perceived" as being disabled.

A staffing firm should consider state laws against discrimination, as well as the ADA. Most states have laws that protect employees against discrimination on the basis of a disability, and some states specifically include as a protected disability alcoholism, drug addiction, or both.

ii. Disabled Employees Must Be Able to Perform. An employee who is disabled (by drug addiction or otherwise) must be able to perform his or her essential job functions, with or without accommodation, as well as comply with the employer's policies and rules. (See Chapter 1, Section A.3.f.) As a general proposition, even if an individual is addicted to drugs or alcohol, he or she will not be protected by the disability discrimination laws if he or she is unable to perform satisfactorily the position sought, and that includes performing the essential functions of the job, gaining access to the work site, and following punctuality and attendance rules and other rules relating to employee conduct.

iii. Accommodation. The ADA, the Rehabilitation Act of 1973, and the laws of many states require an employer to make reasonable accommodations for an employee's disability or handicap, unless doing so would impose undue hardship on the employer. Reasonable accommodations may include leave for treatment, a reduced schedule or alternative schedule related to treatment, etc. In a case interpreting the Rehabilitation Act, a court found that an employee who had undergone treatment for alcoholism was improperly discharged for absenteeism. The employer had considered the employee's absences before the treatment as well as those after the treatment, which were unrelated to his alcoholism. The court held that by utilizing the employee's alcohol- induced transgressions as a factor, the employer failed to reasonably accommodate his condition.

In 2002, an employee filed suit against a staffing firm alleging that it had discriminated against the employee on account of his disability. The employee applied for a temporary assignment as a commercial truck driver but tested positive for THC (an indicator of marijuana use). The employee stated that he was HIV positive and was taking various medications, including Marinol or synthetic marijuana. The staffing firm required the employee to provide a medical certification to determine whether he could drive a commercial truck while taking Marinol without posing a direct threat to himself or others. In the meantime the client canceled the temporary staffing order. The court held that the employer had not violated the ADA and that it was within its rights to request the medical certification. In addition, the staffing firm had no control over the cancellation of the order, and there was no evidence that the order was canceled to avoid hiring the employee.

> **[ASA Tip:** If an employee who is addicted to drugs or alcohol engages in misconduct or performs in an unacceptable manner, a staffing firm may impose discipline on that employee consistent with its normal policies. However, when considering what, if any, disciplinary action to take against the addicted employee, the disciplinary action should be based on the employee's inability to perform the job

or to comply with the company's rules, not the underlying suspected reason (e.g., drug use) for the performance problems. The disability discrimination laws prohibit an employer from treating protected disabled employees differently than other similarly situated employees. Any discipline imposed on an employee with a drug or alcohol problem should be in accordance with company policy and consistent with discipline imposed upon other employees who engage in similar misconduct or suffer from similar performance failures.**]**

b. Other Discrimination Laws. Existing federal and state discrimination laws that prohibit discrimination in employment because of an individual's race, sex, age, national origin, or religion may also be used to challenge a drug-testing program. These laws apply to existing employees as well as applicants for employment.

> **[ASA Tip:** If a staffing firm decides to drug-test only certain applicants, it should carefully consider the criteria used to select the applicants to be tested, because the criteria might be challenged as discriminatory. For example, a decision to drug-test based on the applicant's race, national origin, sex, or age would be impermissible. In addition, a decision to drug-test based on some facially neutral factor (e.g., the applicant lives in the inner city) could be challenged as having a disparate impact on minorities.
>
> On the other hand, it is not necessary to drug-test all employees. For example, it is lawful to test only those employees who wish to be eligible for a particular assignment or reassignment, or only employees assigned to a particular client, or only those who perform certain sensitive jobs (e.g., handle securities, come in contact with pharmaceutical products, or operate heavy equipment and machinery). The key is not to distinguish among employees based on their race, sex, age, or other protected category**.]**

4. State Common Law Theories

In addition to challenging the legality of drug-testing programs on the basis of constitutional or statutory provisions, employees may assert other claims as well. These claims may include: invasion of privacy, negligence, and defamation. Each of these is discussed below.

a. Invasion of Privacy. Most states have recognized a common law right to personal privacy, such that the unreasonable intrusion into another person's seclusion or into his or her private affairs may give rise to a claim for damages. Generally, an individual must show that his or her private affairs were unnecessarily publicized or that the employer unlawfully intruded into the individual's private activities, causing the individual mental shame or suffering.

Drug-testing programs could give rise to invasion of privacy claims in a variety of circumstances. For example, if an individual is required to be physically observed while providing a urine sample, he or she may claim that the test was administered in an unduly intrusive manner and thus constitutes an invasion of privacy. A claim for invasion of privacy may also arise when an individual alleges that simply being required to take the test, regardless of the way in which it is administered, invades his or her right to bodily privacy, particularly if the employer had no reasonable basis to suspect the individual of substance abuse. Finally, because drug tests reveal private health information about an individual, such as whether he or she has diabetes or venereal disease, the tests may be challenged as

an invasion of privacy if such information is improperly disseminated to individuals who have no legitimate reason to know.

b. Negligence. Various kinds of negligence claims may be brought against an employer in connection with a drug-testing program. For example, an employee could sue the employer for negligence when a drug test that mistakenly produces a "false-positive" (i.e., it indicates that a person has used drugs when he or she has not) leads to an employee's discharge or other disciplinary action. Conversely, if a test is negligently administered and produces a "false-negative" (i.e., it indicates that an employee has not taken any drugs when he or she really has), the employer may be subject to liability if the employee injures another while working under the influence of drugs. An employer may also be liable for an employee's injuries to another person or another person's property if the employer knew that the employee used drugs.

c. Defamation. Claims for defamation (i.e., libel and slander) generally involve an employee's assertion that the employer made a false statement to others about the employee, thus injuring the employee's reputation. Stating that an employee is a substance abuser or that the employee tested positive for drugs would tend to harm the employee's reputation and may be defamatory.

> **[ASA Tip:** Given the substantial potential liability for employers that accuse employees of substance abuse, it would be advisable for a staffing firm to adopt these precautionary measures:
> - Restrict information regarding the results of drug and alcohol tests to those individuals within the company who need to know (e.g., people who will make the decision to assign, hire, or discharge an individual)
> - Develop and adhere to appropriate procedures for maintaining the confidentiality of the test results
> - Refuse to disclose, either orally or in writing, any allegation of substance abuse or the results of drug and alcohol tests to anyone outside the company, including clients**]**

5. State and Local Drug-Testing Laws

States have enacted legislation that directly regulates how a private employer may test its employees and applicants for drugs. In general, these laws set forth the circumstances under which employers may require employees and applicants to submit to drug testing, and they prescribe certain procedures that must be followed in administering drug-testing programs. Employers who drug-test or take personnel action based on the results of a drug test must do so in compliance with the applicable laws in their jurisdiction.

D. Responding to Client Requests for Drug Testing

As more employers begin to insist on drug testing, it is virtually inevitable that pressure to drug-test temporary employees will increase. Staffing firms would be well advised to develop a policy of how to respond to drug test requests before clients begin to request such testing. A staffing firm that has not developed a policy will likely end up making decisions on an ad hoc basis, without the benefit of careful consideration; as a result, actions may be taken that violate a state or local law regulating drug testing and/or unnecessarily expose the staffing firm to litigation and increased liability.

[ASA Tip: Staffing firms and their clients both can have liability for improper or wrongful drug testing or for damages arising from the inappropriate disclosure or use of the results of the drug test.

In most situations, however, liability arising from improper drug testing will fall primarily on the entity that makes the "mistake." For example, if a client uses a noncertified laboratory to test temporary employees, the client (and maybe the laboratory) will be primarily responsible. On the other hand, if the staffing firm discloses erroneous information about the results of the drug test to a client, the staffing firm will be liable for any reputational injury suffered by the employee.]

1. General Considerations

a. Know the Clients. In order to develop a successful strategy for responding to client requests for drug testing, the cardinal rule is for staffing firms to know in advance which clients require drug testing, and equally important, under what circumstances.

b. Control the Testing. One issue to be considered is who should control the drug testing, the staffing firm or the client. Sometimes, the client will demand to control the testing, so the issue does not arise. If you have a choice, consider the following factors in deciding whether to seek to control the testing or to allow the client to do so.

- If the client controls the drug testing, the staffing firm saves the money, time, and inconvenience involved in establishing a drug-testing program. On the other hand, drug testing is not yet prohibitively expensive, in part because not every client will require it. In any event, at least some of the costs may be passed on to the client either directly or indirectly.
- To the extent that drug testing gives rise to legal claims, or just animosity, by the temporary employee, having the client do the testing tends to shift the focus of the employee's ire to the client.
- The possibility of defamation, invasion of privacy, and related lawsuits against the staffing firm is minimized if the client does the drug testing and the results are not shared with the staffing firm. However, as a practical matter, it is likely that the staffing firm will learn that an employee has tested positive. In addition, an employee who sues will likely name the staffing firm as a defendant regardless of who controls the drug tests.
- If the staffing firm does not know that a particular employee tested positive, the staffing firm will not be faced with the tough question of whether, knowing the employee uses drugs, it should send the employee to other assignments.
- If a client controls the testing and learns that a temporary employee assigned to it tested positive, this knowledge may create an incentive for that client to stop doing business with the staffing firm for fear that other temporary employees may also test positive. On the other hand, if the staffing firm controls the testing, it can avoid sending persons who test positive to clients that require employees to pass a drug test.
- Drug testing by the staffing firm may enable it to refer those who test positive to appropriate rehabilitation services before they cause harm to a client's employees or property for which the staffing firm is likely to be liable, and may minimize absenteeism, lateness, employee theft, and similar problems that substance abusers often cause.

- Drug testing of employees by a staffing firm may be used affirmatively in marketing strategies (i.e., "we only send drug-tested employees").

g. Authorization and Release From Liability Forms. Applicants or employees asked to be drug-tested should execute appropriate authorization and release from liability forms. There are state law compliance considerations. A sample form is included as part of Appendix E.

> **[ASA Tip:** A staffing firm should not force employees to be tested. If they are unwilling to consent to be drug-tested, the staffing firm can refuse to employ them or declare them ineligible to receive assignments from clients that insist upon drug testing.
>
> Moreover, employees should not be assigned to a client that is known to request drug testing for temporary employees after a certain length of time or as a condition of permanent employment by the client, unless the temporary employee consents in writing to be tested before beginning the assignment. Indeed, alerting the temporary employee to the prospect of drug testing may serve as a screening device, and is likely to decrease the risk that a temporary employee actually assigned to the client will test positive.
>
> A staffing firm should be careful to ensure that the release signed by the employee protects the staffing firm as well as the laboratory and the client.]

iv. Clients. For legal and practical reasons, it is probably imprudent to tell a client that a specific employee failed a drug test. If a client asks why a particular employee is no longer assigned to it, you may simply state that the employee is no longer available.

E. Must All Applicants and Employees Be Drug Tested?

The answer to this question is "no," provided the guidelines set forth in this section are adhered to and provided further that your state has not adopted a law that imposes such a restriction.

Unless prohibited by an applicable state law, it is permissible to differentiate among different categories of employees as to who will be drug-tested. For example, no state law currently prohibits testing only those employees a client requests, only temporary employees who will be given long-term assignments, or only those who are assigned to certain types of jobs. However, there may be limitations on when and under what circumstances such individuals may be tested.

Caution: You may not differentiate among applicants or employees on the basis of their age, race, color, religion, sex, national origin, disability, genetic information, or other protected category.

3. Authorization and Release Forms

It is lawful to request all applicants (or all applicants with certain skills) to execute authorization and release forms to be drug-tested as a condition for being eligible for assignments, without actually requiring them to be drug-tested. In this way, an authorization form would be on file in the event

that this employee is subsequently considered for the kind of assignment (e.g., long-term or indefinite) for which clients require drug testing.

> **[ASA Tip:** It is highly ill-advised (and unlawful in some states) to disclose to clients the test results of specific applicants or employees without the explicit written consent of the person tested. The staffing firm should simply inform a client that it will send someone who has tested negative. Finally, it would be prudent for a firm to explain its drug-testing policy to the client so that there will be no misunderstanding regarding when and under what circumstances employees are tested.**]**

The Pre-Employment Process

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 7)

This chapter is intended to offer general guidance on procedures for screening job candidates and making decisions on whom to offer employment. It includes a discussion of the types of information that can and cannot be elicited from applicants, the administration of medical exams, the content of application forms, and the use of references. Because of the recent and ongoing proliferation of state and local laws governing pre-employment practices, counsel familiar with laws applicable in jurisdictions where a staffing firm operates should be consulted to help ensure compliance and mitigate risks.

A. Recruitment

An employer's recruitment efforts cannot, either by design or effect, be limited in such a way that members of protected classes are systematically denied access to job opportunities. This requirement affects staffing firms in at three key ways:

1. Word-of-Mouth Recruiting

When an employer's existing work force does not include members of protected classes, an employer who relies solely on word-of-mouth referrals by current employees to fill job vacancies runs a substantial risk of violating discrimination laws. Discrimination may occur because protected persons will not have the personal contacts necessary to learn about job openings and, thus, will be excluded from an opportunity to apply for the jobs.

2. Job Advertisements

Staffing firms may also expose themselves to a substantial risk of violating discrimination laws in connection with job advertisements. Employers must take care to select publications and websites that are likely to reach a diverse group of applicants when placing job advertisements. In addition, employers must pay particular attention to the content of job advertisements. Such advertisements should always include an appropriate equal employment opportunity (EEO) caption (e.g., "an equal opportunity employer"). Employers are prohibited from indicating in their job advertisements any preference, limitation, or specification for a particular protected class. An advertisement reflecting a preference for a "young" applicant or a "female" applicant (unless a bona fide occupational qualification is present) is unlawful.

> **[ASA Tip:** The following references in job advertisements have been declared discriminatory:
> - Attractive lady
> - Career-minded men
> - Real sharp girl
> - College student
> - Ages 25 to 35
> - Retiree
> - Gal Friday
>
> Employers seeking to minimize the risk of violating the EEO laws should use neutral

job titles in their advertisements, such as "sales representative" in place of "salesman," or "server" instead of "waitress." Words or phrases such as "recent graduate," which tend to deter members of protected categories from applying, should also be avoided.**]**

All advertising and recruiting materials must be free of any language that would explicitly or implicitly deter members of a protected class (e.g., older workers, women, racial minorities, persons with disabilities, etc.) from applying. Language that might be construed as creating such a deterrent can sometimes be offset by the inclusion of language encouraging persons within the protected class to apply for the position.

Example. An advertisement for a cashier at a supermarket specifies that "applicant must be young, energetic, and possess excellent client relations skills." Such a listing would violate the federal age discrimination statute because it indicates a preference or limitation based on age. The ad would probably be acceptable, however, if the word "young" were deleted. An advertisement seeking an "energetic" candidate would be acceptable since persons of all ages can be energetic.

3. **Walk-In Hiring**

While walk-in hiring is generally lawful, if the practice produces a workforce that disproportionately excludes members of minority groups, exclusive reliance on that practice may be viewed as evidence of discriminatory intent.

B. Pre-Employment Inquiries

1. General Considerations

After potential employees have been identified, the employer must learn some basic information to determine whether the individual is suitable for hire. A prospective employer should elicit from a job candidate only information that is necessary to evaluate that person's qualifications for the job being filled. With temporary employees, this may not always be clear since the applicant may be suitable for many types of jobs. Moreover, application forms and interviewers should not pose questions that seek information about an applicant's age, marital status, religion, disabilities, or any other characteristic that is protected by an employment discrimination statute. Such questions give rise to a suggestion of possible discrimination, because it is reasonable to assume that all questions asked on an application form or during an interview are for some purpose and that the answers given have a bearing on the selection process.

[ASA Tip: Staffing firms should review their application forms and "standard" interview questions and determine why each piece of information is being sought. Any question that does not elicit information that will assist in determining the candidate's suitability for the job should be altered or eliminated.]

In general, employers should observe three overall principles in seeking information from job applicants:

- Determine that all areas of inquiry and information sought serve a legitimate business purpose in enabling employers to evaluate the candidate's suitability for the position(s) at issue.
- Avoid selective questioning or testing. Interview questions and job tests should be administered to all applicants for similar positions who reach the stage of the hiring process at which those

questions or tests are conducted. For example, an employer should not ask only female candidates who appear to be in their 20s and 30s (commonly thought of as childbearing age) about their attendance record at their former job or about caring for their children. If questions about attendance are related to the job(s) at issue, they should be asked neutrally and of all candidates.

- Distinguish between information that is needed to evaluate *candidates* and information that is required only from those who actually become *employees*.

Employers often require information from employees regarding their ages, marital status, and number and ages of children in order to enroll them in insurance and pension programs and for other legitimate business purposes. Generally, however, employers need to obtain this information only from *employees—not from job applicants*. It is generally acceptable to ask newly hired employees to furnish this information provided there is a legitimate business purpose for doing so.

> **[ASA Tip:** Rather than ask for such information on the application form, consider having successful applicants provide that information after they are hired. To avoid any misunderstanding, the employee should be told exactly why the information is needed. In addition, the information should not be contained in the employee's personnel file.
>
> Many states have enacted rules regarding permissible pre-employment inquiries, and these rules should be consulted before making written or oral requests for information from applicants.]

2. Americans with Disabilities Act

Unlike most of the other federal statutes that prohibit employment discrimination, the Americans with Disabilities Act of 1990 contains explicit restrictions on the questions an employer can ask and the tests an employer can require an applicant to take during the pre-employment process.

The ADA divides the hiring process between the "pre-offer" stage and the "postoffer" stage. An employer may ask certain disability-related questions and require medical examinations of an applicant only *after* the applicant has been given a conditional job offer, and only if such questions or examinations are posed or administered to *all* applicants who have received an offer of conditional employment for any job in the same category.

The purpose of these rules is to isolate an employer's consideration of an applicant's nonmedical qualifications from any consideration of the applicant's medical condition. The prohibition against asking disability-related questions or administering medical examinations until after the employer makes a conditional job offer is intended to prevent the employer from considering an applicant's disability until *after* the employer has evaluated the applicant's nonmedical qualifications.

a. Disability-Related Questions. A disability-related question is one that is likely to elicit information about a disability. An employer cannot directly ask whether an applicant has a particular disability, nor can an employer ask questions that are closely related to disability. If, however, there are many possible answers to a question, only some of which would contain disability-related information, the question is not "disability-related."

b. Questions an Employer Can Ask During the Pre-Offer Stage. The EEOC has issued numerous enforcement guidelines to assist employers in understanding their obligations under the ADA during the hiring process. According to the EEOC, an employer may make all of the following inquiries of job applicants:

i. An employer may ask whether applicants can perform the essential functions of the job.

ii. An employer may ask applicants to describe how they would perform any or all job functions as long as all applicants in the job category are asked to do so.

iii. An employer may state its attendance requirements and ask whether an applicant can meet them. An employer may also ask about an applicant's prior attendance record, provided this question is asked of all applicants for the position.

> **[ASA Tip:** In posing such a question, it is important to remember that the employer's legitimate interest lies in determining the candidate's attendance rate, not the reason for absenteeism (e.g., "sick days," workers' compensation leave). For example, it is permissible to ask, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?" It is *not* acceptable to ask, "How many days were you sick?"]

iv. An employer may ask whether an applicant has the certifications or licenses required for the particular job duties, whether the applicant intends to get a particular job-related certification or license, and why the applicant does not currently have the certification or license.

vi. An employer may ask an applicant about an "*impairment*" that does not constitute a disability (i.e., an impairment that does not substantially limit a major life activity). For example, an employer may ask an applicant with a visibly broken leg how she broke her leg but may not ask whether the applicant expects the leg to heal normally or whether the applicant's bones break easily.

> **[ASA Tip:** In view of the difficulties in drawing the line between an "impairment" and a "disability," it is advisable to i. The questions are unlikely to provide meaningful information but may engender disputes as to whether the question is permissible under the ADA.]

vii. An employer may ask an applicant about *current illegal use of drugs*. An individual who currently uses illegal drugs is not protected under the ADA. Most questions about current or prior *lawful* drug use are likely to elicit information about a disability and are therefore improper questions at the pre-offer stage. An employer may not ask what medication an applicant is currently taking or ask whether the applicant has ever taken a particular drug. Employers are permitted to ask about *prior* illegal drug use but cannot ask questions that are likely to reveal past *addiction*, because past addiction to illegal drugs or controlled substances is a covered disability under the ADA as long as the person is not *currently* using drugs illegally. An employer may ask, "Have you ever used illegal drugs?" or "When is the last time you used illegal drugs?" But an employer cannot ask "How often" the applicant used illegal drugs in the past because doing so may elicit information about prior addiction. The legalization of recreational marijuana use in several states (including Alaska, California, Colorado, Massachusetts, Maine, Michigan, Nevada, Oregon, Vermont, and Washington), and of

medicinal marijuana use in several more, further complicates this area of inquiry. Furthermore, questions about legal off-duty marijuana use may run afoul of some states' privacy laws, as discussed below. Advice of counsel knowledgeable about this rapidly evolving area of law should be sought in structuring pre-employment inquiries in relevant jurisdictions. See also Chapter 6 above for a discussion of pre-employment drug testing.

viii. An employer may ask applicants about their *drinking habits* unless the particular question is likely to reveal information about *alcoholism,* which is a protected disability. Accordingly, an employer may ask whether an applicant drinks alcohol and whether the applicant has been convicted of driving under the influence of alcohol. This inquiry may be job related when the applicant is applying for a safety-sensitive position, such as a bus driver or the operator of heavy machinery. Employers cannot ask how much alcohol the applicant drinks or whether the applicant is participating in an alcohol rehabilitation program; these questions are likely to reveal information about whether the applicant has alcoholism. Even though certain questions about drinking habits may be permissible under the ADA, they should be avoided.

c. Questions an Employer Cannot Ask During the Pre-Employment Stage. During the pre-employment stage, an employer may not ask questions regarding the following:

i. Whether an applicant is disabled or handicapped

ii. In general, on an application form or during an interview, whether an applicant will need a reasonable accommodation to perform the job for which he or she is being considered (there are limited exceptions to this rule, which are described below)

iii. An applicant's ability to perform major life activities unless they specifically relate to the applicant's ability to perform essential job functions

iv. An applicant's job-related injuries, illnesses, or workers' compensation history

v. A third party (such as the applicant's references or former employers) any questions that it could not pose directly to the applicant

d. Limited Ability to Inquire Regarding an Applicant's Need for Reasonable Accommodation During the Pre-Offer Stage. There are very limited circumstances in which an employer may make inquiries during the pre-offer stage regarding an applicant's possible need for a reasonable accommodation in performing the essential functions of the job being sought. It is important to note that even when these circumstances arise, the extent to which an employer can then make inquiry is still very limited.

ii. When the Disability Is Obvious or When the Applicant Volunteers Information About the Disability. Sometimes the applicant's disability is obvious (e.g., use of a wheelchair or white cane). Some applicants may also voluntarily disclose information about a hidden disability. In such instances, the employer may then ask that particular applicant to describe or demonstrate how he or she would perform the essential functions of the job being sought even if other applicants are not asked this question. An employer may also ask whether such an applicant will require a reasonable accommodation to perform the functions of the job and, if so, the type of reasonable accommodation that will be required. If an applicant applying for a receptionist position voluntarily

discloses that she has diabetes and will need periodic breaks to take medication, the employer may ask how often she will need breaks and how long the breaks will be. Remember, however, that the employer may not ask any question about the underlying physical condition even in situations where the disability is obvious or applicant has voluntarily disclosed the condition.

> **[ASA Tip:** In those limited instances when such interactive dialogue is permitted under the ADA, the purpose is to help evaluate the applicant's ability to perform the essential functions of the job with or without a reasonable accommodation—not to screen out a disabled candidate.]

e. Medical Examinations and Other Employment Tests Under the ADA. An employer cannot require medical examinations during the pre-offer stage. A medical examination is one designed to reveal information about physical or mental impairments or about an applicant's physical or mental health.

Despite these restrictions, applicants may be required to take the following tests:

i. An employer may require applicants to take *physical agility tests* designed to demonstrate the applicant's ability to perform actual or simulated job tasks. Such a test is not considered a medical examination. While such tests are permitted, an employer cannot take the applicant's blood pressure or heart rate during or at the conclusion of the physical agility test. Measuring physiological responses in this fashion would constitute a medical examination.

ii. A *physical fitness test* that determines an applicant's ability to perform physical tasks related to the job, such as running or lifting, is not a medical examination.

iii. An employer may ask an applicant to provide medical certification of his or her ability to safely perform a physical agility or physical fitness test.

iv. An employer may ask an applicant to assume responsibility and release the employer of liability for injuries incurred in performing a physical agility or fitness test.

v. An employer may administer *psychological examinations* provided they do not reveal information that would lead to identifying a mental disorder or impairment. A test that reflects whether applicants have characteristics that might indicate whether the individual has excessive anxiety, depression, or compulsive disorders would be a medical examination. A test designed and used to measure only such characteristics as aptitude, honesty, or reliability is not a medical examination. Note that potential employers are required to offer reasonable accommodations to disabled applicants to permit them to complete a written test (such as offering the test in a different format or manner (for example, orally)) that does not measure the disabled person's impaired skill, unless the test is designed to measure that skill because the skill (e.g., reading) is an essential function of the job.

vi. An employer may administer *drug tests* to determine *current* illegal use of controlled substances. Such tests are not considered medical examinations under the ADA. On the other hand, tests to determine whether or how much alcohol an applicant has consumed are considered medical examinations and therefore are not permitted under the ADA at the pre-offer stage.

f. The Post-Offer Stage Under the ADA. After making a job offer to an applicant for an actual

work assignment with a client but before the candidate has started the work assignment, an employer may ask disability-related questions and perform medical examinations. The offer of a work assignment may be conditioned on the employer's evaluation of the applicant's answers to these post-offer, disability-related questions or the results of a medical examination.

At the post-offer stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illness, diseases, impairments, and general physical and mental health. EEOC regulations state that disability-related questions and medical examinations at the post-offer stage do not have to be related to the job but if decisions based on information from post-offer questions or medical exams is used to screen out applicants, such criteria must be job-related and consistent with business necessity. The EEOC recently negotiated a $4.4 million settlement with a company that administered a post-conditional offer carpal tunnel syndrome test to all applicants, then disqualified anyone who tested positive without individualized assessments of ability to perform the relevant job duties with or without a reasonable accommodation.

> **[ASA Tip:** If the employer chooses to ask such questions or require such examinations during the post-offer stage, these questions and tests must be required of all entering employees in the same job category, regardless of disability. It is also important to realize that a rejection of a candidate based on information obtained at the post-offer stage of the hiring process will be subjected to careful scrutiny if the hiring decision is subsequently challenged.

After obtaining basic medical information from all individuals who have been given conditional offers of employment in a given job category, the employer may ask specific individuals for more medical information if the follow-up questions are related to the medical information already obtained from the applicant.

At the post-offer stage, an employer may ask all individuals whether they need reasonable accommodation to perform the job. If, at this stage, someone requests a reasonable accommodation to perform the essential functions of the job, the employer may ask the individual for documentation of the disability that causes the need for the accommodation.

3. Other Restrictions on Pre-Employment Inquiries

a. Race, Color, Religion, Sex, or National Origin. Pre-employment inquiries concerning race, color, religion, sex, or national origin do not constitute violations of Title VII in and of themselves. Some state laws, however, expressly prohibit such inquiries and may also deem it improper to seek related information that could indirectly reveal the answers to these questions. Even under Title VII, moreover, posing such questions often leads to the inference that the employer used the information obtained for illegal purposes. For this reason, these inquiries should clearly be avoided.

b. Marital Status and Child Care. An employer should not ask questions about marital status, pregnancy, future childbearing plans, the numbers and ages of children, or child-care arrangements. The use of such information may constitute a violation of Title VII or state laws, particularly if it is used to deny or limit employment opportunities for female applicants. The EEOC has filed suit against a staffing firm for failing to assign a pregnant employee to clients. Employers often tend to seek pre-employment information about child-care arrangements only from female applicants. Such

inquiries constitute sex discrimination. It is best to avoid such questions altogether.

c. Age. An employer should not ask questions of an applicant that tend to establish the applicant's age or approximate age. Application forms should not ask for birth dates or for the dates of attendance or graduation from elementary or high school. If there are legal age requirements for the job position, it is acceptable to ask a candidate whether he or she will be able to show proof of age or to produce necessary work permits if hired.

d. Arrest Records. Making personnel decisions on the basis of arrest records may have a disproportionate effect on the employment opportunities of members of some minority groups. Without proof of business necessity, an employer's use of arrest records to disqualify job applicants is unlawful discrimination. The mere request for such information tends to discourage minority applicants and has therefore been held to be illegal. In addition, a number of states prohibit employers from inquiring about arrests. In some circumstances, however, the conduct underlying an arrest may be the basis for an employment decision if that conduct, as opposed to the arrest, makes the individual unfit for the position in question.

e. Conviction Records. Subject to individual state law, an employer generally may give fair consideration to the relationship between a conviction and an applicant's fitness for a particular job. Conviction records (or guilty pleas) should not generally be automatic bars to employment. It is preferable for an employer to make case-by-case decisions, taking into account such factors as the nature and severity of the crime, when it was committed, the person's overall record, any rehabilitation efforts, and the nature of the position the applicant is seeking, and then making a reasoned business judgment as to the risks entailed in employing this particular applicant. To encourage candor, some employers advise applicants that a conviction record is not necessarily a bar to employment.

f. Nature of Military Discharge. Employers should not ask questions regarding the type of discharge an applicant received from military service unless a "business necessity" can be shown. Such inquiries should be accompanied by a statement that a dishonorable or general discharge is not an absolute bar to employment and that other individualized factors will affect the final hiring decision. According to a Department of Defense study, minority service members receive a higher proportion of general and undesirable discharges than nonminority members of similar aptitude and education. Accordingly, a requirement that applicants have received an honorable discharge may have a disparate impact upon minority applicants and thus violate Title VII.

g. State Law Variances. Many state and local laws protect categories of persons not covered by federal law. For example, sexual orientation, gender identity, gender expression, marital status, and off-premises smoking are protected in some jurisdictions. Other lawful, off-duty conduct is also protected in some jurisdictions, such as alcohol use or gun ownership, among others. Questions about any protected category should be avoided.

h. Genetic Information

Federal law protects against discrimination on the basis of genetic information in making hiring and other employment decisions. Employers therefore should not require applicants to answer questions about family medical history during an employment-related medical exam, except under very narrow circumstances after a conditional offer of employment has been made. When an employer lawfully

asks for information related to disability status (e.g., to support a request for reasonable accommodation), it should caution the employee (or his/her health care provider) not to provide genetic information. Employers must tell their own health care providers not to collect genetic information as part of post-conditional offer medical exams.

i. Prior Salary Information

Some jurisdictions, including California, prohibit prospective employers or their agents (such as staffing firms) from asking job applicants about their salary/pay history (including benefits) or relying on such information in making hiring decisions. The purpose of such laws is to help prevent continuation of unjustified gender- or race-based pay inequities. However, the California law permits asking applicants about their "salary expectations." Staffing firms should base hiring and initial pay decisions on applicants' qualifications and experience relative to the specific job in question, and not on prior rates of pay. Laws in this area are developing at the state and local level, so staffing firms should seek legal counsel regarding acceptable pre-employment pay inquiries in their jurisdictions.

G. Credit and Background Reports

The federal Consumer Credit Reporting Reform Act of 1996 amended the Fair Credit Reporting Act (hereinafter collectively referred to as FCRA) and became effective Oct. 1, 1997. The amendment significantly changed the procedures employers must follow in connection with credit reports and similar background reports that are used for any employment-related purpose.

> **[ASA Tip:** Many states have enacted laws either limiting the availability of background reports or limiting an employer's right to make decisions based on such reports. So long as such state law requirements do not conflict with the federal Fair Credit Reporting Act, they must be complied with as well. Experienced counsel should be consulted for the limitations of a particular state.]

1. Reports Prepared by Consumer Reporting Agencies

The FCRA permits staffing firms to request and obtain consumer credit reports to evaluate persons for employment, promotion, reassignment, or retention as an employee. There are two types of reports governed by the FCRA: "consumer reports" and "investigative consumer reports." Consumer reports are communications received from a "consumer reporting agency" bearing on a person's credit worthiness, credit standing, character, general reputation, personal characteristics, or mode of living. Investigative consumer reports encompass similar information, but they are obtained through personal interviews of friends, neighbors, and associates as well as from written records.

Because most staffing firms will generally not require investigative consumer reports, this discussion will focus on consumer reports. A consumer report would include criminal history, credit history, motor vehicle records, Social Security identification, license verification, and military records, obtained from a consumer reporting agency. A consumer reporting agency includes any firm or organization that obtains information on an applicant or employee and charges a fee to the user of the report (e.g., credit checking firms, detective agencies, private investigators, online database companies, etc.).

The FCRA requires an employer to disclose clearly and conspicuously to an employee or prospective employee, in writing and before a consumer report is requested, the fact that such a

report may be obtained for the purpose of evaluating an individual for employment, retention, promotion, or reassignment. The written disclosure must be provided to the employee or prospective employee through a separate document consisting solely of the FCRA disclosure. Moreover, the employee must obtain the employee's or prospective employee's written authorization to obtain such a report. The written authorization form should notify the employee that he or she is authorizing the staffing firm to obtain a consumer report at any time during the employee's employment with the staffing firm for the purpose of evaluating the employee for employment, retention, promotion, or reassignment.

The FCRA requires the employer requesting the report to sign and file with the consumer reporting agency a certification as to the permissible purpose intended (e.g., for employment purposes), and that it will comply with the law's disclosure and adverse action requirements.

The FCRA requires clear and conspicuous written notice to and written consent from the "consumer" before a consumer report may be obtained. Before taking any adverse action based on the report (e.g., refusal to hire), employers must provide the applicant or employee with a copy of the report and a description of the person's rights under the FCRA. The employer must wait for a "reasonable" period after furnishing the report and statement of rights before taking any adverse action based on the report. Five days would probably be adequate.

After taking adverse action based on the consumer report, the affected individual must be notified (verbally or in writing). This notification must include the following:

- Nature of the adverse action
- Name, address, and toll-free telephone number of the consumer reporting agency
- A statement that the agency did not make the adverse decision and cannot explain it
- A statement setting forth the person's right to obtain a copy of the report from the reporting agency upon request within 60 days
- A statement setting forth the person's right to dispute the accuracy or completeness of the report directly with the reporting agency

2. Reference Checks Conducted by Staffing Firm Personnel

Special rules apply to staffing firms that communicate the results of reference checks to their clients. Under the Fair Credit Reporting Act, staffing firms can communicate such information to their clients if they take the following actions:

- Get consent (oral or written) from an applicant prior to making a reference check or communicating such information to clients
- Confirm any oral authorization in writing within three business days
- Notify the applicant in writing of the right to request the nature and substance of information in the applicant's file at the time of the request
- Disclose in writing within five days of a request from the applicant the nature and substance of information in the file (NOTE: Sources of information need not be revealed.)

Staffing firms that undertake additional checks such as criminal record checks 9subject to applicable laws) and other background checks may still be subject to FCRA (and state law) requirements if such information is communicated to a third party, such as a client.

The Occupational Safety and Health Act

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 9)

A. Coverage of the OSH ACT

The OSH Act covers virtually every private sector employer and its employees. Some states, as authorized by the OSH Act, have their own workplace safety statutes, which apply in those states in lieu of the federal law. Employers in all fields, including manufacturing, construction, and the staffing industry, are covered by the Act.

Under the Act, covered employers have two general obligations: to provide a safe working environment for their employees, and to comply with the Act's rules and regulations, including its record-keeping requirements.

B. Application of the OSH Act to Staffing Firms

The extent to which the OSH Act may apply to a staffing firm in any given situation depends primarily on whether the staffing firm is considered to be the "employer" of persons who work at client company work sites for purposes of the Act. Plainly, staffing firms are the employers of their own regular employees for purposes of the Act.

In 1985, OSHA informally decided that the entity hosting the temporary employees (i.e., the client) will generally be responsible for complying with the OSH Act with respect to temporary employees assigned to its work site, particularly where, as is customary, that entity controls the work site, directs and controls the work of the temporary employees, and is in a position to cure any unsafe conditions at the workplace. Decisions from administrative law judges deciding specific cases generally were consistent with OSHA's informal policy.

In recent years, however, as staffing firms have become involved in various different types of staffing arrangements, and as various OSHA field offices have begun to receive complaints filed by temporary employees naming the staffing firm as their employer, the issue of whether a staffing firm is the responsible employer under the Act has become more complex. In assessing whether a staffing firm may be liable under the Act, OSHA will normally take into account the following factors:

- Who directs and controls the employees at the work site
- Who employs the employees' supervisor
- Whether the parties allocated among themselves responsibility for complying with the OSH Act (e.g., in a staffing services agreement)
- Who the temporary employees consider to be their employer
- Who has the authority to control the physical conditions at the work site
- Who has knowledge of the workplace hazards and conditions
- Whether the staffing firm has the right or the authority to remedy any hazardous conditions or unsafe practices at the work site
- Who provides the tools and equipment used by the temporary employee

No one of these factors is determinative, but direction and control of the employees and of the work site are generally the most important factors. Notably, factors such as who pays the employees

and who is responsible for employment tax obligations are not generally considered as significant in assessing who is the employer for purposes of the OSH Act.

It remains the case that in most traditional temporary help arrangements, the client company will generally be viewed as the host employer responsible under the Act to provide a safe workplace for all employees who perform work at the client company's work site, including temporary employees. However, in outsourcing, facilities management, or other staffing arrangements where the staffing firm directly supervises the employees on site or has control over the workplace itself, OSHA will generally view the staffing firm as the host employer.

> **[ASA Tip:** Staffing firms may reduce the likelihood of being cited for OSH Act violations by including a provision in their staffing services agreements explicitly establishing that the client controls the work site and is therefore responsible for OSH Act compliance at the work site. You should consult with an experienced OSH Act attorney concerning appropriate legal provisions.]

Even if the staffing firm is not the host employer, it can be cited for violations related to preparing employees for likely work site safety hazards. Depending on the circumstances, such preparation may include providing safety training for temporary employees or certain personal protective equipment, such as hard hats or gloves.

C. Providing a Safe Workplace

Under the Act, employers have two principal duties with regard to ensuring the safety of their employees: a "general duty" to provide a place of employment that is free from recognized hazards that cause, or are likely to cause, death or serious physical harm to its employees, and a duty to comply with all occupational safety and health standards under the Act.

An employer's "general duty" is to maintain a safe and healthy workplace for its employees, and arises from the Act's "general duty clause." The general duty clause exists in addition to specific standards and rules promulgated by OSHA as regulations under the Act. The general duty clause allows OSHA to protect employees from hazards or conditions that may be inherently dangerous but for which no specific standard or rule has been adopted. Thus, the general duty clause acts as a catchall for OSHA, enabling it to require employers to abate any recognized hazard that causes or is likely to cause death or serious harm to employees.

Like all employers, staffing firms have a general duty to ensure a safe workplace for their staff employees. As noted above, OSHA requires that the host employer provide the safe workplace for temporary employees assigned to a client site. Also, OSHA requires that staffing firms inquire into the conditions of their temporary employees' assigned workplaces and verify that the host has fulfilled its responsibilities to ensure that the temporary employees are being sent to safe workplaces.

D. Hazard Communication

In 1986, OSHA issued an administrative regulation officially titled the Hazard Communication Standard. The HCS is designed to protect employees from chemical hazards in the workplace. Specifically, the HCS is intended to reduce the incidence of chemically related injuries and illnesses

in companies where chemicals are either used, produced for use or distribution, or otherwise handled. The HCS does not generally apply to companies in office settings.

The HCS applies to all employees, temporary or regular, who may be exposed to hazardous chemicals under normal operating conditions or foreseeable emergencies. In most instances, covered employees are production workers, line supervisors, and repair or maintenance personnel. Office workers, security personnel, and other nonproduction employees normally are not covered unless their job routinely involves potential exposure to hazardous chemicals in an amount greater than the average consumer.

The HCS requires employers to develop a written hazard communication program; preserve warning labels provided by the chemicals' manufacturers; obtain and make available safety data sheets; and provide affected employees with information and training.

A question that often arises is whether a staffing firm that furnishes employees to a covered employer (e.g., a chemical manufacturer) is required to comply with the HCS because its temporary employees are entitled to the protection of the regulation.

According to OSHA's website, "[i]n meeting the requirements of OSHA's Hazard Communication Standard, the temporary agency employer would…be expected to provide generic hazard training and information concerning categories of chemicals employees may potentially encounter. Host employers would then be responsible for providing site-specific hazard training…." OSHA also advises that contracts between a staffing firm and client "should clearly describe the responsibilities of both parties in order to ensure that all requirements of the regulation are met." When asked "[i]s the temporary help service required to maintain cumulative exposure data (e.g., 30-day lead exposure, six months noise exposure, etc.), when the employee works for several different companies during the year," the agency answered "[y]es, the temporary help service must maintain employee records in accordance with the appropriate OSHA standard (e.g., the lead standard, the occupational noise exposure standard, etc.). However, the client employer must perform the site characterization and monitoring of exposure to hazardous chemicals on the work site."

In 2016, OSHA released a TWI bulletin explaining how the Hazard Communication Standard applied to the temporary staffing environment. In it, OSHA emphasized that the "staffing agency also has a duty to inquire and verify that the host employer has adequately fulfilled its shared training responsibilities for assigned employees." To do so, OSHA advises that "the staffing agency should take reasonable steps and have a reasonable basis for believing that the host employer's hazard communication training adequately addresses the potential chemical hazards to which employees may be exposed to at the host's worksite."

In those situations where the staffing firm controls the manner in which assignments are performed, or otherwise controls the work environment, the staffing firm may be legally obligated to provide site-specific hazard training under the HCS. Unusual or complex work arrangements involving temporary employees will be decided on an individual basis by the appropriate OSHA area director.

In 2012, OSHA revised its Hazard Communication Standard to align with the United Nations Globally Harmonized System of Classification and Labeling of Chemicals. Two significant changes in the revised standard require the use of new labeling elements and a standardized format for Safety Data Sheets. All OSHA stateplans were required to adopt the 2012 changes, and therefore,

employers under both federal OSHA jurisdiction and stateplan jurisdiction must comply with the new requirements.

Some states, including, for example, New York, Massachusetts, New Jersey, and Pennsylvania, have laws similar to the HCS. It is advisable to learn how staffing firms are treated under these state laws inthe state(s) in which you operate.

E. Record-Keeping Requirements

As a general rule, it is the host employer that must keep and maintain the injury and illness records required by the OSH Act. Normally, this is the client company. Even if the staffing firm agrees to help the client by keeping the required records for temporary employees, this will not relieve the client company of the legal obligation to keep and maintain the required records.

In general terms, employers that have not been exempted from the record-keeping requirements must adhere to the following requirements:

- Maintain a log and incident report of all occupational injuries and illnesses (OSHA Forms 300 and 301, or their equivalent), and submit these forms annually. Whether staffing firms and other employers are required to electronically submit their reporting obligations is in flux. Toward the end of the Obama Administration, OSHA required employers with 250 or more employees in industries that are routinely required to keep records to electronically submit their information. However, under the Trump Administration, OSHA issued a final rule on January 25, 2019 to retract this requirement, thereby relieving establishments with 250 or more employees from the need to electronically submit information from OSHA Forms 300 and 301. These employers must still submit their Form 300A (see below) electronically. Despite this relief from federal regulators, California recently passed legislation requiring California employers to electronically submit the required information to California's OSHA, thereby circumventing the federal OSHA's efforts to relax regulatory requirements.
- Record all occupational injuries and illnesses on the log within seven calendar days of receiving information that a recordable injury or illness has occurred
- Post an annual summary of occupational injuries and illnesses for each establishment (OSHA Form 300A)
- Report to OSHA all work-related fatalities within eight hours, and report to OSHA all inpatient hospitalizations, amputations, and losses of an eye within 24 hours. The report must be made to the nearest OSHA area office or by calling OSHA at 1-800-321-6742. OSHA now allows online reporting as well. In a situation where the host employer is responsible for reporting injuries to OSHA, confirm that the host employer did so in a timely manner. Note that certain states and local jurisdictions have shorter reporting periods than does OSHA.

Staffing firms and placement agencies are required to maintain the above injury and illness records for all employees that they supervise on a day-to-day basis, which will typically be only their regular office staff.

F. Enforcement

According to OSHA's guidance and several OSHA administrative decisions, citations for all safety and health hazards occurring at workplaces where temporary employees are assigned should

generally be issued against the host employer. For example, in several cases involving temporary employees assigned to construction sites, the construction company that supervised the work site, not the staffing firm, was found liable. However, staffing firms are occasionally issued citations either due to complaints by temporary employees or because a particular OSHA field office concluded that the staffing firm should be treated as the host employer in the circumstances of that case.

Unless the staffing firm qualifies as a host employer, these citations are typically limited to those safety issues within the staffing firm's control. For example, OSHA has cited staffing firms for failure to provide certain safety equipment (e.g., hard hats) for those employees it sends to a client's work site, for failing to provide safety training (e.g., ergonomics for word processors who later develop repetitive motion injuries), or for failing to provide satisfactory information or training as required by the HCS.

Under OSHA's Temporary Worker Initiative, which started in 2013, during on-site inspections, the OSHA inspectors will determine whether temporary employees are present, identify their staffing firm, identify their day-to-day supervisor, determine whether they have been exposed to hazardous conditions, and determine whether they received required training in a language and vocabulary that they understand.

The Family and Medical Leave Act

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 10)

The Family and Medical Leave Act of 1993 was enacted to protect the job security of employees faced with family care responsibilities such as the birth of a child or the serious health condition of themselves or an immediate family member. The FMLA requires covered eligible employers to grant up to 12 weeks of unpaid leave per leave year (and up to 26 weeks per 12-month period for military caregiver leave) to an employee. State and local laws must also be considered when determining whether and how much leave an employee must be given. Employers must follow the most generous provisions under federal, state, or local leave laws.

A. Leave Entitlements Under the FMLA

1. Covered Employers

A staffing firm will be covered by the FMLA if it employed at least 50 employees during at least 20 calendar weeks in the current or preceding calendar year, including both regular and temporary employees. For purposes of this section, any regular or temporary employee whose name appears on the staffing firm's payroll in a particular week will be considered employed for that calendar week, regardless of whether the employee actually receives any compensation for that week, and regardless of whether the employee is personally eligible for FMLA leave as set forth herein.

> **[ASA Tip:** In most temporary help situations, it is likely that a joint employment relationship will be found for purposes of the FMLA. Therefore, both the staffing firm and its client must count the temporary employees in determining employer coverage and employee eligibility.]

2. Qualified Employees

a. Time Worked. To be eligible for an FMLA leave, an employee must have worked for his or her employer for at least 12 months, for at least 1,250 hours during the 12-month period preceding the start of the leave, and be employed at a work site where the employer employs at least 50 employees within a 75-mile radius. With respect to staffing firms, the relevant work site for the 75-mile-radius test is the staffing office that assigned the employee to a client, and not the client's work site.

To be protected by the FMLA, an employee must meet the three criteria described above. If an employer has failed to maintain accurate records of hours worked, it is the employer's burden to show that the employee did not meet the eligibility criteria.

Time spent on paid or unpaid leave is not counted in the hours of service for purposes of determining eligibility for FMLA leave. If, however, the employee is kept on the payroll for any part of a week, including during a period of paid or unpaid leave, the week will count as employment for purposes of determining the 12-month eligibility test.

> **[ASA Tip:** All prior employment by an employer, regardless of how long ago it occurred, must be considered in determining whether an employee has the 12 months of total service required for coverage under the FMLA. Therefore,

employment applications should be sure to request information about the applicant's prior employment by the employer, and current employees who have not yet reached the 12-month mark should be asked for this information before any leave is designated as non-FMLA.]

b. FMLA Does Not Require Paid Leave. The FMLA requires unpaid leave be provided. An employer may provide paid leave benefits and/or require the substitution of any available paid leave during any unpaid FMLA, unless prohibited by state of local law.

c. Benefit Continuation. Employers must continue to provide the employee on leave with the same life and health insurance coverage (if any) that it offered prior to the leave, under the same conditions (e.g., if the employee received only individual coverage prior to the leave, he or she is only entitled to individual coverage during the leave; if the employee paid 10% of the premium cost prior to the leave, he or she must continue that payment during the leave period, etc.).

[ASA Tip: The term "employment benefits" encompasses all benefits provided or made available to employees by the employer. Included are: group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions.

While an employee is on FMLA leave, the employer is required to maintain the same level of health insurance benefits provided to the employee prior to the leave period. If a new benefits plan is established during the leave period, the employee on FMLA leave is entitled to the new benefits.]

d. Leave Taken for the Birth of a Child or Placement of a Child for Adoption or Foster Care. Employees are entitled to leave to care for a child, whether the child is born to the employee or his spouse, adopted, or placed for foster care. An employee's entitlement to FMLA leave for the birth or placement of a child expires 12 months after the birth or placement. An employee is entitled only to one leave of absence (for up to 12 weeks) under these circumstances, and such leave cannot be taken intermittently or by working a reduced workweek without the employer's approval.

Employees who take such leave can elect, or the employer can require them, to substitute their paid vacation time, personal leave, or family leave for any part of the 12 weeks of unpaid FMLA leave.

e. Leave Taken to Care for a Sick Family Member or Due to the Employee's Own Serious Health Condition. Employees are also entitled to leave to care for a family member with a serious health condition, or if their own serious health condition prevents them from working. When leave is taken to care for this purpose, it may be taken all at once, intermittently, or on a reduced work schedule (e.g., on those days when the normal caregiver is unavailable) when medically necessary (e.g., to transport a sick child to weekly medical treatments). Unlike leaves for the birth of a child, the employer's approval is not required for intermittent or reduced schedule leaves when the leave is taken for health-related reasons.

Under the FMLA, a "family member" means a child, parent, or spouse who has a serious health condition. The Department of Labor has revised the definition of "spouse" to include a same-sex spouse for purposes of taking FMLA leave. Under the FMLA, spouse is defined as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the

employee resides, including 'common law' marriage and same-sex marriage." "Child" includes legal wards, biological, adopted, foster, and stepchildren less than 18 years of age, plus older children with physical or mental disabilities.

Employees who take leave due to their own serious health condition may elect, or the employer may require them (unless prohibited by state or local law), to substitute whatever paid vacation, medical, and sick leave the employer provides for any part of their FMLA leave. Paid vacation leave may be substituted for the care of a family member with a serious health condition, but paid medical or sick leave may be substituted for the care of a family member only if the employer's leave plan allows such leave to be used for that purpose.

An exception to the usual rule that an employee can be required to substitute paid leave for unpaid FMLA leave is when the employee is receiving payments from a plan covering temporary disability, such as an employer's disability insurance plan, workers' compensation plan, or a state-mandated disability statute. If the employee is receiving such payments, the employer cannot require the employee, and the employee cannot elect, to substitute paid leave for unpaid leave. While the leave still counts as FMLA leave (i.e., workers' compensation leave and FMLA leave can run concurrently), the employer cannot require the employee to use up accrued paid leave during the period the employee is receiving such payments.

f. Serious Health Condition. Under the FMLA, a "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves one or more of the seven situations described below. Some of the situations described below require supervision or treatment by a health care provider in order to qualify as a "serious health condition."

i. Inpatient Care. An overnight stay in a hospital, hospice, or residential medical care facility, and any period of incapacity or subsequent treatment in connection with such an overnight stay.

ii. Pregnancy or Prenatal Care. Any period of incapacity due to pregnancy or for prenatal care, regardless of the length of the incapacity or whether the individual visits a health care provider. Absences due to severe morning sickness are protected.

iii. Four-Day Absence Involving Treatment. A condition involving incapacity for more than three consecutive calendar days (and any subsequent treatment or period of incapacity relating to the same condition) that involves two or more treatments by or under the supervision, orders, or referral of a health care provider within a 30 day period. In the alternative, it may involve at least one visit to a health care provider for treatment resulting in a regimen of supervised continuing treatment to resolve the condition. The taking of over-the-counter medications, bed rest, drinking fluids, and other activities that can be initiated without visiting a health care provider are alone not sufficient to constitute a "regimen of continuing treatment." Prescription drugs or therapy requiring special equipment, however, would satisfy this requirement. A patient also would be under continuing supervision" if, for example, the patient is advised to contact the physician if the condition does not improve.

iv. Chronic Serious Health Condition. A period of incapacity or treatment for such incapacity due to a chronic serious health condition that requires periodic visits for treatment by or under the direct supervision of a health care provider, continues over an extended period, and may involve occasional episodic recurrences of incapacity. An individual need not receive treatment during the

absence, and the absence need not last more than three days to qualify as FMLA leave. This category covers conditions such as asthma, diabetes, and epilepsy.

v. Long-Term or Permanent Incapacity. A period of permanent or long-term incapacity for which treatment may not be effective. Only supervision by a health care provider, rather than active treatment, is required. Individuals suffering from Alzheimer's disease, severe strokes, or the terminal stages of an illness may fit into this category.

vi. Multiple Treatments to Avoid Incapacity. An absence to receive or recover from multiple treatments for a condition likely to result in a period of incapacity of more than three consecutive calendar days if not treated. Examples include chemotherapy or radiation for cancer, dialysis for kidney disease, and physical therapy for severe arthritis.

vii. Multiple Treatments for Restorative Surgery. An absence to receive or recover from multiple treatments for restorative surgery after an accident or other injury.

An "incapacity" exists only when an individual is unable to work, or perform other regular daily activities. It does not cover an absence that is not "required" by a serious health condition.

> **[ASA Tip:** Unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches (other than migraine), routine dental or orthodontic problems, and periodontal disease are not serious health conditions. If, however, these conditions result in incapacity for more than three days, plus two or more treatments by a health care provider or one visit resulting in a regimen of continuing treatment, these conditions may qualify as "serious health conditions." Routine physicals, eye examinations, and dental exams are not considered treatment, although exams to determine if a serious health condition exists and evaluations of the condition are considered treatment.]

j. Return to Work Upon Expiration of Leave. Any eligible employee who takes FMLA leave is entitled to be restored to the same position he or she held before taking leave. If "business necessity" requires that the position be permanently filled while the employee is on leave, the employer may do so. If so, the employee on leave must be given an equivalent position with the same pay that he or she had prior to taking leave.

However, an employee may lose entitlement and reinstatement if, at the end of FMLA leave, he or she is incapable of returning to work with or without accommodation. If the Americans With Disabilities Act applies, the employer will be obligated to consider a reasonable accommodation, and hold an employee's position open as a reasonable accommodation.

Although an employee cannot lose any employment benefits that accrued prior to his or her leave, he or she is not entitled to accrual of seniority or employment benefits while on FMLA leave. For example, if company policy provides that employees earn one paid sick day per month, the employee on leave for two months would not earn two additional days of paid sick leave during the FMLA leave period.

k. Key Employee Exemption. An employer may deny job restoration (but not the leave itself) to certain "key employees." This exception applies to any salaried, eligible employee who is among the

highest paid 10% of the employees employed within 75 miles of his or her work facility if the denial of job restoration is necessary to prevent substantial and grievous economic injury to the employer's operations; the employer notifies the employee of its intent to deny restoration when the employer learns that such economic injury would occur; and, if leave has begun, the employee elects not to return to work after receiving such notice.

4. Responsibility for Compliance in the Staffing Industry

The regulations issued pursuant to the FMLA specifically address the employer status of temporary help companies and employee leasing firms. The rules recognize that such firms and their clients may be joint employers and that *both* must count the employees in determining employer coverage and employee eligibility. However, they also make clear that only the "primary employer" is responsible for giving required notices to its employees, providing leave, maintaining health benefits, and restoring jobs. The regulations state that temporary help companies and employee leasing firms generally will be considered the primary employer.

Clients of staffing firms are normally viewed as "secondary employers" under the regulations. As such, they may not interfere with a temporary employee's attempt to exercise rights under the act, or discharge or discriminate against an employee for opposing a practice that is unlawful under the act.

Secondary employers, such as clients of temporary help firms, must accept an employee returning from FMLA leave if the client continues to use the firm's employees. A covered secondary employer in a joint employment situation need only keep basic payroll records with respect to its secondary employees.

a. Primary and Secondary Employers in the Temporary Help Context. Pursuant to the regulations, the following factors will be considered in determining whether the staffing firm or the client is the primary employer:

- The nature and degree of control of the employees
- The degree of supervision, direct or indirect, of the work
- The power to determine pay rates or methods of payment
- The right to hire, fire, or modify employment conditions
- Preparation of payroll and payment of wages

b. Job Restoration for Temporary Employees. In its formal interpretation of the regulations, the DOL has provided the following guidance:

- If the temporary employee's assignment continued after the FMLA leave had expired, or if the client continues to engage temporary employees in the same job category, the temporary employee is entitled to be restored to work at that client at the conclusion of the FMLA leave even if a substitute temporary employee assigned to the client during the leave of absence must be displaced to make room for the employee returning from leave.
- If the temporary employee was hired for a specific term or only to perform work on a discrete project, the employee is not entitled to be restored to a position if the term or project is over and the client would not have otherwise continued to employ the temporary employee.
- If the client discontinues the services of the primary employer or stops using that staffing firm to furnish employees in the same job category as the employee who took the FMLA leave during

the period of the FMLA leave, the employee is not entitled to be restored to a position at that client.

- In the latter two situations, the employee returning from FMLA leave is entitled to priority consideration by the primary employer for possible placement at other clients—the so-called "head-of-the-line" rule.

B. Employer Requirements Under the FMLA

2. Employer Requirements

Within five business days of the initial request for leave or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying event, an employer must inform the employee of his or her eligibility status and if ineligible, one reason why.

It is the employer's responsibility to designate all time off (whether paid or unpaid) as FMLA leave (or not) and to notify the employee of the designation based on the information provided by the employee and the certification. The employer must also indicate whether paid leave will be substituted for unpaid leave. If an employer lacks sufficient information regarding an employee's reason for taking paid leave, it must inquire of the employee or his or her spokesperson to ascertain whether the requested leave is FMLA-qualifying leave.

a. Designation of FMLA Leave in Writing. DOL regulations provide that an employer must designate and document FMLA leave as follows:

- Notify an employee, within five business days (absent extenuating circumstances) after ascertaining that an employee is taking leave for an FMLA purpose, whether the requested leave will be counted as FMLA leave and whether paid leave will be substituted
- Provide the employee with a written designation notice
- Document all discussions and decisions concerning disputes as to whether paid leave qualifies as FMLA leave

An employer may designate a leave as FMLA leave, even if the employee has not requested FMLA leave, if the leave is for a condition that qualifies for FMLA leave. An employee cannot refuse to allow the employer to count otherwise qualifying leave as FMLA leave.

> **[ASA Tip:** An employee who fails to answer whether he or she is requesting time off for an FMLA reason will lose FMLA protection within two days after returning to work if, by that time, he or she has not notified the employer that the leave was for an FMLA reason.]

b. Notice Requirements. Pursuant to the regulations, employers must provide detailed notice to an employee of his or her rights and obligations under the FMLA when an employee notifies the employer of the need for FMLA leave. The notice must include the following:

- That the leave will count as FMLA leave
- The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, and the conditions related to

- Any requirement for the employee to make premium payments to maintain health benefits, the arrangements for making such payments, and the ramifications of failing to make timely payments
- Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment
- Designation of the employee's status as a "key employee" and the potential consequence that restoration may be denied following leave
- The employee's right to restoration to the same or an equivalent job
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave

> **[ASA Tip:** The safest course for employers is still to notify employees that their leave is being counted as FMLA leave as soon as possible, and whenever possible before the employee commences such leave. Such notice should also state if the leave is being counted against any state family or medical leave for which the employee may be eligible**.]**

d. Posting. Employers must conspicuously post a notice containing information about the FMLA and information on how to file a charge for any violation of the Act.

Employers must include information concerning FMLA rights in any written guidance (e.g., a handbook) concerning leaves, wages, attendance, and similar matters. If the employer does not have a written policy, the employer must still provide written guidance to any employee who requests leave.

The Affordable Care Act

(*Employment Law for Staffing Professionals*, 13th edition, Chapter 11)

The Affordable Care Act imposes major new legal obligations on employers, including new excise taxes, which will increase the cost of supplying temporary and contract workers. The staffing industry is committed to compliance with the ACA, and the American Staffing Association is actively working to help staffing firms and clients understand the rules and how they will affect staffing services.

Beginning in September 2013, the Certified Staffing Professional® and Technical Services Certified℠ exams included questions that test the candidate's knowledge on ACA issues relevant to staffing professionals. This ACA study guide will help you prepare.

These FAQs are designed to help staffing professionals understand the basic ACA requirements and compliance issues. Additional information is available on the ASA website at *americanstaffing.net/stateaddendums*.

1. How Does the ACA Affect Staffing Firms?

Staffing firms will be subject to new "employer shared responsibility" ("play or pay") requirements effective Jan. 1, 2015. For 2015, the requirements apply to all "large" employers—those with 100 or more full-time and full-time-equivalent employees. Starting in 2016, the threshold will be 50 or more. The great majority of staffing firms will qualify as large employers.

Large employers are subject to a nondeductible excise tax penalty in either of two cases if at least one full-time employee qualifies for subsidized coverage from a public health insurance exchange.

- **Play option**
  Employers that offer "minimum essential coverage" to at least 70% of their full-time employees—and those employees' dependent children under age 26 (excluding spouses)—will not be subject to penalties unless the plan is "unaffordable" to the employee or does not provide "minimum value." In such case, the employer will be assessed a monthly penalty of $250 (up to $3,000 annually) for any full-time employee who qualifies for a government subsidy to buy coverage through a public health insurance exchange.
- **Pay option**
  Employers that do *not* offer minimum essential coverage will be assessed a monthly penalty of $167 (up to $2,000 annually) multiplied by the number of the employer's full-time employees. For 2015, employers can exclude the first 80 employees in calculating their monthly penalty. Starting in 2016, the exclusion drops to 30 employees.

Affordability: An employer's plan will be considered affordable if the employee's share of the premium for a single-only plan does not exceed 9.5% of the employee's wages.

Minimum essential coverage: Any employer group health insurance plan that covers "medical care," which the law defines as "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body."

Minimum value: The actuarial value of the plan's share of cost of benefits must be at least 60%. Except for certain 2015 plans that qualify under a special one-year transition rule, plans must include coverage for in-patient hospital and physician services to qualify as minimum value. The government has provided an online calculator for determining whether an employer plan offers minimum value.

2. Are Staffing Firms Offering Health Insurance Coverage to Their Temporary Employees?

Yes. Although staffing firms have faced challenges in providing health insurance coverage for temporary employees because of the high employee turnover and insurance carriers' fear of adverse selection, the great majority are offering at least basic minimum essential coverage. Many also are offering "minimum value" coverage that is affordable to most, if not all, employees.

Basic minimum essential coverage plans that that cover only preventive and wellness services are designed to be affordable to temporary employees, but they do not provide minimum value. An employee who needs broader coverage could therefore seek subsidized health insurance coverage through a public exchange—which, if granted, would subject the staffing firm to a $250 monthly tax penalty for each employee receiving a subsidy.

Regardless of the health coverage offered, most staffing firms will incur significant new administrative and operating costs relating to ACA compliance. Their exposure to those costs will vary depending on multiple factors, including the type of work their employees perform, their employees' full-time status and tenure, their employees' wage rates, the type of health insurance plan offered to employees, and how many employees participate.

3. Are Staffing Firms Subject to Tax on All Temporary Employees?

No. The ACA provides that employers are subject to play-or-pay taxes only with respect to their "full-time" employees. For this purpose, the ACA defines a full-time employee as an employee who works, on average, 30 or more hours per week with respect to any month.

The government recognized that offering health insurance coverage or determining employer penalty obligations on a monthly basis would not be feasible for employers whose employees work on a part-time or intermittent basis and whose hours are variable or otherwise uncertain. The law therefore allows employers to use a "look-back" measurement period of up to 12 consecutive months to determine an employee's full-time status for purposes of benefits eligibility.

Employers can use the look-back method for "ongoing" employees who have already worked a full measurement period as well as for new, "variable hour" employees. Variable hour employees are those whose work patterns, on their start date, are expected to be uncertain. Assuming a 12-month look-back, an ongoing or variable hour employee will have to work at least 1,560 hours over 12 months to be considered full-time.

Employees expected to work full time for longer periods of time (e.g., information technology and professional employees) likely will be nonvariable hour, in which case they will be eligible for benefits on their start date subject to a maximum waiting period of 90 days.

4. Do Clients Have Employer Responsibilities for Staffing Firm Employees?

Generally, no. "Employer" under the ACA has the same meaning it has under the Employee Retirement Income Security Act. The U.S. Supreme Court has ruled that whether an entity is an employer under ERISA is determined by the common law multifactor test.[1]

Staffing firms generally should be viewed as the common law employer because they recruit, screen, and hire the employees; pay employees' wages and benefits; withhold and pay employment taxes; and have the right to terminate or reassign employees. They generally also retain the right to control and direct how the employees perform their work, although the law doesn't require that they actually exercise such control. The few rulings that have specifically examined the employer status of staffing firms under the common law test have upheld the employer status of staffing firms based on facts and circumstances that are typical of most staffing arrangements.[2]

In the rare case where a client is determined to be the common law employer, the rules provide that an offer of health insurance coverage made by the staffing firm will be treated as an offer of coverage by the client provided the staffing firm charged the client a higher fee for employees who enrolled in the staffing firm's plan than it would have charged had the employees not enrolled. The ASA model staffing agreement contains language to help ensure that staffing firm agreements reflect the staffing firm's common law employer status and to comply with the "higher fee" rule.

5. What If the Staffing Arrangement Causes a Client's Headcount to Fall Below 50?

There are no bright line answers to this question, but the regulations suggest that the answer will depend on whether the primary purpose of the staffing arrangement is to avoid the ACA requirements.

Businesses have a right to decide whether and when to outsource portions of their workforce—or how many full-time employees they need—based on legitimate business and economic reasons: for example, meeting fluctuating demand for goods and services, staffing special projects, and managing high-turnover operations. Therefore, staffing services used by clients for such reasons should generally be ACA- compliant even if the client's headcount is incidentally affected. But if the primary purpose of the arrangement is to avoid the ACA requirements, it may come under scrutiny and the client held to be the responsible employer.

6. Can Staffing Firms Help Clients Reduce Costs by Supplying Part-Time Employees?

The ACA applies only to full-time employees, defined as those working, on average, at least 30 hours per week. Many businesses rely on part-time employees, and staffing firms can supply them if needed. But clients should be aware that this will not necessarily result in lower staffing costs. Staffing firms strive to maximize their temporary employees' work hours by employing them full time during any given work week. So even if a client asks a staffing firm to supply an employee for

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[1] *Nationwide Ins. v. Darden,* 503 U.S. 318 (1992).

[2] See, e.g., Burrey v. Pac. Gas & Elec. Co., 1999 U.S. Dist. LEXIS 22619 (N.D. Cal. May 12, 1999) and Blue Lake Rancheria v. U.S., 653 F. 3d 1112 (9th Cir. 2011) upholding the common law employer status of temporary staffing and employee leasing firms.

part of a week, the employee generally will work the rest of the week for another staffing firm client and thus could qualify as full-time (unless classified as variable hour). Whether or not the employee is enrolled in the staffing firm's health insurance plan, the staffing firm will incur costs related to ACA compliance.

Of course, it could be considered an abuse if an employees' weekly hours are split between a staffing firm and its client, or between multiple staffing firms, and each business claims that the employee did not work full time.

7. Can Employees be Terminated or Refused Reassignment to Avoid Full-Time Status?

Terminating or refusing to reassign a temporary employee prior to the employee achieving full-time status would likely be viewed as abusive if the primary purpose is to avoid the ACA employer coverage or tax obligations; such action may also violate ERISA if the primary purpose is to deny the employee benefits.

Independent Contractor Versus Employee Status

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 12)

Failing to appropriately classify a worker as an employee or an independent contractor can have serious consequences. Companies that misclassify workers as independent contractors when they should have been classified as employees can be held liable for a number of federal and state taxes (e.g., income, unemployment, workers' compensation). Further, such workers often sue for unpaid overtime under the FLSA and state wage and hour laws. In addition, companies can be held liable for the negligent acts and omissions of individuals mistakenly believed to be contractors engaged in their own businesses. The Internal Revenue Service, the U.S. Department of Labor, and various other federal and state government agencies regulate the accuracy of worker classification. However, as discussed in more detail below, the standards and criteria used by these agencies and in courts can vary.

The common law standard used by courts was developed out of the law of agency over many years of court decisions. Under the common law standard, the primary issue in determining worker status is whether or not the principal has the right to direct and control the agent (the worker). If the right of direction and control exists regarding the manner and means of performance and the end result, the agent is likely an employee.

For many years, the IRS utilized a 20-factor test adapted from the common law to determine worker status. The IRS, however, simplified its test to three factors, all of which are geared toward the degree of control exercised by the putative employer as compared to the independence with which the worker operates:

1. **Behavioral Control.** This factor focuses on the level of control the putative employer has over the manner and means with which the worker performs the job. The more control the principal exerts, the less likely an independent contractor relationship will be found.
2. **Financial Control.** The IRS also looks at the level of control the putative employer has over financial aspects of the working relationship, such as how the worker is paid, whether the worker has the potential for profit or loss, whether the worker's business expenses are reimbursed, and who provides the tools. Again, the more control the putative employer has, the less likely the worker is properly classified as independent contractor.
3. **Type of Relationship.** This factor focuses on the parties' perception and definition of the relationship. For instance, do the parties have a written agreement specifying that they intended to form an independent contractor relationship; how permanent is the relationship; and are the services provided by the worker integral to the core business activity or is the worker providing an incidental service.

The factors should not be mechanically applied, as no one factor is determinative. The various factors must be looked at together and evaluated looking at the totality of the circumstances.

B. Section 530 of the Revenue Act of 1978

Under Section 530 of the Revenue Act of 1978, employers may find relief from federal employment tax obligations (income, FICA, and FUTA) when workers who have been misclassified as independent contractors are reclassified as employees. Section 530 relieves the employer's

employment tax liability for the period of misclassification if certain requirements are met. An employer must meet the following two tests in order for the relief provisions under Section 530 to apply:

1. Consistency Test

Reporting Consistency. File all required tax forms consistent with the manner in which the worker was treated (e.g. issue Form 1099s to workers reported as independent contractors).

Substantive Consistency. Treat all workers in similar positions the same.

The following list of considerations is used in determining the existence of substantive consistency:

- Work performed on a day-to-day basis
- Method used to perform services
- Compare to services and methods of other workers and how they are classified
- Compare job functions of employees and independent contractors

2. Reasonable Basis Test

The taxpayer must reasonably rely on one of the following:

- Prior judicial or administrative precedent
- Traditional practice safe haven (prior audit of similar workers)
- Industry practice safe haven (a long-standing industry practice to treat the particular type of worker like an independent contractor); or
- Other reasonable basis

If an employer meets these tests, the employer may be relieved from employment tax liability even though workers are determined to be employees rather than independent contractors.

The most important factor under the reasonable basis test is whether the employer has reasonably relied on a longstanding (but at least 10 years), recognized practice of a significant segment of the industry (at least 25%) in which the individual was engaged. However, the practice does not have to be utilized by all businesses in the particular industry.

C. Section 1706 of the Tax Reform Act of 1986

Section 1706 of the Tax Reform Act of 1986 amended Section 530 to provide that relief from tax liability under Section 530 may not be obtained in the case of a three-party arrangement where an individual (worker) who, pursuant to an arrangement between the taxpayer (staffing firm) and another person (client), provides services for such person (client) as any of the following capacities:

- Engineer
- Designer
- Drafter
- Computer programmer
- Systems analyst
- Other similarly skilled worker engaged in a similar line of work

Section 1706's limited exception to the safe harbors of Section 530 only applies to multiparty transactions that involve firms that supply or broker the services of technical personnel; technical personnel; and clients that benefit from the services of technical personnel.

Even if an employer's liability is relieved by Section 530, the employee still remains liable for the employee's portion of FICA taxes on wages received from the employer.

> **[ASA Tip:** Whether or not a worker is incorporated as an independent business is irrelevant in determining the worker status of individuals retained by a company to provide the above technical services.]

D. The Benefits to the Employee of Being Classified as an Independent Contractor

There are numerous pros and cons of being an independent contractor. The fact that independent contractors are their own boss is obviously a significant pro. However, there are also significant tax benefits to being engaged in a separately established business. Independent contractors can deduct business expenses for tools and equipment, travel, home offices, and business entertainment. Independent contractors are also given more flexibility to allocate more income to retirement benefit plans.

E. The Benefits to a Business of Classifying Workers as Independent Contractors

Many of the benefits and advantages to businesses of using independent contractors have been alluded to above. For example, businesses are not required to contribute to pay FUTA, FICA, SDI, SUI, or other federal and state employment-related taxes. Businesses utilizing independent contractors also are not subject to wage and hour laws (e.g., overtime and minimum wage) and do not have to contribute to employee benefit plans for those workers. Other benefits include

- No requirement to pay workers 'compensation insurance
- Generally no liability for the negligence of independent contractors; and
- Usually no liability under discrimination laws

G. Worker Status Under Other Laws

As noted above, the common law standard for determining worker status applied by the IRS does not apply across the board. Whether or not a worker is an employee or an independent contractor varies from state to state and also depends upon the particular law the worker status issue is being considered under.

H. The Fair Labor Standards Act

In order for an employer to be subject to the wage and hour provisions of the Fair Labor Standards Act, an employment relationship must exist. As such, employers generally are not liable for FLSA compliance on payments made to its independent contractors. However, classification mistakes are made. For example, companies who retain temporary workers to help in rush situations or on large projects often misclassify such workers as independent contractors when they should be treated as employees. The temporary nature of the relationship alone is not sufficient to support an independent contractor classification.

The FLSA itself does not clearly define who is an employee for purposes of the statute. As a result, courts must decide the correct standard to use when assessing whether a worker is an employee or an independent contractor. Although there is a significant degree of variation among the circuit courts as to the correct standard, the analysis generally boils down to an "economic realities test" focused on determining whether, as a matter of economic reality, the worker is dependent upon the business to which he or she is providing services.

Although written independent contractor agreements do provide evidence of the intent of the parties in entering the work relationship, they do not control. Courts regularly disregard these written agreements. Such agreements tend to be form contracts, and the worker usually has little or no negotiation ability in entering them.

> **[ASA Tip:** Each case must be examined on an individual basis and all of the facts and circumstances must be considered. It is possible for a worker to be determined to be an independent contractor under the common law (IRC) test and be determined to be an employee under the economic realities test at the same time.]

I. State Unemployment and Workers' Compensation Laws

State workers' compensation and unemployment laws should be referred to, because these laws vary from state to state and may utilize different standards for determining employment status within the state. Because the purpose of these laws is remedial in nature and they are broadly construed to serve the purposes of the legislation, employment status can be found under these laws even when independent contractor status is found under other laws.

Per Diem Regulations

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 13)

When an employee is assigned a job away from his or her primary place of work, the employer may reimburse him or her for business-related expenses through an accountable plan per diem arrangement. *Per diem* is a Latin phrase that means "by the day." Such arrangements are particularly relevant in the staffing industry, because they provide a way of reimbursing a temporary employee for business, travel, and living expenses incurred while the employee is working away from his or her permanent home on a temporary job assignment with funds that do not constitute taxable wages. Employers can benefit by being able to deduct the amounts reimbursed, with some limitations, while avoiding some administrative costs and matching obligations required with FICA and FUTA taxes. The employee benefits because reimbursed per diem business expenses are not considered taxable income.

However, these benefits may only be reaped if the reimbursements are made pursuant to an accountable expense reimbursement plan. While the Internal Revenue Code and the Internal Revenue Service provide these benefits, the IRS strictly monitors the appropriate use of per diem arrangements to ensure that they are not merely disguised attempts to pay tax-free wages. If the accountable plan requirements are not met, then the reimbursements must be included as wages and noted in the employee's Form W-2 income, and the employer must make appropriate tax contributions and withholdings, and include the amount paid within the employee's regular rate of pay.

In order to be considered a reimbursement made under an accountable plan, the following requirements must be met:

- The cost or expense must have a "business connection," meaning the cost must have been incurred in the rendering of services to the employer;
- The cost must be "substantiated" (the employee must appropriately account for the expenses to the employer within a reasonable amount of time); and
- The employee must be required to return any amounts reimbursed that are in excess of expenses actually incurred and substantiated.

All of the accountable plan requirements are located in the Internal Revenue Code Section 62(a)(2)(A) and (c) and Treasury Regulations Section 1.62-2.

A. Business Connection

In general, a reimbursement, advancement, or allowance meets the business connection requirements if the employee uses it in connection with the performance of services for the employer. The business connection requirement is not met if the employer does not reasonably believe that the employee will use the reimbursement for deductible expenses.

According to IRC Section 162(a), deductible travel-related expenses include all ordinary and necessary trade or business expenses that are incurred away from an employee's tax home, are not extravagant or lavish, and are incurred in the pursuit of trade or business. Examples include:

- Travel expenses
- Meals

- Lodging
- Other incidental expenses

The definition of "incidental expenses" includes only fees and tips given to porters, baggage carriers, hotel staff, and staff on ships. Transportation between places of lodging or business and places where meals are taken, and the mailing cost of filing travel vouchers and paying employer-sponsored charge card billings are not considered incidental expenses.

For purposes of determining if any employee is traveling away from his or her tax home for business, an employee's "tax home" is his or her regular place of business or his or her principal place of business if the employee has more than one regular place of business. If the employee has no regular or principal place of business, then the employee's tax home is his or her regular place of abode. Should the employee fail to have a tax home as defined by the above categories, because he or she has no regular or principal place of business and no regular place of abode, then the employee is considered to be an itinerant whose tax home is wherever the employee happens to work. As a result, an itinerant worker is technically never away from his or her tax home, and his or her travel related expenses, such as lodging, food, and transportation, are deemed personal and nondeductible, and any reimbursement of such expenses are not excluded from the employee's income.

> **[ASA Tip:** If the employee does not customarily or frequently work in any one specific or general area, but instead frequently changes work locations, it is probable that he does not maintain "a regular place of abode" in a real and substantial sense. Employees can provide certification to employers of a permanent place of abode but the employer should not rely exclusively upon the employee's certification and should take affirmative steps to confirm via alternate means.]

B. Substantiation

In order to meet substantiation requirements, employees must provide "adequate records" or sufficient evidence to substantiate the reasonableness of the alleged business expense. "Adequate records" refers ideally to the maintenance of an account book, diary, statement of expenses, or other similar documentation.

In lieu of substantiating the amount of actual travel-related meals and lodging costs, an adequate accounting for the amount of such costs can be made by the employee's use of certain types of established per diem rates (e.g., rate for meals or incidental costs provided by the federal government). However, such rates may be used only if the employee substantiates the time, place, and business purpose of the expense.

There are two types of approved plans under which an amount of expenses up to the specified rate may be deemed substantiated:

1. **M&IE Only**—A per diem allowance for an employee's meals and incidental expenses only.
2. **Lodging-Plus-M&IE**—A per diem allowance for an employee's lodging, meals, and incidental expenses.

If an employee receives a per diem allowance or reimbursement for only meals and incidental expenses, the amount of expenses deemed substantiated is equal to the lesser of the per diem allowance actually received or the amount computed using the daily federal M&IE-only rate.

Per diem for M&IE only may be used in connection with an employer's reimbursement or expense allowance arrangement only if the employer either

- Provides lodging in kind
- Pays the cost of lodging directly
- Reasonably believes that the employee will not incur any lodging costs
- Pays the employee for actual expenses of lodging
- Computes the allowance on a basis similar to that used in computing the employee's wages or other compensation

Under Lodging-plus-M&IE approved plans, if an employee receives a reimbursement or per diem allowance for these expenses under an accountable plan, the amount deemed substantiated is the lesser of the actual allowance provided to the employee or the amount determined using one of the two following rates:

- The maximum federal per diem rate for the particular locality (these rates change annually and can be accessed via *gsa.gov,* or the IRS Web page, *irs.gov*)
- The high-low substantiation method

Per diem rates depend upon the locality of travel within the continental U.S. (CONUS) and are determined by the General Services Administration. Employers may use the CONUS tables published annually by the GSA. CONUS tables indicate the acceptable maximum per diem rate that can be used without treating part of the per diem allowance like wages for tax purposes. New CONUS per diem rates become effective on Oct. 1 of each year and remain effective through Sept. 30 of the following year.

The high-low rate provides a simplified method of computing the federal per diem rate for CONUS travel. Under the high-low method, the IRS publishes a list of localities that are considered to be high-cost localities for all or part of the year. All other localities are considered low-cost. The IRS then publishes a per diem rate for all high-cost localities and for all low-cost localities.

Employers may also utilize flat rates or schedules for determining travel allowances. These methods must be uniform and objective. An example would be a method by which the allowance is calculated by the number of days away from home. However, 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 under an accountable plan.

When an employer pays a per diem allowance for lodging, meals, and incidental costs, it must treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day the employee is away from home as an expense for food and beverage, except that if a per diem allowance for lodging, meals, and incidentals is paid at a rate less than the federal per diem rate for the locality of travel, the employer may instead treat 40% of the allowance as the federal M&IE rate for the locality of travel. This is significant for employers because meals are not totally deductible as a business expense. The allowable deduction for meals is generally 50%.

[ASA Tip: For work-related traveling that is less than a full day (partial day), the federal rates must be prorated to reflect time that an employee is not actually traveling. The rate may be prorated by allocating 75% of the applicable rate to each day, or by using any method that is consistently applied and is in accordance with reasonable business practice**.]**

C. Return of Amounts in Excess of Expenses

In general, to meet this accountable plan requirement, a reimbursement arrangement must require the employee to return any amounts in excess of the expense amount actually substantiated by employee to the employer. Such return must occur within a reasonable period of time. Whether or not an arrangement requires an employee to return amounts in excess of the substantiated expense amount provided will depend on the particular facts and circumstances. What constitutes a "reasonable period of time" will also generally depend upon the particular facts and circumstances. (See Safe Harbor discussion below.) All money advances must be reasonably calculated to not exceed the amount of anticipated expenditure. The money advanced must be provided reasonably close to the time that the expenses are anticipated. Therefore, if an employee's work assignment requiring travel is scheduled for July, the advancement should not be provided in January.

[ASA Tip: If an employee fails to return excess amounts within a reasonable period of time, only the amounts substantiated will be treated as paid under an accountable plan and the excess must therefore be included in the employee's gross income reported on the Form W-2, and applicable employment taxes must be paid and withheld. Also, if an appropriate regulatory agency determines that an employer's expense allowance practices violate applicable rules and regulations, all payments may be treated as made under a nonaccountable plan and appropriate penalties may be imposed**.]**

1. Safe Harbors

The following scenarios will generally meet the "reasonable time period" requirements:

- If an employer gives an advance within 30 days of the time the employee incurs the expense, the employee substantiates the expense within 60 days after incurring the expense, and any excess amount is returned to the employer within 120 days after the expense is incurred—this is known as the "Fixed Date Method."
- If an employer provides the employee with periodic statements (no less frequently than quarterly) setting forth the amounts reimbursed that exceed substantiated expenses and requesting that expenses be substantiated and that any excess or unsubstantiated amount returned, or both, within 120 days of the statement—this is known as the "Periodic Statement Method."

As noted above, per diem payments that are inappropriate will be invalidated and considered wages. Courts have found that it is not appropriate to pay employees different per diem rates. In other words, travel and other business expenses should not vary from employee to employee. Also, per diem payments must be separately noted with the payment to employees. Courts and regulatory agencies are skeptical of any payments that may be disguised compensation for services.

It should be noted that there is a difference between what constitutes taxable income and what constitutes wage. Regulations issued by the U.S. Department of Labor provide that per diem payments are not included in the employee's regular pages as long as the payment does not exceed reasonable living expenses and meets certain requirements. In order to be excludable from one's regular wage rate, per diem payments must (1) be based on living expenses for an entire day, (2) not be limited or tied to the number of hours worked in day, (3) be reasonably related to expenses actually incurred, and (4) not be paid to employees who live close to where the work is to be performed. This is an important consideration because the FLSA's definition of wages and what constitutes one's regular rate of pay affect overtime calculations for nonexempt employees. If the amount paid to an employee for business expense reimbursement varies depending upon the number of hours worked, then under the FLSA, the amount paid will generally be considered wages and should be included in the employee's regular rate of pay for premium rate overtime calculations. Failure to properly include all amounts paid to the employee as wages or to pay the appropriate applicable overtime rate will result in a violation of the FLSA's overtime provisions.

For example, an employee's regular rate of pay is $15 per hour, and the employer mistakenly believes it is appropriate to calculate the per diem reimbursement rate on an hourly basis, that is, at $10 per hour. Also suppose that the employer pays the employee overtime at $25 per hour for all hours worked in excess of 40 hours per week. This would be incorrect. Since the employer did not pay per diem correctly, the per diem amount would generally be included in the employee's regular rate of pay for calculating overtime. Therefore, the FLSA would require the employee to be paid $37.50 for overtime hours.

$15.00	Hourly wage rate
+ 10.00	Reclassified per diem
$25.00	Regular rate of pay per hour
x 1.5	Required by the FLSA for hours worked in excess of 40 per workweek
$37.50	Per hour for each overtime hour (1.5 x $25 = $37.50)

The H-1B Worker in a Specialty Occupation

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 14)

The H-1B visa for employees in a "specialty occupation" is one of the most common, and most heavily regulated, work visa categories available to a foreign national whose services are desired by a U.S. employer. It is also subject to an annual numerical quota for each federal fiscal year. The H-1B quota—which often proves insufficient to cover annual employer demand—allows for the issuance of 65,000 visas per year plus another 20,000 visas available to graduates with master's or higher degrees conferred by American universities and colleges.

As defined in the Immigration and Nationality Act, the H-1B category is limited to nonimmigrant employees seeking to perform services in "specialty occupations." To qualify for H-1B classification, the offered job must be in a specialty occupation and the sponsored foreign citizen must be qualified to perform services in the same specialty occupation.

The term "specialty occupation" is defined to mean an occupation that requires:

- Theoretical and practical application of a body of highly specialized knowledge, and
- Attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty, as a minimum for entry into the occupation in the United States.

In general, eligibility for classification as an H-1B may be established by showing that

- A foreign citizen has graduated from a U.S. college or university and holds a baccalaureate or higher degree with a major field of study that is directly relevant to the specialty occupation offered by the sponsoring employer. In the absence of a U.S. baccalaureate or higher degree, an individual may still qualify for H-1B status if he or she holds a degree from a foreign college or university that is determined by a qualified academic credentials evaluation service to be educationally equivalent to a U.S. bachelor's or higher degree. One may even qualify without holding a college degree if the individual has equivalent nondegree training, equivalent professional experience, or a combination of the two. (Note that USCIS equates three years of progressively responsible work experience to be the equivalent of one year of university study; hence, 12 years of progressively responsible work experience in a relevant field, if verified, may serve as a substitute for a four-year bachelor's degree.)
- The foreign citizen has an offer of employment in a position that requires at least a U.S. baccalaureate degree or its educational or work-experience equivalent. The prospective job duties must be such as to require the specific theoretical training that a graduate of a U.S. college obtains through his or her baccalaureate or higher studies.
- The prospective employer is eligible to serve as an H-1B employer. In practice, this means that the prospective H-1B employer may not be a so-called "working owner," i.e., he or she may not have an ownership interest in the entity such that the employer-employee relationship will be disregarded. It also means that if the H-1B services to be rendered will take place at the location of a third party, such as the location of a customer of an H-1B employer, then the H-1B firm must demonstrate (a) the existence of an agreement to provide services requiring an individual in a specialty occupation, and (b) the authority of the firm (and not the customer) to direct and control the work of the sponsored H-1B employee.
- The required wage obligations and other H-1B worker protections are met.

> **[ASA Tip:** A position does not need to be "full time" in order to qualify for the H-1B. H-1B petitions may be obtained for individuals working for 20 hours a week and, in some cases, if justified, less than 20 hours a week.]

The first three H-1B requirements noted above are within the authority of USCIS to determine; the fourth requirement is under the purview of the DOL.

An H-1B visa is one of the several nonimmigrant work visas that require an approval of a preliminary petition in the U.S. before the sponsored foreign worker (and the individual's spouse and minor children) may apply for the visa at a U.S. consular post abroad. The sponsoring employer is called the "petitioner." The foreign national employee is known as the "beneficiary."

The H-1B process involves several steps. If a staffing firm is the prospective H-1B employer, it must (1) determine the required wage, (2) comply with the preconditions to executing a labor condition application (LCA), discussed below, (3) file the LCA with the DOL, and (4) once the DOL has certified the LCA, file the petition for a nonimmigrant worker, Form I-129 with USCIS. These processes are outlined below.

A. The Required Wage Determination

The H-1B "required wage" is the higher of (a) the "prevailing wage" for an occupation in a particular metropolitan area that includes the place where the H-1B worker will render services, and (b) the "actual wage" paid by the employer to employees with similar qualifications performing comparable duties as the H-1B worker at the employer's work site where these duties will be performed. A prevailing wage determination may be obtained from the DOL or through an independent survey that satisfies the DOL regulations.

Because the place of employment is geographically confined to a particular metropolitan area and work site, an H-1B worker may not render services in a different locality unless the employer obtains another certified LCA from the DOL for that new area and receives USCIS approval of an amended petition to work in the new location. Staffing firms should note that the place of employment is not the headquarters or regional office of the staffing firm but rather the customer's work site location. If an H-1B worker employed by a staffing firm is to be moved to another customer's work site in the same metropolitan area, the DOL does not require certification of a new LCA; instead, it requires paper posting or an electronic notice at the new customer's work site. Moreover, USCIS would still require s submission of an amended petition before the move occurs. If, however, the H-1B worker employed by a staffing agency is to be assigned to perform services for a different customer at a new location that is beyond normal commuting distance from the metropolitan area where he or she had initially been stationed, then the DOL would require a new LCA to be certified. Likewise, USCIS would require submission of an amended petition before the job change to a different metropolitan area takes place.

> **[ASA Tip:** A violation of the required obligation can lead to expensive back-wage obligations. The H-1B employer should therefore consult with legal counsel to confirm that the required wage obligation has been satisfied. The DOL online prevailing wage information classifies jobs based on educational degree and by level of experience. Counsel for the staffing firm can confirm if the prevailing wage source provided by the DOL and the employer's proposed classification of experience level

are justified in light of case precedent and the requirements of the DOL regulations. Counsel can also advise on the required filing procedures and anticipated timetable if a staffing firm wishes to reassign an H-1B employee from one customer to another, whether in the same or a new metropolitan area.]

B. The Labor Condition Application

Employers seeking to employ a foreign worker in an H-1B specialty occupation must file, in advance, a labor condition application (LCA) with the DOL. The LCA (Form ETA Form 9035), which is available at *foreignlaborcert.doleta.gov/preh1bform.cfm*, must be filed electronically. The LCA requires the employer to attest that it (1) will pay at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time, (2) will provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed, while offering benefits on the same basis as offered to U.S. workers, (3) confirms the absence of a strike, lockout, or work stoppage in the named occupation at the place of employment, and (4) has publicly notified the union bargaining representative of the employees in the occupational classification at the place of employment of its intention to employ an H-1B nonimmigrant, or, if there is no representative, it has posted an appropriate paper or electronic notice of the plan to employ an H-1B worker at the employer's or customer's job site, as applicable under the regulations.

The DOL does not require supporting documentation to be submitted with the LCA at the time of the filing. It is, however, required that both the LCA and the supporting documentation be made available for public inspection in the employer's files within one working day after the date on which the LCA is filed with the DOL. The documentation must support each of the following attestations, which the employer must make on the LCA: (1) the actual wage paid the H-1B worker, (2) the prevailing wage determination, (3) the required notice of the filing made available to other employees, (4) the working conditions at the intended place of employment, and (5) the absence of a strike or lockout. The documents that must be maintained for public inspection within 24 hours upon request are collectively known as the "public access folder." The employer must also maintain a "private access folder" that contains payroll, tax, and other records that the employer must provide to the DOL if an aggrieved party files a complaint with the DOL's Wage and Hour Division alleging a violation of the agency's H-1B regulations.

In addition, the employer must (1) be prepared to provide the H-1B worker with return transportation to the individual's country of last residence if the employer terminates employment before the period of H-1B petition validity, (2) make only authorized deductions (meeting the requirements of the DOL regulations) from the payment of the required wage (e.g., the employer may not shift employer business expenses directly or indirectly to the employee such as government filing fees and attorney fees for preparation of the H-1B petition), (3) refrain from imposing a penalty as determined by state law if the employee resigns before the end of the H-1B period of petition validity (although legitimate, mutually agreed liquidated damages under state law may be imposed), and (4) maintain required business records and make them available for inspection by the DOL upon request. A violation of these requirements may allow the DOL to impose sanctions including debarment from sponsorship of current and future foreign employees for employment-based nonimmigrant and immigrant visa benefits for up to three years, back wages, civil fines and other equitable or "make whole" relief. The extent of these sanctions will vary with the substantial nature of the violations found and the employer's state of mind. Unwitting violations committed in

good faith may lead to minor penalties, whereas willful, substantive violations may result in more significant sanctions. The DOL may not impose penalties for an employer's technical or procedural failures to comply with the regulations unless the agency gives the employer 10 days to correct the violations and they remain uncorrected by the expiration of the 10-day warning period.

C. Form I-129H for Submission to USCIS

After the DOL has certified the LCA, the next step involves the employer's filing with USCIS of the H-1B petition on Form I-129. The I-129H Petition to Classify Nonimmigrant as Temporary Worker or Trainee—accessible at *uscis.gov/i-129*—is submitted, along with supporting documentation, to the USCIS Regional Service Center office having jurisdiction over the employer's place of business. Supporting documents include a letter from the U.S. employer describing its business, the proffered position (confirming that the job is a specialty occupation), and the foreign national's qualifications (confirming that the individual is qualified to perform in a specialty occupation); evidence of the foreign national's professional qualifications (such as the university degree and transcript, the academic credentials evaluation if the degree is a foreign degree, or the work experience equivalency evaluation); the LCA; and the required fees. USCIS may approve the petition or issue a request for additional evidence (RFE). The employer must then submit additional proof satisfying the RFE, and then USCIS will make a final decision to approve or deny the petition.

H-1B petition and status adjudications may take USCIS from approximately two to six months, but the employer may accelerate the process by paying an extra fee for premium processing service, whereby a response is provided in 15 days (if an RFE is issued, then the final decision is issued within 15 days of the submission of supplemental evidence in response to the RFE). An approval comes in the form of a Notice of Action, Form I-797, indicating approval of the petition with the period of petition validity noted. If the employer has requested a change or extension of status under the H-1B visa category, then the approval includes a clip-out status document evidencing employment authorization known as an I-94 Departure Record. A denied petition may be subject to a motion to reopen and reconsider or to an appeal to the USCIS Administrative Appeals Office.

> **[ASA Tip:** An H-1B petition may be approved for an initial period of three years. After that time, an additional three years may be obtained. After a six-year stay in the U.S. in H-1B status, the foreign national must reside abroad for one year before once again seeking H-1B status. Exceptions to this "visa maxout" rule and extensions of time in H-1B status are available if the employer has initiated the labor certification process (which involves pre-filing recruitment and job ads) at least one year before the sixth year of the individual's cumulative H-1B presence in the U.S., or if the individual may not yet be granted lawful permanent resident status because the immigrant visa quota is oversubscribed.]

Unlike F-1 optional practical training, where a student is allowed to work for any employer whose activities are connected to his or her field of study, an H-1B beneficiary is only allowed to work for the petitioning employer.

D. Special Circumstances

Competent immigration counsel should be consulted (preferably in advance when possible) if any of the following occur or are likely to occur:

- A merger, acquisitions, or other corporate restructuring transaction resulting in the change of an H-1B worker's employer or job location
- A reduction in force
- A termination of employment prior to the expiration of H-1B petition validity
- A government audit
- Internal complaints about wages and working conditions by U.S. workers or H-1B employees
- The staffing firm wishes to employ an individual who has received H-1B petition sponsorship through another employer.

[ASA Tip: A staffing firm need not wait till USCIS approves its new petition for a foreign national employed in H-1B visa status by a different company. Under the principle of H-1B "portability," the staffing firm can hire and deploy the individual as soon as the DOL has certified an LCA and USCIS has received a "properly filed" H-1B petition from the staffing firm. The individual may be employed until USCIS adjudicates the petition. If the petition is approved, employment may continue; but if it is denied, employment must cease immediately. A "properly filed" petition is one that is duly signed by an authorized official of the staffing firm and accompanied by a check or checks for the required filing fees. In order to invoke H-1B portability and commencing employment, staffing companies may choose to rely upon a courier's confirmation that the H-1B petition has been delivered to USCIS or wait until USCIS confirms receipt of the new petition by issuance of a receipt on Form I-797 (notice of action). Alternatively, a staffing firm may eschew H-1B portability, postpone hiring the individual (who in the interim must maintain lawful nonimmigrant status by continuing employment with his or her current H-1B employer), and instead seek an accelerated adjudication under the USCIS premium processing service. Information on this service is available here: *uscis.gov/forms/how-do-i-use-premium-processing-service*.]

D. Proposed Changes to H-1B Process

On December 3, 2018, USCIS proposed two significant changes to the current H-1B selection process. Currently, employers and foreign national employees seeking an initial grant of H-1B status may file petitions with U.S. Citizenship and Immigration Services ("USCIS") during the first five business days of April. As stated above, the H-1B quota allows for the issuance of 65,000 regular visas per year plus another 20,000 masters visas.

If USCIS receives more than the allowable number of H-1B petitions within the first five business days of April, USCIS conducts a lottery to select the H-1B petitions it will continue to adjudicate. USCIS first conducts the lottery for the master's visa allotment. Master's petitions not selected in the first lottery are placed back in the general pool for the regular visa lottery.

USCIS proposed the following changes to that process: First, the proposed rule requires employers seeking H-1B petitions to electronically register each petition with USCIS during a designated registration period. USCIS would then conduct the annual selection process from the pool of timely filed electronic registrants.

Second, USCIS proposed to change the process by which it selects H-1B petitions. The proposed rule would reverse the selection--currently masters petitions are selected first--to select regular visas before selecting petitions for masters visas. By changing the order in which it counts visa allocations, USCIS hopes to materially increase the number of H-1B petitions awarded to individuals holding an advanced degree from a U.S. institution of higher education.

The proposed rule's 30-day notice and comment period ended on January 2, 2019. USCIS is currently reviewing all concerns raised by the public and finalizing the rule accordingly. It is unlikely that this rule will be finalized for the upcoming H-1B filing season. Therefore, the proposed rule includes a provision to temporarily suspend the electronic registration requirement for the upcoming 2020 fiscal year selection process.

Laws Specific to Health Care Staffing

(Excerpted from *Employment Law for Staffing Professionals*, 13th edition, Chapter 15)

A. Americans With Disabilities Act

1. When Health Care Workers Are "Employees" Under the ADA

While the ADA's protections apply to applicants and employees, the statute does not cover independent contractors. Many medical professionals in the health care industry who are placed through staffing firms are classified as independent con- tractors. However, whether a particular medical professional is properly classified as an independent contractor, or an "employee" covered by the ADA is a fact- based and case-specific determination that depends on a variety of factors.

The mere fact that an individual is designated as an "independent con- tractor," has a certain title (i.e., partner, director, or vice president), or has an employment agreement, by itself is not determinative of whether the individual would be covered under ADA.

2. Health Care Employees as Direct Threats

In February 2007, the Equal Employment Opportunity Commission published a factsheet directed specifically to employers and employees in the health care industry. In this fact sheet, the EEOC explains that an employer may exclude an applicant or employee with a disability from a particular position if that individual would pose a direct threat to health or safety. The EEOC also makes clear that the determination that an applicant or employee with a disability poses a direct threat to safety must be based on "an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The decision must be based on a reasonable medical judgment that relies on the most current medical knowledge rather than on speculation about what people with a particular impairment generally do."

B. Anti-Kickback and the Stark Laws

On the books since 1972, the federal Anti-Kickback Statute was enacted to protect patients and the federal health care programs from fraud and abuse by cur- tailing the corrupting influence of money on health care decisions. The law states that anyone who knowingly and willfully receives or pays anything of value to influence the referral of federal health care program business, including Medicare and Medicaid, can be held criminally accountable for a felony. The statute applies to virtually all sectors of the health care industry, and establishes penalties for individuals and entities on both sides of the prohibited transaction.

> [**ASA Tip:** Health care staffing professionals should have an understanding of the law as it pertains to medical professionals they place.]

b. Elements of the Offense

The Anti-Kickback Statute prohibits individuals and entities from knowingly and willfully (1) receiving or soliciting or (2) offering or paying remuneration in exchange for or as an inducement to: (a) refer a patient or business for services paid for by Medicare or Medicaid or (b) purchase or lease

items, services, or facilities paid for by Medicare or Medicaid.

> **[ASA Tip:** Health care staffing professionals should align their business practices with the ethical standard common to the industry. Health care staffing professionals should align their business practices with the ethical standard common to the industry. Financial transactions between potential referring parties should be conducted at fair market value. For maximum protection under the Anti-Kickback law, a financial arrangement should meet all of the requirements of one of the law's enumerated safe harbors.]

i. Remuneration. Remuneration includes the transfer of anything of value, in cash or in kind, directly or indirectly, overtly or covertly. Almost any benefit by and between medical providers can be considered remuneration. Examples of remuneration include:

- Kickbacks
- Bribes
- Rebates
- Gifts
- Above- or below-market rent or lease payments
- Discounts
- Furnishing of supplies, services, or equipment, either free or above or below market
- Above- or below-market credit arrangements
- Waivers of payments due

ii. Intent. The Anti-Kickback Statute is an intent-based statute requiring that the party "knowingly and willfully" engage in the prohibited conduct. While actual knowledge of, or specific intent to violate, the kickback statute is not required, a general intent to commit wrongdoing must be proven.

c. Safe Harbors

Safe harbors protect certain payment and business practices that are implicated by the anti-kickback statute from criminal and civil prosecution under the statute. To be protected by a safe harbor, an arrangement must fit squarely in the safe harbor.

The original 13 safe harbors ad- dress the following types of business or payment practices: investments in large publicly held health care companies; investments in small health care joint ventures; space rental; equipment rental; personal services and management con- tracts; sales of retiring physicians' practices to other physicians; referral services; warranties; discounts; employee compensation; group purchasing organizations; and waivers of Medicare Part A inpatient cost-sharing amounts.

d. Penalties

The Anti-Kickback statute applies to both individuals and entities alike—a health care staffing firm and its internal staff members may be charged with violating the law. Conviction for a single violation under the Anti-Kickback Statute may result in a fine of up to $25,000 and imprisonment for up to five years. In addition, conviction results in mandatory exclusion from participation in federal health care programs. Absent a conviction, individuals who violate the Anti-Kickback Statute

may still face exclusion from federal health care programs at the discretion of the Secretary of Health and Human Services.

The government may also assess civil monetary penalties, which could result in triple damages plus $50,000 for each violation of the Anti-Kickback Statute.

2. The Stark Law

Section 1877 of the Social Security Act, also known as the physician self-referral law and commonly referred to as the "Stark law," was passed in 1989 to pre- vent unethical physician self-referrals and to reduce corruption within the medical profession. The law is named for United States Congressman Pete Stark, who sponsored the initial bill.

Physician self-referral is the practice of a physician referring a patient to a health care client in which he has a financial interest, be it ownership, investment, or a structured compensation arrangement. A provider, or members of the provider's family, may not make referrals to designated health services (DHS) clients that the physician has a financial relation- ship with unless an exception applies.

Under Stark, DHS includes the following services:

- Clinical laboratory services
- Physical therapy, occupational therapy, and outpatient speech-language-pathology services
- Radiology and certain other imaging services (now includes nuclear medicine)
- Radiation therapy services and sup- plies
- Durable medical equipment and supplies
- Parenteral and enteral nutrients, equipment, and supplies
- Prosthetics, orthotics, and prosthetic devices and supplies
- Home health services
- Outpatient prescription drugs
- Inpatient and outpatient hospital services

C. Health Care Credentialing Requirements

Steps taken during the credentialing process include verifying license(s); identifying schools and verifying completion of education, ie medical; verifying training such as internships, residency, and fellow- ships; and verifying other qualifications. Verification is done by going to the primary source, which means reaching out to the entity that provided the education, license, or other credential to verify the accuracy of the information given by the health care provider.

2. Peer Review Protections

Once a determination has been made that a challenged peer review action is a professional review action, immunity under HCQIA is available if four safe harbor provisions are met. These four provisions are that the professional review action was taken:

1. In the reasonable belief that the action was in furtherance of quality health care,
2. After a reasonable effort to obtain the facts of the matter
3. After adequate notice and hearing procedures are afforded to the medical professional

involved or after such other procedures as are fair to the medical professional under the circumstances

4. In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).

3. Best Practices

Health care staffing firms should incorporate information that is reason- ably accessible to consumers (e.g., by "Googling" applicants and checking social media to the extent allowed by law) and attempt to obtain truthful assessments of practitioner quality. Companies should pay particular attention to red flags such as unanswered reference requests, unexplained resignations, and prior investigations and claims.

Further, credentialing should be a continual process, not a single action. Health care staffing firms should:

- Review pending licensure actions in real time
- Collect performance data on an ongoing basis
- Establish a consistent, evidence-based evaluation program with defined and enforceable parameters
- Incorporate quality-improvement activities and peer review findings into an ongoing quality-assurance program.

The emerging "gold standard" in credentialing risk management is the use of third-party, online, credential-verification organizations (CVOs), in addition to or in lieu of an individualized, manual credentialing process.

D. *Locum Tenens* as Independent Contractors

A *locum tenens* position is a temporary or substitute position. *Locum tenens* is a latin phrase, the literal meaning of which is "place holder." Most commonly refer- ring to temporary physicians, *locum tenens* doctors contract with staffing firms to perform medical services over a certain period of time for a health care client of the staffing firm. The physician works as an independent contractor paid through the staffing firm, which is in turn paid by the client.

> [**ASA Tip:** Health care staffing firms must ensure that individuals classified as locum tenens are in fact independent, not under the control of the hospital or staffing firm. All contracts that address the relationship between the locum tenens and the health care staffing firm should specify that the locum tenens are not employees, but rather are independent contractors. While such a contractual provision will not guarantee that a particular physician will be deemed to be an independent contractor, it will be an important indication of the parties' intent in establishing the relationship.]

The employment relationship triggers obligations relating to unemployment insurance, workers' compensation, Social Security, wage and hour laws, OSHA, ERISA, and various federal and state tax withholding statutes.
Employees have much broader rights under the National Labor Relations Act to organize and be

rep- resented by labor organizations than do independent contractors. Employees can assert claims of employment discrimination and other employment-related causes of action relating to adverse employment decisions.

E. Malpractice Issues

Under state law, a patient may pursue a civil claim against physicians or other health care providers, called medical liability or medical malpractice, if the health care provider causes injury or death to the patient through a negligent act or omission.

2. Informed Consent

Most medical procedures or treatments involve some risk. It is the doctor's responsibility to give the patient information about a particular treatment or procedure so the patient can decide whether to undergo the treatment, procedure, or test. This process of providing essential in- formation to the patient and getting the patient's agreement to a certain medical procedure or treatment is called informed consent.

States vary on the specific definition of informed consent. A doctor does not have to tell a patient about every possible thing that might happen as a result of a procedure or treatment, but only those risks that are important. For the most part, states use one of two standards to determine what risks are important and must be disclosed:

> *1. Would Other Doctors Have Disclosed the Risk?*
> In states that use this first standard, an injured patient who is suing a doctor must hire a medical expert to testify that other competent doctors would have informed the patient of this risk. The doctor being sued will also hire an expert to testify that a competent doctor would not necessarily have disclosed the risk to the patient. In the end, the crux of the argument is usually over whether the risk was statistically likely enough to make disclosure worthwhile. Simply because a particular bad result is a remote possibility does not mean it must be disclosed—even if that bad result comes to pass.
>
> *2. Would a Normal Patient Have Made a Different Decision If Informed of the Risk?* In states using this second standard, courts ask whether a normal patient, with the same medical his- tory and conditions as the plaintiff, would have changed his or her mind about the treatment if the risk was disclosed. Unlike states following the first standard, a doctor must also inform a patient of realistic alternative treatments, even if the doctor only recommends one treatment.

3. The Res Ipsa Doctrine

To prove a negligence claim based on resipsa loquitur, a plaintiff must prove that:

- He or she was injured
- He or she was injured in an occurrence that ordinarily does not hap- pen in the absence of negligence
- He or she was injured by an agency or instrumentality within the defendant's management or exclusive control

4. Vicarious Liability

When a patient is injured due to mal- practice by a medical professional who is an employee of a health care client, the health care client itself may be held vicariously liable under the legal doctrine of "respondeat superior."

5. State Legislation Affecting Malpractice Actions

While the general principles required for a medical malpractice lawsuit are consistent nationwide, medical malpractice laws vary by state. State laws differ on the applicable statute of limitations (time within which individuals must file a lawsuit) for medical malpractice suits. Most states have a two-year time limit for filing malpractice actions, unless extraordinary circumstances affect the case. There are also differences in the types of negligence requirements, and in "caps" on award amounts for certain types of damages.

F. Mandatory Vaccination Policies for Health Care Personnel

2. Exemption Provisions

Most employers' mandatory vaccination policies include exemption and/or declination provisions that allow employees to seek exemption from some or all of the required vaccines. Even when an employer does not have an exemption policy, most health care employers will consider exemption requests on medical or religious grounds.

5. Legal Issues for Employers With Mandatory Vaccination Policies

The primary legal issue for employers with mandatory vaccination policies is the potential for discrimination claims under the Americans With Disabilities Act or Title VII of the Civil Rights Act. Employees may assert these claims if an employer seeks to impose discipline or terminate an employee's employment based on the employee's refusal to receive a vaccination. As discussed more fully below, in some cases failure to exempt individuals from immunization when it is medically contraindicated or conflicts with their religious beliefs could run afoul of the ADA or Title VII.

6. Other Legal Issues

Employers are also at risk of other tort law claims. Employees who feel "forced" to be vaccinated could assert claims such as invasion of privacy or intentional infliction of emotional distress. Additionally, a recipient of the flu shot who suffers an adverse medical outcome as a result of the vaccine or who is harmed as a result of negligent handling of the immunization could also bring a tort claim.

7. EEOC Guidance Regarding Employee Requests for Exemption From Vaccination Requirements on Medical or Religious Grounds

As mentioned above, the primary potential legal issue for employers requiring vaccinations is disability or religious discrimination claims under the ADA or Title VII. In a March 5, 2012, informal discussion letter, the EEOC stated that even during a pandemic, employers can- not compel all of their employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs.

8. General Rule: Employers May Be Required to Accommodate Legitimate Exemption

Requests Absent Undue Hardship

Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense." Factors to consider include the nature and cost of the accommodation, the financial resources of the employer, and the impact on the facility

9. The Employer May Request Evidence to Support an Exemption Request

The EEOC has also stated that where a religious accommodation is requested, the employer is permitted to request and obtain supporting information from the requesting party. Presumably, the right to request supporting evidence would also extend to exemption requests based on medical reasons.

In the Dec. 5, 2012, informal discussion letter, EEOC stated that supporting evidence for exemption requests based on religious grounds need not come from "a church official or member, but rather could be provided by others who are aware of the employee's religious belief or practice." An employee requesting an exemption must cooperate with an employer's reasonable request or he may not be entitled to accommodation. The accommodation need not be provided if it causes the employer undue hardship in the circumstances, or the employer may impose other infection control measures on those excused from vaccination, such as a mask requirement, if not done for retaliatory or discriminatory reasons. See the Dec. 5, 2012, EEOC Informal Discussion Letter on the webpage, *eeoc.gov/eeoc/foia/ letters/2012/tiitle_vii_vaccination_polic- es_and_reasonable_accommodation.html.*

10. Accommodation of Employees Exempt From Vaccination Requirements

If the employer decides that an employee's request for exemption from vaccination requirements is legitimate, and that accommodation does not pose an "undue hardship," the employer is obligated to offer the employee "a reasonable accommodation" that would allow the employee to remain employed without receiving the vaccination. An example of a reasonable accommodation suggested by the EEOC is requiring the unvaccinated employee to wear a face mask.

G. Medical Information Privacy

1. HIPPA

The Health Insurance Portability and Accountability Act of 1996, was enacted on Aug. 21, 1996. HIPAA is a federal law that provides baseline privacy and security standards for medical information. The U.S. Department of Health and Human Services is the federal agency in charge of creating rules that implement HIPAA and also enforcing HIPAA.

2. Covered Entities

The HIPAA rules apply to covered entities and business associates. Individuals, organizations, and

firms that meet the definition of a covered entity under HIPAA must comply with the rules' requirements to protect the privacy and security of health information. Covered entities must also provide individuals with certain rights with respect to their health information.
A covered entity is one of the following:

1. **Health Care Provider:** This includes health care professionals and entities such as doctors, clinics, nursing homes, pharmacies, and others—but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard, such as electronic billing and funds transfer. For example, an employer's on-site medical clinic that does not conduct electronic transactions would not be covered by the Privacy Rule.
2. **Health Plan:** This includes individual and group plans that provide or pay the cost of medical care. Health plans include staffing firm-sponsored group health plans, government and church-sponsored health plans, and multi-employer health plans. Insured or self-insured staffing firm-sponsored plan that have 50 or more participants, and group health plans regardless of size that are administered by entities other than firms, are covered. Health care staffing firms that have group health plans with fewer than 50 plan participants and group health plans regardless of size that are administered solely by employers are not covered entities and are not subject to HI- PAA's privacy and security requirements.
3. **Health Care Clearinghouse:** This includes entities that process non- standard health information they receive from another entity into a standard format, or vice versa. A billing service is an example of a covered health care clearinghouse.

3. Covered Entities

Business associate functions or activities on behalf of a covered entity include claims processing, data analysis, utilization review, and billing. Examples of business associates are:

- Accountants
- Actuaries
- Attorneys
- Claims processors
- Consultants
- Utilization review and disease management vendors
- Group health care continuation coverage administrators under the federal Consolidated Omnibus Budget Reconciliation Act of 1985

4. What Information Is Protected: Protected Health Information

Individually identifiable health in- formation includes many common identifiers (e.g., name, address, birth date, and Social Security number). Genetic information also is considered to be individually identifiable health information. Health information is not considered to be individually identifiable health information if it does not identify individuals or if there is no reasonable basis to believe that it can identify specific individuals

8. Valid Authorizations

A covered entity must obtain the individual's written authorization for any use or disclosure of

protected health information that is not for treatment, payment, or health care operations or otherwise per- mitted or required by the Privacy Rule. This authorization is distinct from any consent that covered entities might obtain for routine uses and disclosures of health information.

10. The Breech Notification Rule

Covered entities must provide notice if unsecured protected health information (PHI) is or reasonably is believed to be accessed, acquired, or disclosed to un- authorized persons. "Unsecured" PHI is protected health information that is not secured through technologies or methodologies specified by the secretary of Health and Human Services. If covered entities use technologies or methodologies specified by HHS to make protected health information un- usable, unreadable, or indecipherable, then such protected health information is considered secured and breach notification requirements are not applicable. For example, such safeguards might include shredding documents containing protected health information before discarding them, securing medical re- cords with lock and key or pass code, and limiting access to keys or pass codes. The two methods specified by HHS to secure protected health information are encryption and destruction.

On Jan. 25, 2013, HHS published regulations that set out a risk assessment method that business associates and employer health plans must follow to deter- mine if a privacy breach has occurred. The rules expressly favor disclosure of a breach unless the covered entity can demonstrate that there is a "low probability that the protected health information has been compromised."

Covered entities must provide notice of breaches of unsecured protected health information promptly, but no later than 60 calendar days after breaches are dis- covered. Breaches are considered to be discovered on the first day that covered entities or business associates know or should know that breaches have occurred.

H. When Is Continuing Education Time Compensable?

1. Time Spent in Continuing Education Classes Is Evaluated in Accordance With a Four-Part Test

The Code of Federal Regulations sets forth a four-part test applicable to most nonexempt employees, including medical professionals, to determine whether time spent in a continuing education course or class must be paid time under the law. The Code provides that: "Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met":

- Attendance is outside of the employee's regular working hours
- Attendance is in fact voluntary
- The course, lecture, or meeting is not directly related to the employee's job
- The employee does not perform any productive work during such attendance.

2. Outside of Regular Working Hours/No Productive Work Performed

For an employee's attendance at a continuing education class to qualify as non- compensable time,

the employee must attend the class outside of the employee's regular working hours and the employee may not perform any productive work during the class.

3. Voluntary Attendance

The crux of the "voluntary attendance" requirement is whether the employer, or a party acting on behalf of the employer, either directly or indirectly, required the employee to attend the class or course. Attendance is not considered voluntary if:

- It was required by the employer;
- The employee was led to believe that his or her present employment would be adversely affected by not attending.

If attendance is required by the employer, any time spent by the employee attending the class must be paid as time worked. An exception to this is state-required training. In general, if state-required training is of a general nature, and not tailored to meet the particular needs of individual employers, the time spent completing the training can be classified as voluntary.

4. Not Directly Related to the Employee's Job

The final consideration is whether or not the class, course, or training is directly related to an employee's job. It is considered directly job related if it is designed to make the employee handle his or her cur- rent job responsibilities more effectively. If the training content is intended to help the employee handle current responsibilities more effectively, the employee must be compensated.

Again, all four criteria must be met for training time to not be compensated. Thus, training outside nor- mal working hours is always compensable when it is directly related to the employee's job, or when the class or training is required by the employer. It should also be noted that, in either situation, the time spent by the employee in the class or course is compensable whether or not the class was offered in house. One illustration of this situation is the Division's decision in an April 21, 1986, Administrative Letter Ruling holding that health clerks employed by a school district were entitled to compensation for time spent in a first aid recertification training class outside of their normal working hours because the employer required the health clerks to renew their first aid certificates every three years.

6. Time Is Not Compensable Where Class Is for the Benefit of the Employee/Corresponds to Courses Offered by Bona Fide Institutions

The Code provides an exception to the requirement that the training not be directly related to the employee's job where the training is for the benefit of the employee and corresponds to courses offered by independent bona fide institutions of learning: time spent in attending such lectures, training sessions, and courses of instruction is not regarded as hours worked. An example is when an employer establishes, for its employees' benefit, courses that correspond to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they directly relate to his job, or are paid for by the employer.

7. Employer Provided/Paid Programs

Continuing education classes, courses, and trainings offered in house or otherwise provided by the employer can qualify as noncompensable if they meet the requirements of the four-part test, or correspond to classes, courses or trainings offered by independent institutions that are of general applicability and benefit the employee. Thus, if the state requires continuing education of a general nature for nurses as a condition of practice of the profession, and the employer offers courses that fulfill this requirement but are not tailored to meet the employer's particular needs, then such training is not compensable time under the Fair Labor Standard Act.

Labor–Management Relations

(Excerpted from *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, 8th edition, pages 56–60)

In the area of labor relations, the key to determining co-employment is whether the client is substantially involved in determining the terms and conditions of employment of the staffing firm's employees. In such cases, clients may have joint employer obligations with respect to a staffing firm's employees.

Joint Employment in Labor Relations

The law of joint employment under the National Labor Relations Act has changed significantly since the last edition of Co-Employment. For thirty years, the NLRB had applied a joint employer standard requiring a showing that the employers jointly exerted direct and immediate control over the essential terms and conditions of employment in matters such as hiring, firing, discipline, supervision, and direction of employees.

Inclusion of Staffing Firm Employees in Client Bargaining Units

Since 1970, the National Labor Relations Board and at least one federal court have held that temporary employees employed by staffing firms may be included in client bargaining units where there is a sufficient "community of interest" between a staffing firm's employees and the client. A key issue, however, is whether the staffing firm's employees can be forced into the client's bargaining unit without the consent of both employers.

But an equally long line of NLRB cases, beginning with the *Greenhoot* case in 1973, the NLRB long held that both joint employers must consent.

In 2004, the Board changed course again, overruling Sturgis in *H.S. Care L.L.C. dba Oakwood Care Center*. Citing the decades of precedent beginning with *Greenhoot*, the NLRB in a 3–2 decision said that allowing such units to be formed without consent results in a "bifurcation of bargaining… [that] hampers the give-and-take process of negotiation between a union and an employer, and places the employers in the position of negotiating with one another as well as with the union.

Crediting Prior Service When Temporary Workers Are Hired by Clients

Even if a temporary worker is not included in a joint bargaining unit, he or she may be entitled to benefits under a collective bargaining agreement covering the client's employees if the client directly hires the temporary employee following completion of a temporary assignment. At least one labor arbitrator has held that the temporary employee may be entitled to back pay to make up any difference between what he or she was earning as a temporary employee and the wage rate specified for that work classification in the client's collective bargaining agreement.

Liability for Unfair Labor Practices

'Salts'

A unique twist on the theme of co-employment involves the use by unions of "salts," individuals employed and paid by unions to apply for work with a nonunion employer for the express purpose of organizing the employer's work force. The U.S. Supreme Court held in *NLRB v. Town & Country Electric* that salts are "employees" within the meaning of the National Labor Relations Act and therefore cannot be rejected or dismissed from employment based solely on their union activities.

Staffing firms and their clients should exercise care not to discriminate against applicants or employees on the basis of union membership. However, the NLRB has upheld an employer's refusal to hire applicants who were also full-time employees of a union based on the employer's policy against moonlighting.

Staffing Firm Liability for Unfair Labor Practices of Client

The NLRB established in the 1993 case of *Capital EMI Music* that a staffing firm will not be held liable for a client's unfair labor practice unless it knows or should have known that the client acted against the employee for unlawful reasons and acquiesced in the unlawful action by failing to protest it or exercise any contractual right it might have had to resist it.

Employer Obligations to Military Reservists and National Guard Members

(Excerpted from *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, 8th edition, pages 50–52)

Employer Obligations to Military Reservists and National Guard Members

Uniformed Services Employment and Re-Employment Rights Act

The Uniformed Services Employment and Re-employment Rights Act (38 U.S.C. § 4301 et seq.) protects any employee who must be absent from civilian employment because of active-duty military service when all of the following apply:

- The employee provides advance notice to the civilian employer.
- The cumulative length of the employee's military absence does not exceed five years.
- The employee returns to work within the period prescribed by law or submits a timely application for re-employment.
- The character of the employee's service does not disqualify him or her from re-employment.

Internal Employees—Seniority and Position Upon Return

After military service, an employee's re-employment rights and seniority are governed by the "escalator principle." The Supreme Court has stated that the returning employee "does not step back on the seniority escalator at the point he stepped off. The employee steps back on at the precise point he would have occupied had he kept his position continuously." Thus, a staffing firm's returning internal employees suffer no loss of seniority because they have served on active duty.

When an employee returns after being absent for 90 days or fewer, the employee is entitled to the position he or she would have attained had the absence not occurred (the "escalator" position) provided the employee is qualified to perform the duties of that position. If, despite the staffing firm's reasonable efforts, the returning employee is not qualified for a higher-skilled position, the employee may be reassigned to the position held when the absence started.

For absences exceeding 90 days, the returning employee must be assigned to either the "escalator" position or a position with equivalent seniority, status, and pay, assuming the employee is qualified to perform the duties of the position. If the returning employee is unqualified despite the staffing firm's reasonable efforts, the employee must be assigned to his or her former position or a position with equivalent seniority, status, and pay. If the returning employee is unqualified for that position, the firm must try to reassign the employee to an alternative position of lesser status and pay, with full seniority.

Hardship Exception

USERRA provides that there may be no obligation to re-employ an individual if the employer's circumstances have changed such that re-employment is impossible or would create an undue hardship for the employer.

Whether re-employment is required will depend on the specific facts and circumstances. For example, re-employment may not be required if the employee's position has been eliminated during his or her absence. There is no requirement to re-establish a position that is no longer needed.

However, the returning employee may be entitled to re-employment if other positions exist that involve his or her former duties. The veteran may also be entitled to re-employment in a position to which he or she would have advanced or been transferred if employment had continued without interruption. The veteran may be entitled to re-employment in a position of equivalent seniority, status, and pay. Thus, re-employment cannot necessarily be refused if equivalent positions exist for which the veteran is qualified or could be qualified after reasonable training.

Temporary Employees—Reinstatement With Clients

USERRA contains a broad definition of the term "employer," which potentially encompasses both staffing firms and their clients as joint employers of temporary workers.

Although USERRA does not specifically address the obligations of employers in joint employment situations. The Family and Medical Leave Act may provide useful guidance. FMLA provides that, in joint employment situations, the primary employer (the staffing firm) has an obligation to restore to employment an employee returning from leave. The secondary employer (the client) also may be required to accept the returning employee, depending on the facts.

However, USERRA's re-employment provisions do not apply if the original employment was "for a brief, nonrecurrent period and there [was] no reasonable expectation that such employment [would] continue indefinitely or for a significant period" (38 U.S.C. § 4312([d])([1][)(C]). Whether a temporary worker is entitled to re-employment with the client will therefore depend on the nature of the former assignment. If the assignment was reasonably expected to be continuous and for an indefinite period, re-employment with the client would likely be required.

Casual and nonrecurrent assignments, however, would not likely implicate USERRA's reinstatement requirements. For example, an extra clerk hired during the holiday rush or a substitute employee hired during the absence of a regular employee on a year's leave would not likely be entitled to re-employment with a staffing firm's client (see *Martin v. Roosevelt Hospital*, 426 F.2d 155, 159 [2nd Cir. 1970]). Similarly, a temporary worker placed with a client to perform a particular task, such as a defined piece of research, that was completed during military service would not be entitled to re-employment with the client if the client does not regularly employ people for such tasks.

Depending on the facts, a worker in a temporary-to-hire position might be entitled to re-employment. While there do not appear to be any cases addressing such a situation, the law provides that employees on probationary status are entitled to re-employment if they reasonably anticipated that they would be hired on completion of the probationary period.

Priority Consideration for Future Assignments

Because USERRA does not address joint employment, it is unclear whether staffing firms must to provide returning veterans with priority consideration for future assignments. However, USERRA's strong protections for returning veterans, embodied in the escalator principle, suggests that priority consideration may be required.

Under the FMLA, when individuals returning from medical leave cannot be reinstated with the client they were previously assigned to, the staffing firm must give them priority consideration or place them at the "head of the line" for possible assignments with other clients for which they are qualified. Staffing firms wishing to take a conservative approach may wish to adopt a similar approach under USERRA.

Workers' Compensation, Unemployment Insurance, and Benefits

(Excerpted from *Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements*, 8th edition, pages 14–38)

Workers' Compensation

General Employers and Special Employers

State workers' compensation laws provide benefits on a no-fault basis to employees accidentally injured on the job. The basic premise of these laws is that in return for such protection, employees are barred from suing their employer for damages. In other words, workers' compensation generally is the employee's exclusive remedy for workplace injuries.

Although staffing firms almost always are viewed as the "general employer" for workers' compensation purposes, courts in most jurisdictions have treated staffing firm clients as "special employers," thereby conferring immunity on the client from tort liability under the exclusive remedy principle. At least 13 states have codified this principle in their state statutes.

In determining whether a client is a special employer, courts apply the common-law "loaned" (or "borrowed") servant doctrine, which generally requires a showing that the client supervises the individual's work, the assigned employee has consented to the arrangement, and the work is essentially that of the client. All three elements generally can be established in the typical staffing arrangement. Thus, the exclusive remedy defense is usually available to clients in suits brought against them by staffing firm employees for negligence in work site injury cases.

The defense will not, however, protect a client that injures an employee intentionally. Courts also may not protect a client if its written contract with the staffing firm expressly disclaims any employment relationship with the employees assigned to them. Similarly, courts have allowed suits against clients with managed services arrangements (see Chapter 1, p. 10) in which the client has no day-to-day control over the employees' activities—expressly distinguishing those arrangements from temporary services where the client does have control.

On the other hand, some courts have denied a temporary employee's claim against a client based on the negligence of the client's employee where the client's payment to the staffing firm included an amount for workers' compensation coverage.

Even in cases where the employee is allowed to sue the client, staffing firms still can protect the client through contractual indemnification provisions backed by appropriate liability insurance coverage

Client as Employer—Alternate Employer Endorsement

Some states have taken the view that a client's control of an employee's activities at the worksite is grounds for holding the client directly liable for paying workers' compensation claims, even when the staffing company has expressly agreed to provide the coverage.

In those states, staffing companies should ensure that their workers' compensation policies contain a

temporary service contractor or alternate employer endorsement. These endorsements require the staffing firm's carrier to provide benefits directly to clients in the event that state law prevents payment of benefits to the employee. They also preclude the staffing firm's carrier from seeking reimbursement from the client's carrier.

Note that in states where the client is viewed as the sole employer for workers' compensation, the staffing company may be exposed to liability for negligence if sued by its own workers injured on the job because it cannot claim immunity as an employer. But most states treat both clients and staffing companies as employers for workers' compensation purposes.

Fellow Employee Rule

In addition to protecting employers from tort liability, most state workers' compensation statutes protect fellow employees from suing each other for job-related injuries. (See 6 *Larson's Worker's Compensation Law*, Ch. 111.) This is known as the "fellow employee" rule. For example, a temporary employee who negligently injures a client's employee on the job cannot be sued by the client's employee because the temporary worker is a special employee of the client and therefore a fellow employee of the client's employee. The question is whether the client's employee has any recourse against the staffing firm.

Several courts have allowed a client employee to sue a staffing firm on the ground that there was no employment relationship between the staffing firm and the client's employee, and therefore the staffing firm is not immune from suit. But to recover damages from the staffing firm in such cases, the client employee must show that the staffing firm is liable under the principle of respondeat superior (i.e., that the staffing firm had a right to control its temporary employee's activities at the work site or that the employee was performing work primarily for the staffing firm, not the client). This burden may be more difficult to meet in some states than in others. At least two courts have held that a staffing firm or labor contractor automatically enjoys the same immunity conferred on its employees and therefore cannot be sued by a client's employees. In 1999, North Dakota codified protection for staffing firms against suits by employees of the client.

Waivers of Client Liability

Courts in Arkansas and Massachusetts have upheld the validity of waivers executed by staffing firm employees in which the employees gave up their rights to sue any client for injuries covered by state workers' compensation laws. In these states, a properly drafted and executed waiver may protect clients from liability for workplace injuries caused by negligence. Waivers may be viable in other states, and staffing firms should consult with legal counsel regarding their use.

Unemployment Insurance

Staffing firms are generally recognized as the employer for unemployment insurance purposes. There are exceptions in certain states. In Arizona, clients of temporary staffing firms can be held jointly liable as co-employers for any unpaid unemployment insurance premiums. Rhode Island holds clients jointly liable for certain employment taxes if they use the services of a staffing firm that is not certified with the state tax department.

Employment Taxes

Staffing firms generally are viewed as having sole liability for payment of employment taxes despite the clients' control of the employees' activities at the work site, --- provided that the staffing firm controls the payment of the wages.

As employers, staffing firms pay their employees' wages and all employment taxes. They pay the employer's share of Social Security and federal and state unemployment taxes. When they are viewed as the common-law employer or the party controlling the payment of wages, staffing firms have been expressly recognized by the courts and by the Internal Revenue Service as employers for federal employment-tax purposes.24 Moreover, clients generally should not be held liable as co-employers, even if staffing firms default on their obligation to withhold taxes.

Health and Pension Benefits

The primary co-employment concern in the benefits area is whether a staffing firm client has a legal obligation to provide benefits to a staffing firm's employee. The answer is generally no, but this area of law is highly fact specific.

San Francisco law requires certain employers to contribute to employee health care, and the federal Patient Protection and Affordable Care Act (ACA) require certain employers to either provide health insurance coverage or pay a tax penalty to the government, but no law (except in Hawaii), requires employers to provide health or pension benefits to employees. Federal tax law does, however, require employers to include "leased employees" in their head count for the purpose of "coverage tests" that applyto certain employer benefits plans.

To understand how the leased employee rules work, it is essential to understand the tax policy behind the "coverage tests."

Coverage Tests

Federal tax law does not require employers to provide their employees with benefits such as pensions and health insurance. However, it does provide incentives designed to encourage employers to offer benefits to certain rank-and-file employees. For example, businesses may deduct the cost of the benefits, which generally are not included as taxable income to employees. To qualify for favorable tax treatment, however, plans must cover employees fairly (i.e., they cannot discriminate in favor of higher-paid employees).

Federal tax law does not require employers to provide their employees with benefits such as pensions and health insurance. However, it does provide incentives designed to encourage employers to offer benefits to certain rank-and-file employees. For example, businesses may deduct the cost of the benefits, which generally are not included as taxable income to employees. To qualify for favorable tax treatment, however, plans must cover employees fairly (i.e., they cannot discriminate in favor of higher-paid employees).

Beginning with plan years after Dec. 31, 1988, the 1986 Tax Reform Act imposed much stricter coverage tests for retirement plans. Under the act's amendments, one of two tests must be passed: A plan must cover (1) a percentage of rank-and-file employees equal to at least 70% of the percentage of higher-paid employees benefited, or (2) a nondiscriminatory classification of employees based on

objective standards and provide lower-paid employees an average benefit that is at least 70% of the average benefit provided to higher-paid employees.

Since the new coverage tests became effective, employers can no longer provide qualified retirement benefits simply by covering a nondiscriminatory classification of employees (e.g., full-time salaried employees). Staffing firms, for example, must apply more stringent tests that require counting their temporary employees. This makes it virtually impossible for them to maintain their plans' tax-qualified status because the relatively large numbers of temporary employees excluded from the plans practically guarantee that the plans will fail the tests. Consequently, many staffing firms were forced to terminate their qualified retirement plans as a result of the new coverage tests.

The new coverage tests apply to retirement plans but not to other kinds of benefit plans such as self-insured group health plans and group life insurance. Those plans remain subject to pre-1986 coverage tests, which permit employers to provide benefits to nondiscriminatory classifications of workers (e.g., home office staff or employees assigned to particular clients). It is not entirely clear, though, to what extent the determination of what is a nondiscriminatory classification is affected by the new objective standards applicable to retirement plans.

Insured health plans historically were not subject to any nondiscrimination coverage tests, either pre-1986 or post-1986. However, the ACA enacted in 2010 provides that, effective Jan. 1, 2011, all insured group health plans are subject to nondiscrimination rules similar to the rules applicable to self-insured health plans but those rules have not been implemented.

Leased Employee Rules

As noted above, the tax code requires employers to satisfy applicable coverage tests by taking into account workers who are their common-law employees. When applying the tests, the tax code also requires employers to include in their head count certain employees, *who are not their common-law employees,* supplied by third-party contractors. These rules, sometimes referred to as the "leased employee rules," are set forth in section 414(n) of the Internal Revenue Code, which applies to tax years after Dec. 31, 1983.

Section 414(n) was enacted to address the practices of certain small professional groups that fired their entire staffs, transferred them to the payroll of leasing organizations, and then set up pension plans only for themselves, thus circumventing the coverage tests. Section 414(n) dealt with this practice by requiring employers to treat certain outside employees as leased employees who must be counted along with their own employees when applying the coverage tests. (For the full text of section 414(n), see Appendix F.) As the following definition indicates, section 414(n) is very broad. Employees supplied by many traditional service providers, including long-term employees supplied by staffing firms, may have to be counted as leased employees, even though clients do not use them to replace full-time employees or to circumvent the coverage tests.

Definition of Leased Employee

Section 414(n) defines a leased employee as any person furnishing services to a recipient if the following conditions are met:

- The person must perform services under an agreement between the recipient employer and the

leasing organization.

- The person must perform services under the primary direction and control of the recipient.
- The person must perform services on a substantially full-time basis for a one-year period. Under IRS guidance, this test is met if one of the following conditions is met during a 12-month period: The employee performs at least 1,500 hours of service for the client (or related entities), or the employee performs a number of hours of service for the client (or related entities) that is equal to at least 75% of the average number of hours customarily worked by the client's own employees performing similar services.

The "substantially full-time" test under section 414(n) is different from the "year of service" test under the Employee Retirement Income Security Act, which uses a 1,000-hour standard for participation, benefit accrual, and vesting. ERISA and section 414(n) have different purposes and requirements. ERISA sets forth rules for an employer's benefit plans, but they apply only to the employer's own employees. Section 414(n) applies to an employer's use of outside employees.

Control Test

The "primary direction and control test" of section 414(n), enacted as part of the Small Business Job Protection Act of 1996, replaced a test under prior law that looked to whether services performed by employees for a recipient were of a type historically performed by employees in the recipient's field of business. This test was widely criticized as being too broad in its application. The control test significantly narrows the scope of the leased employee rules.

Effective Jan. 1, 1997, clients do not have to count third-party employees as potential leased employees when their work is directed and controlled primarily by a staffing firm and not the client. Whether an individual performs services under the primary direction or control of the client depends on the facts and circumstances. Relevant factors include whether the client has the right to direct where, when, and how the employee performs services; whether the client has the right to direct that services be performed by a specific person; whether the client supervises the worker; and whether the employee must perform services in an order set by the client.

The legislative history of the control test indicates that professionals (e.g., attorneys, accountants, actuaries, doctors, computer programmers, systems analysts, and engineers) are not considered leased employees if they regularly use their own judgment and discretion on matters of importance in the performance of their services and are guided by professional, legal, or industry standards. They do not have to be counted by the client, even though the staffing firm does not closely supervise them on a continuing basis and even though the client requires their services to be performed on site and in accordance with client-determined timetables and techniques.

The control test may benefit clients using professional services and managed services arrangements in which the staffing firm exercises actual day-to-day direction and control of employees at the work site. Office and clerical staffing services could also be exempt, but clients claiming exemption from the head-counting rules will have to satisfy a heavy burden of proof on the issue of control because the legislative history provides that clerical and similar support staff generally are considered to be subject to the client's primary direction or control and would be leased employees if the other requirements of section 414(n) are met.

Benefit Plans Affected by the Leased Employee Rules—Application to the ACA

Section 414(n) leased employee rules come into play when applying coverage tests to retirement, life insurance, and cafeteria plans and when determining whether group health plans are subject to the Consolidated Omnibus Budget Reconciliation Act (COBRA) and certain Medicare coordination-of-benefit rules. But section 414(n) rules do not currently apply to the coverage tests relating to group health plans.

The Affordable Care Act addresses the treatment of leased employees in two specific contexts. First, the law expressly provides that leased employees must be included by any employer claiming a small business tax credit under the law.46 This was to ensure that clients of professional employer organizations with less than 25 employees do not lose their ability to claim the small business tax credit provided by the ACA. But it also is intended to prevent larger employers from improperly claiming the credit by shifting employees to PEOs to lower their headcount. Second, the final regulations make clear that recipients do not have to count leased employees as employees for purposes of compliance with the employer shared responsibility rules.47 Hence, staffing firm clients should have no obligation to include staffing firm employees for purposes of ACA compliance unless the client is determined to be the common law employer based on the facts and circumstances. Based on historical practice and legal precedent, staffing firms generally should be viewed as the common law employer, not the client.

Record-Keeping Exemption

The 1986 Tax Reform Act directed the Treasury Department to issue regulations to minimize employer record-keeping under section 414(n). According to the legislative history of this provision, Congress contemplated that employers do not have to maintain records of outside employees for coverage testing purposes unless the total number of such individuals performing 1,500 hours or more of service exceeds 5% of the employer's total lower-paid work force. To take advantage of this exemption, a client's benefit plans must not be top heavy under IRS rules and must specifically exclude leased employees.

Coverage Testing of Leased Employees—Consequences of Failing the Tests

Generally, under the record-keeping exemption described above, if an employer's use of outside employees working 1,500 hours or more is 5% or more of its lower-paid work force, it will have to maintain records, and those employees meeting the definition of "leased employee" will have to be counted as leased employees for coverage testing purposes. Outside employees generally must be counted after working 1,500 hours or more in a year, assuming the client uses a 40-hour workweek as full time. Plans that continue to satisfy the coverage tests after leased employees are counted will remain qualified. However, plans that fail the tests will lose some or all of their tax benefits, depending on the type of plan.

For example, if a retirement plan fails the coverage tests, the employer stands to lose its tax deduction for all contributions made to the plan. Higher-paid employees will be immediately taxed on the value of their vested plan benefits, and the income of the retirement trust will become taxable. Consequently, clients should keep careful track of any outside employees working 1,500 hours or more to ensure that their retirement plans do not fail the coverage tests. Clients that do not maintain tax-favored benefit plans need not be concerned with the leased employee rules.

Credit for Benefits Provided by Leasing Organization

Even if a client must count a staffing firm employee for coverage tests, the client is entitled to a credit to the extent that the employee receives benefits from the staffing firm. The law states that "contributions or benefits provided by the leasing organization that are attributable to services performed by the recipient shall be treated as provided by the recipient." Hence, if the benefits provided by the staffing firm are fully comparable to those provided by the client, the client may be entitled to full credit under the coverage tests. Comparability must be determined case by case, and certain technical requirements be satisfied. The mere fact that a staffing firm covers its assigned employees under a benefit plan does not exempt the client from having to take leased employees into account when applying the coverage tests.

Any plan covering staffing firm employees must meet the IRS's 50-employee rule, which requires that plans cover at least 50 employees or 40% of the employer's total work force, whichever is less. In the case of a staffing firm plan, this means that, assuming a staffing firm has more than 200 employees (including all of its temporary employees), at least 50 employees must be covered under any plan established for those assigned to a particular client. As a result of changes enacted as part of the Small Business Job Protection Act of 1996, this 50-employee requirement does not apply to defined-contribution plans such as profit-sharing and 401(k) plans, effective for plan years beginning in 1997.

In addition, of course, any plan established for temporary employees must satisfy the coverage tests, which will not be a problem if the plans maintained by the staffing firm do not cover highly compensated employees and only cover common-law employees of the staffing firm.

Prior Service Credit for Employees Hired by Client

Employees who perform services for a client through a staffing firm and are later hired directly by the client are entitled to credit under the client's pension plan for hours of service performed for the client as an employee of the staffing firm. Section 414(n)(4)(B) requires a client to take into account, for the purpose of determining an employee's years of service under ERISA, "any period for which such employee would have been a leased employee but for the requirements of subparagraph 2(B)" (i.e., the 1,500-hour test). This requirement may have the effect of accelerating the entry and vesting of the hired employee in the client's plan.

Section 414(n) requires only that leased employees be treated as employees for the purpose of including them in the client's head count for coverage testing purposes. They are not required to be treated as participants in the client's benefit plans. Indeed, leased employees may be excluded as a class from participating in the client's plan. However, as the following discussion illustrates, it is critically important to use clear and unambiguous language.

The **Microsoft** *Case*

Section 414(n) simply requires businesses to count certain longer-term leased employees for coverage testing purposes. The *Vizcaino v. Microsoft Corp.* case, however, raised the specter that staffing firm employees may be considered a client's common-law employees under certain

circumstances and thus become eligible for the client's benefit plans—although the facts in the case were unique in that the client, Microsoft, was held to have conceded the issue..

In 1993, a group of former Microsoft freelancers, whom the IRS said should have been classified by Microsoft as employees, sued the company for benefits under its 401(k) and stock purchase plans. The class of workers suing for benefits involved two groups: (1) those who worked directly for Microsoft from 1987 to 1990 as independent contractors, and (2) those who were employed by staffing firms after the IRS reclassified the workers as Microsoft employees for tax purposes in 1990.

Microsoft challenged the workers' claims on the basis that their work agreements and the company's benefit-plan language excluded them from coverage. The U.S. District Court for the Western District of Washington denied the workers' claims, but the U.S. Court of Appeals for the Ninth Circuit ultimately sided with the employees.

The court ruled that Microsoft was bound by the wording of its stock purchase plan, which referred to a provision of the tax code requiring all common-law employees to receive benefits for a plan to qualify for preferential tax treatment. That reference, the court ruled, created a legal obligation to provide benefits to any common-law employee, which a client cannot avoid merely because a staffing firm can establish that it is also an employer. In an earlier ruling, the Ninth Circuit found that Microsoft had conceded the employees' common-law status and thus the company would not be permitted to reopen that issue, although the court did allow Microsoft to challenge particular employees' claims if it could prove special circumstances rendering the employees ineligible. But Microsoft elected to settle the case, agreeing to pay almost $97 million in damages relating to the company's stock purchase plan.

In the wake of the *Microsoft* case, several lawsuits have been filed against private-sector corporations and state government agencies seeking benefits. Most of the private-sector cases have been won all or in part based on plan exclusions.

Because the law generally does not require employers to provide benefits or mandate that all employees be covered, businesses can take steps to reduce the likelihood that such claims will be successful.

Operational Steps—Avoiding Control

Ironically, the *Microsoft* case itself provides guidance on how staffing firm clients can avoid being considered the employer of staffing firm employees claiming benefits under client plans. *Microsoft* and other cases have relied on criteria for determining employer status set forth by the U.S. Supreme Court in the *Darden* case.

Clients can structure their relationships with staffing firms and assigned workers to avoid some of the contacts that might imply an employee–employer relationship. Although day-to-day supervision of workers by the client may be unavoidable in most cases, other factors can be controlled. For example, the client can control who recruits and trains the worker, the length of the worker's assignment, the right to assign the worker to other projects, and the client's influence on the relationship between the worker and the staffing firm. Other factors would also be relevant in making this determination. A 1999 federal district court decision in California, *Burrey v. Pacific Gas & Electric*, recognized the substantial employer responsibilities of the staffing firm and held that it, not

the client, was the employer for benefits purposes despite the client's substantial day-to-day involvement with the workers.

Benefit Plan Exclusions Must Be Clear and Unequivocal

Another way for clients to avoid benefits liability by drafting their plans to clearly and explicitly exclude staffing firm employees, even if they are determined to be the client's common-law employees. The Ninth Circuit in the *Microsoft* case itself explicitly held that Microsoft had the legal right to exclude the workers who were claiming benefits and could have done so had it drafted its plan more explicitly. As previously noted, this right has been recognized by a number of federal courts. Hence, clients should carefully review their benefit plan documents to ensure that they are properly drafted.

Further support for the ability of staffing firm clients to protect themselves through exclusionary plan language can be found in a technical advice memorandum issued by the IRS national office and unofficially published in 2000.

The memorandum involved a taxpayer seeking an IRS plan determination. The plan excluded from coverage individuals not on the client's payroll, even if the individuals were subsequently reclassified as common-law employees. The IRS upheld the exclusion. Use of language similar to that used by the taxpayer in the memorandum would therefore appear to offer protection.

Employee Contracts and Waivers

In addition to careful plan drafting, it may be possible for clients to achieve additional protection from benefits liability through carefully drafted employee agreements or waivers.

Some benefits experts believe that temporary employee waivers are not enforceable unless they are consistent with and expressly sanctioned by the client's benefit plan, suggesting that any waiver language should be tailored to particular client situations. Because of the complexity of the issues, staffing firms and their clients should consult with expert legal counsel about plan-drafting issues and any agreements with workers relating to benefits eligibility.

Do Time Limits on Worker Assignments Offer Protection?

To protect against benefits claims following the Microsoft litigation, clients began to adopt policies limiting the length of assignment of staffing firm workers. Some of these policies seem to be based on the erroneous belief that, after working for a certain period of time, such employees are automatically eligible for coverage under client benefits plans or even entitled to be hired into regular full-time positions with the client.

However, length of assignment is not the sole issue in determining the employment status of workers supplied by staffing firms. For tax and benefits purposes, it is but one of many factors under the common-law control test and is by no means determinative. Assignment limits may even carry some risk if the client has not clearly excluded staffing firm employees from its plan because those limits might be construed as an effort to deny benefits by preventing employees from reaching the hours needed for plan participation. Clients could face charges of violating ERISA, the tax code, and the Affordable Care Act, which protect employees from such employer action.

Because assignment limits can cause economic harm to workers whose assignments are terminated prematurely and can disrupt client business operations, clients should examine their time limits policies to ensure that they are necessary and are not based on misinformation. For example, it is important to understand that while ERISA sets rules for employer benefit plans, it does not require employers to offer benefits and does not dictate what level of benefits must be provided—and that federal tax law, while it requires that plans satisfy certain coverage and nondiscrimination rules as a condition of receiving favorable tax treatment, does not require employers to offer benefits or to cover all employees in their plans. A company generally can exclude up to 30% of its rank-and-file employees under a pension, profit-sharing, or 401(k) plan without endangering the plan's tax-advantaged status. This "slack" is why clients generally can exclude staffing firm workers from their benefit plans without jeopardizing their tax status.

Nevertheless, some clients, relying on the ERISA "hours of service" rule, terminate the staffing firm's workers before they reach 1,000 hours in the erroneous belief that all individuals who work at least 1,000 hours in a year are entitled to participate in the client's retirement plan. This is unnecessary because the year of service rule does not apply to nonemployees or to employees who have been expressly excluded from the plan under a proper exclusion provision. Nor does it apply in cases where the client's retirement plan does not require 1,000 hours of service or, necessarily, to an employer that adopts the "elapsed time" method.

Other clients' assignment limit policies are based on the federal tax code provisions dealing with "leased employees," IRS Code section 414(n). Again, those provisions do not require clients to provide benefits to leased employees—in fact, leased employees can and should be excluded from client plans. The rules require only that leased employees be included in a client's head count for discrimination testing purposes. This is not a problem unless the client has so many leased employees (and other excluded employees) that they exceed the "slack" in the client's plan discussed earlier, which could affect the plan's tax qualification.

ASA Code of Ethics

One of the principal missions of the American Staffing Association is to encourage high standards of ethical conduct in dealings with employees, clients, and competitors. In furtherance of that mission, the ASA board of directors has adopted the following codes of ethics: a general code applicable to all staffing firms, and a separate code covering construction and other types of day labor services.

Code of Ethics and Good Practices

As a condition of membership in the American Staffing Association, each member pledges its support of, and adherence to, the principles and practices set forth below. ASA members acknowledge that such compliance is in the best interests of the staffing services industry, its clients, and its employees. ASA members agree to always strive

- To comply with all laws and regulations applicable to their business, and to maintain high standards of ethical conduct in the operation of that business and in their dealings with employees, clients, and competitors.
- To treat all applicants and employees with dignity and respect, and to provide equal employment opportunities, based on bona fide job qualifications, without regard to race, color, religion, national origin, sex, age, disability, or any basis prohibited by applicable law.
- To maintain high standards of integrity in all advertising, and to assign the best qualified employees to fill clients' needs.
- To determine the experience and qualifications of applicants and employees as the staffing firm deems appropriate to the circumstances, or as may be required by law.
- To explain to employees prior to assignment their wage rate, applicable benefits, hours of work, and other assignment conditions—and to promptly pay any wages and benefits due in accordance with the terms of their employment and applicable legal requirements.
- To encourage employee efforts to upgrade their skills.
- To satisfy all applicable employer obligations, including payment of the employer's share of Social Security, state and federal unemployment insurance taxes, and workers' compensation—and to explain to employees that the staffing firm is responsible for such obligations.
- To ascertain that employees are assigned to work sites that are safe, that they understand the nature of the work the client has called for and can perform such work without injury to themselves or others, and that they receive any personal safety training and equipment that may be required.
- To take prompt action to address employee questions, concerns, or complaints regarding unsafe work conditions, discrimination, or any other matter involving the terms and conditions of their employment.
- To confirm their temporary employees' periods of service upon request by a subsequent employer and with the consent of the employee.
- To observe the following guidelines to ensure an orderly transition when taking over an account being serviced by another staffing firm:
  - The outgoing firm and its employees should, whenever feasible, be given reasonable prior notice that the account is being transferred.
  - Assigned employees of the outgoing firm should, whenever feasible, be allowed to continue working on the payroll of the outgoing firm for some reasonable transition period;

thereafter, they should be given the choice of accepting an assignment with another client of the outgoing firm if one is available, or applying to stay on their current assignment with the new staffing firm.

These guidelines are subject to enforceable contracts between staffing firms and their clients, employees, and other parties, and are not intended to prohibit or discourage any other provisions or arrangements, agreeable to the parties, that achieve an orderly transfer of accounts. ASA members are encouraged, whenever feasible, to specifically address the terms and conditions relating to the transfer of accounts in written agreements with their clients.

Code of Ethics and Good Practices for Day Labor Services

Recognizing that staffing firms that provide construction and other types of day labor services make an important and unique contribution to the communities they serve by providing employment for those who need temporary work, and further recognizing that their employees and prospective employees deserve to be treated with respect, fairness, and dignity, the American Staffing Association has established this Code of Ethics and Good Practices applicable to day labor services.

For the purposes of this code, "day labor" means work that is occasional or irregular, and where the individuals seeking work report voluntarily to a central location and are assigned to client job sites as work becomes available. Individuals generally are assigned to work, and are paid, on a daily basis.

As a condition of membership, each firm providing day labor services pledges its support of and adherence to this code and to the general code of ethics and good practices applicable to all ASA members. Each member providing such services agrees to always strive

- To comply with all laws and regulations applicable to its business, and to maintain high standards of ethical conduct in the operation of that business and in its dealings with employees, clients, and competitors.
- To treat all applicants and employees with dignity and respect, and to provide equal employment opportunities, based on bona fide job qualifications, without regard to race, color, religion, national origin, sex, age, disability, or any basis prohibited by applicable law.
- To maintain high standards of integrity in all advertising, and to assign qualified employees to fill clients' needs.
- To determine the experience and qualifications of applicants and employees as the staffing firm deems appropriate to the circumstances, or as may be required by law.
- To explain to employees prior to assignment their wage rate, applicable benefits, hours of work, and other assignment conditions—and to promptly pay any wages and benefits due in accordance with the terms of their employment and applicable legal requirements.
- To ascertain that employees are assigned to work sites that are safe, that they understand the nature of the work the client has called for and can perform such work without injury to themselves or others, and that they receive any personal safety training and equipment that may be required.
- To take prompt action to address employee questions, concerns, or complaints regarding unsafe work conditions, discrimination, or any other matter involving the terms and conditions of their employment.

- With respect to the procedures to be followed in dispatching:
  - To promptly advise individuals remaining in the dispatching office when it appears likely that no further client orders will be received.
  - To pay employees a prestated minimum amount if they report punctually to a designated client ready and able for work, and the client does not utilize their services.
- To keep the dispatching office and the immediate surroundings clean and well-lighted and to provide adequate restroom facilities for workers waiting to be dispatched.
- To pay wages only by negotiable check or in cash or cash equivalents, and to give employees an itemized statement of gross earnings, advances, deductions, and net earnings for each pay period.
- To pay wages at the staffing firm office or by mail to the employee's mailing address. Other arrangements may be made at the request of the employee.
- To advise workers that they are not required to use staffing firm-supplied transportation, if any, to the client job site.
- To confirm their temporary employees' periods of service upon request by a subsequent employer and with the consent of the employee.