Staffing Industry Analysts
CWS COUNCIL

North America

Contingent Workforce Legal, Legislative and Regulatory Update

Moderator:
Tony Gregoire, Senior Research Analyst
Staffing Industry Analysts

Guest Speaker:
Suellen Oswald Esq., Shareholder
Contingent Workforce Practice Group, Co-Chair
Littler Mendelson

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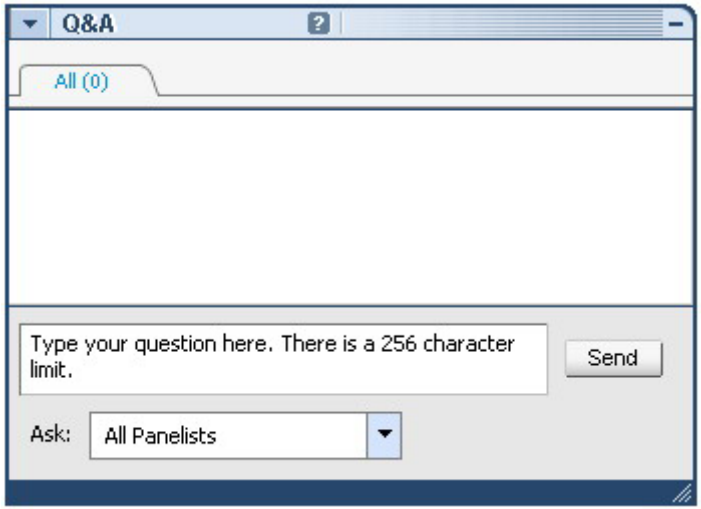
Q&A icon



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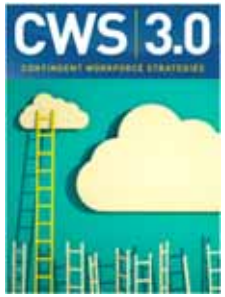
About Staffing Industry Analysts

Staffing Industry Analysts is the global advisor on contingent work

- **Over 700 firms benefit from our international research services**
  - 19 of the world's 25 largest staffing firms are members
  - More than 55 buyers of contingent labor are members of our CWS Council, representing over $100 billion in annual contingent workforce spend
  - Customers in more than 25 countries
- **Founded in 1989**
  - Acquired by Crain Communications ($200M media conglomerate) in 2008
  - Headquartered in Mountain View, California and London, England
  - 80+ years of industry and advisory service experience among executive team



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Save the Date for CW Risk Forum and CWS Summit 2012

Where: **San Diego Hilton Bayfront San Diego, CA**

2012 CW RISK FORUM

September 18-19, 2012

2012 CWS SUMMIT SAN DIEGO

September 20-21, 2012

North America

Our Speakers Today

Speaker

Suellen Oswald Esq; Shareholder
Contingent Workforce Practice
Group, Co-Chair

Moderator

Tony Gregoire

Senior Research Analyst

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LEGS / REGS AUGUST 2012 SIA UPDATE

***Presented by*:**
Suellen Oswald, Esq.;
Shareholder
Contingent Workforce Practice Group, Co-Chair
Littler Mendelson, P.C. – Cleveland
216.623.6099
soswald@littler.com

August, 2012

Littler™

DISCLAIMERS

- I will go fast
- I won’t cover everything
- This does not substitute for the advice of counsel!

Legislative Update

- From the “Volunteer State”
- Tennessee Professional Employer Organization Act (Tenn. Ann. Code, Title 62, Chapter 43)
- Revises current state statute on employee leasing and staff leasing companies
- Concern for financial viability/workers’ compensation coverage
- Effective immediately

Legislative Update

- From the “Pelican State”
- Louisiana Independent Contractor Statute (LA Rev. Stat. 23:1711(G)
- Posting requirements
  - Independent Contractor Responsibilities to pay taxes
  - Right of employees to workers’ compensation and unemployment compensation
  - How to file complaint and get more information
  - Protection against retaliation
  - Penalties for misclassification
- Effective August 1, 2012

Legislative Update

- From the “Golden State”
- AB 1744 – ***pending in Senate Committee*** -
- Would increase penalty for temporary services who “knowingly and intentionally” fail to provide required information on employee wage statements to misdemeanor
- Would increase burden, cost and risk for staffing firms

Legislative Update

- From the “Right To Know State”
- Massachusetts - the legislative burden winner!
- Staffing agencies must notify employees of:
  - Name, address, telephone number of agency
  - Workers’ compensation carrier of agency
  - Name of worksite employer
  - Contact information Dept. of Labor Standards
  - Employee’s position description and special reqs.
  - Pay date

Legislative Update

- Hourly pay rate
- Whether overtime pay may occur
- Daily start and end time of each workday
- Expected duration of employment (if known)
- Whether agency or worksite will provide meals and any charges that may apply
- Details on means of transportation to worksite and any transportation charges that may apply

- Worksite employer must provide all this information before end of first pay period

Legislative Update

- Staffing agencies may initially communicate all of this information to employees by telephone
- Any changes to initial information provided must be immediately provided to, and acknowledged by, employee
- Certain fees are prohibited
- Other fees are limited
- Civil and criminal sanctions
- Effective January 31, 2013

Agency Update

- **Department of Labor**
- *Myers & Baxter v. AMS/Breckenridge/Equity Group 1* (U.S. DOL, ALJ No. 2010-STA-00007/00008 (8.3.12)
- DOL reversed ALJ and found PEO was **not** a joint employer for OSHA retaliation claim
- AMS and NRF had staffing lease agreement
- Under agreement NRF to make "any and all strategic, operational and other business-related decisions regarding its business"

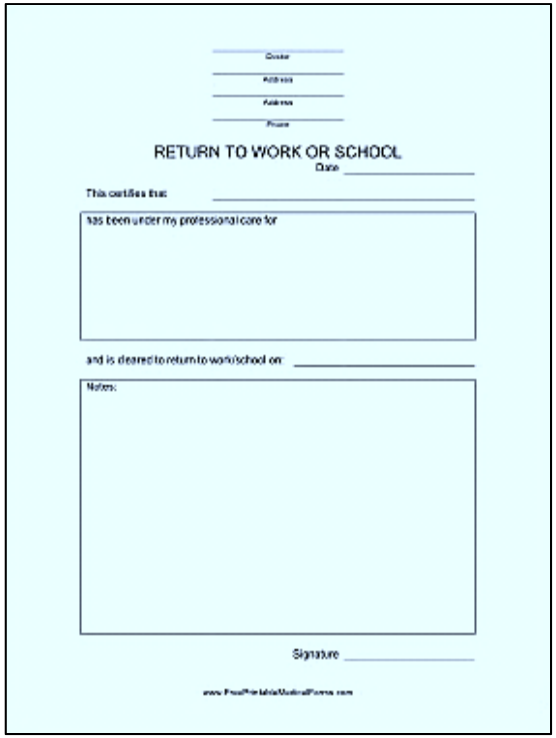
Agency Update

- AMS reserved “right of direction and control over leased employees assigned to NRF’s location, but not to the extent of prescribing how the work shall be performed”
- A number of employees were discharged after safety complaints on a truck they drove
- OSHA complaint filed against AMS and NRF
- OSHA dismissed complaint

Agency Update

- ALJ reversed OSHA and found AMS vicariously liable as joint employer because it reserved the right to control the work, even though AMS did not exercise that right
- DOL reversed ALJ (in part) because AMS did not exercise its reserved right to control work
- AMS did not participate in decision to terminate or know of protected activity

Agency Update



RETURN TO WORK OR SCHOOL

Date _____

This certifies that: _____

has been under my professional care for

and is cleared to return to work/school on: _____

Notes:

Signature _____

- **EEOC settlement**
- *EEOC v. JES Personnel Consultants, Inc.* d/b/a Genie Temporary Service (N.D. Ill. No. 11C5119, 8.13.12)
- Temporary employee placed by JES suffered an epileptic seizure and was required to bring a physician's note authorizing him to continue working
- EEOC contended employee brought note to JES and was effectively terminated

Agency Update

- JES required to adopt policy to comply with Americans With Disabilities Act

- EEOC agreed to $80,000 settlement with JES

- JES is going out of business, but required to comply if it re-establishes its business

Agency Update

- *In re: Lettire Constr. Corp.* (No. 2011-CBA-00007, DOL ALJ 7 26 12)
- Construction of two housing projects in East Harlem, funded by American Recovery and Reinvestment Act
- After a 2-year investigation, DOL's Wage and Hour Division found:
  - 16 of Lettire's subcontractors violated many provisions of the Davis-Bacon Act and other construction statutes

Agency Update

- Submitted falsified payroll records
- Misclassified employees
- Failed to pay employees for all hours worked
- Lettire failed to pay some employees the prevailing wage rate and fringe benefits

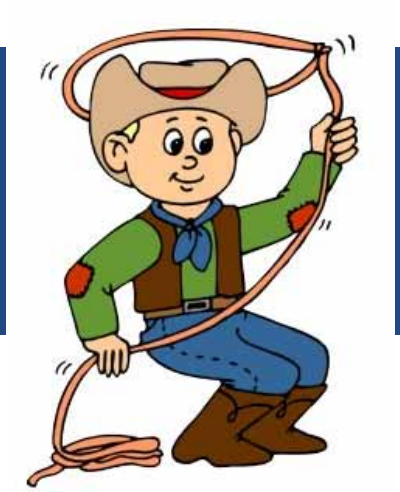
- WHD settlement (w/Lettire and 14 subs):
  - Lettire agreed to pay back wages and unpaid overtime that its subcontractors failed to pay totaling $142,345
  - 3 subcontractors were debarred
  - Future compliance will be subject to oversight

Agency Update

- *Solis v. Gen. Interior Sys. Inc.* (N.D. NY No. 08-00823 (NY 6.1.12)
- DOL pursues New York drywall installer, alleging misclassification of 340 drywall installers as independent contractors
- Court denied the DOL's motion for partial summary judgment on the misclassification issue, as it requires fact specific analysis of many factors

Agency Update

- Court says “economic realities” test shall be used to determined workers’ status
- Employees’ employment status will be determined at trial



Court Roundup

- *Romo et al. v. Manpower Inc. et al.* (No. 1:09 CV 03429, N.D. Ill. 6.5.09)(5.17.12)
  - Case settled for $1.5 million to resolve all class action claims brought on behalf of thousands of temporary workers who alleged company failed to provide them accrued vacation pay in violation of Illinois law

Court Roundup

- Plaintiffs contended that there was a common policy that employees must work a minimum number of hours before receiving vacation pay
- Under the policy, if employees stopped working before minimum-hour threshold, all vacation pay earned was forfeited
- Illinois Wage Payment and Collection Act required that employees are entitled to *pro-rata* portion of vested vacation pay

Court Roundup

- *Casserly v. Randstad US LP*(No. 8:12 CV 01023, C.D. California)
  - Settlement filed 8.10.12
  - Randstad US LP paid $4.9 million to settle California class action alleging failure to properly compensate employees for overtime and missed meal breaks under California Labor Code

Court Roundup

- Settlement covers those who worked as exempt account managers and recruiters (or similarly-titled positions) at Randstad facilities in California back to June 1, 2007
- Plaintiff contended that class members were misclassified as exempt from overtime and meal breaks

Court Roundup

- *Patterson v. Domino's Pizza*, LLC, 2012 Cal. App. LEXIS 753 (6.27.12)
  - Lawsuit filed by former employee of franchisee who claimed she was sexually harassed by franchisee's assistant manager
  - Court of Appeals reversed summary judgment in favor of franchisor as there were issues of fact on whether franchisor had sufficient control over franchisee to find franchisor liable

Court Roundup

- Court of Appeals found sufficient evidence that franchisor exercised "substantial control" over the franchisee and thus, could be liable on plaintiff's employment claims
- Specifically, the court relied on:
  - Franchisor's day-to-day control over the franchisee as set forth in the franchise agreement; and
  - Franchisor's significant involvement in franchisee's personnel decisions

Court Roundup

- *In re: Enterprise Rent-a-Car Wage & Hour Employment Practices Litigation*, 2012 U.S. App. LEXIS 13229 (3d Cir. 6.28.12)
  - Third Circuit Court of Appeals expanded the joint employer test under the FLSA in context of parent providing shared services to subsidiaries
  - Parent provided subsidiaries shared services on employee benefit plans, business guidelines and human resources

Court Roundup

- Plaintiff filed nationwide class action alleging that he and other similarly situated managers were misclassified as exempt and owed back wages for overtime, liquidated damages and attorneys' fees
- Plaintiff claimed that parent, Enterprise Holdings, was liable as a joint employer because of provision of shared services

Court Roundup

- Court determined the joint employer analysis must consider whether alleged employer has or exercises:
  - Authority to hire and fire employees;
  - Authority to promulgate work rules and assignments and set employment conditions, including compensation, benefits and hours;
  - Day-to-day supervision; or
  - Control of employee records, including payroll, insurance, taxes, and the like

Court Roundup

- Court determined that Enterprise Holdings was not a joint employer of Plaintiff as:
  - Subsidiaries has discretion to determine whether or not to adopt the offered policies and practices; and
  - Enterprise Holdings recommendations were akin to those of a third-party consultant
- Court emphasized that the four factors were not exhaustive and courts must consider any other “real world” indicia of “significant control”

Court Roundup

- *Tricia Ene, et al. vs. Maxim Healthcare Services, Inc.* (No. 4:09-CV-02453, 4:12-CV-01526, 4:12-CV-01594, S.D. Texas, 6.28.12)
  - Maxim Healthcare agreed to pay $12.3 million to settle three class and collective actions filed in federal courts in Texas, Illinois and California
  - The cases alleged that Maxim failed to pay recruiters overtime pay after 40 hours of work in a work week

Court Roundup

- The cases contended that the recruiters were improperly classified as exempt as they did not regularly or customarily perform any exempt functions
- The exemption classifications of healthcare employees under the FLSA has been a particularly sensitive issue in the wake of the *Christopher v. SmithKline Beecham Corp.* case decided by the Supreme Court in June 2012.

Court Roundup

- *Brinker Restaurant Corporation v. Superior Court* (No. S166350, California Supreme Court, 4.12.12)
  - This was the much anticipated decision from the California Supreme Court on how employers must manage meal periods and rest breaks

Court Roundup

- The Court held that an employer must relieve an employee of all duties during their meal period, so the employee is free to use the meal period for his/her own purpose
- If an employee continues to work after the employer relinquishes control, the employer will be liable for straight time only when it knew or reasonably should have known that the employee continued to work

Court Roundup

- On rest breaks, the Court held that a “major fraction” of a four-hour work period is anything more than two hours over and above the prior four-hour work period.
- The Court also found that the obligation to provide a second meal period arises only if an employee works more than ten hours in a day
- The first meal by the end of the 5th hour, and the second meal by the end of the 10th hour.

Court Roundup

- This case was a huge win for staffing companies, who generally are not on site to monitor proper meal and rest breaks
- Buyers are generally responsible to ensure all workers are provided appropriate breaks
- The Court did not endorse a strict liability theory, which should help staffing firms defend against these types of claims

Court Roundup

- *Jones v. C&D Technologies, Inc.* (No. 11-3400, 7th Cir. 6.28.12)
  - Jones decided to test and see whether, in fact, the FMLA does have limits
  - He learned: Yes, the FMLA **does** have limits
  - The Seventh Circuit held that pickup of prescription notes from a physician's office is not FMLA covered

Court Roundup

- Jones brought suit claiming that because he suffered from chronic back pain and anxiety, his employer interfered with his FMLA right to seek treatment for his serious health condition after it terminated his employment for missing work to pick up his prescription refill at the doctor's office

Court Roundup

- The Court of Appeals found that picking up a prescription refill did not amount to seeking "treatment" under the FLSA
- Instead, the Court reminded us that FMLA entails more than a "chronic condition" requiring medication; it requires an inability to perform one's job functions

Suellen Oswald Esq.
Shareholder
Contingent Workforce Practice Group
Co-Chair
Littler Mendelson, P.C.
Cleveland
216.623.6099
soswald@littler.com

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Time for Your Questions

Upcoming Webinars

September 12, 2012 Legal Roundup Europe

September 12, 2012 Insource or Outsource? A Practical Look at Today's MSP Options

September 25, 2012 Unhide Your Forgotten Workforce: How to Manage Your Non-Employee Headcount

October 10, 2012 How to get the most from your business partners.

October 24, 2012 VMS in France

October 25, 2012 IP Ownership in a Contingent World: What You Need to Know To Own And Protect Your Intellectual Property

November 15, 2012 MSP/VMS Landscape

November 28, 2012 2013 European Contingent Market Forecasts

December 13, 2012 US Legal Update

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Slides and Audio

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