

North America

## Contingent Workforce Legal, Legislative and Regulatory Update

Moderator:

Barry Asin, President  
Staffing Industry Analysts

Guest Speaker:

George Reardon, Special Counsel, Littler Mendelson

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**February 16, 2012**  
**10 am PT/ 1 pm ET**

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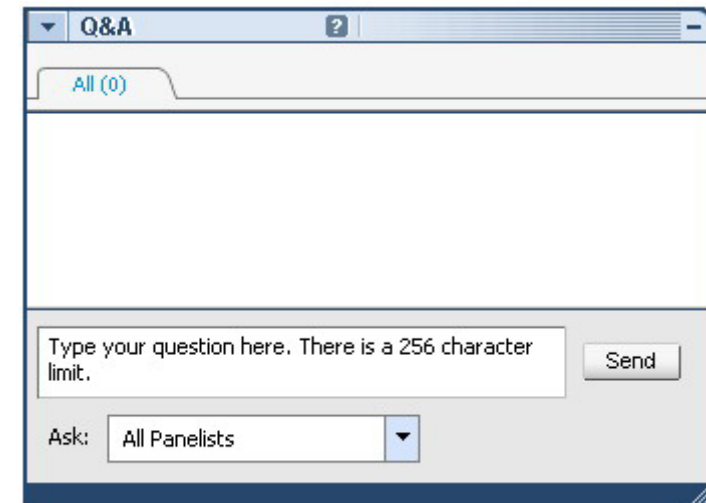


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## Our Speakers Today



**George Reardon,  
Special Counsel  
Littler Mendelson**



**Moderator:  
Barry Asin, President  
Staffing Industry Analysts**

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# PLEASE NOTE

- ❑ This presentation is not intended as legal advice.
- ❑ The law is evolving and can change dramatically overnight by a new court decision or statute.
- ❑ Laws and court decisions can be state specific or even city/locality specific.
- ❑ Attendees should consult their own legal advisors for legal advice.

# OVERVIEW

## Highlights since last overview

- ▣ Controversy at the National Labor Relations Board
- ▣ Misclassification continues as a key issue
- ▣ Wage & Hour – not just the providers' exposure
- ▣ PEO (professional employer organization) laws and why you should care about them
- ▣ Miscellaneous
  - ACA briefs at the Supreme Court
  - Texas Workers' Compensation case
  - Cost-sharing in contingent staffing
  - Court holding that contingent workers can't be fired

# National Labor Relations Board

## ■ What it is and what it does

- Consists of 5 members, appointed by the President for 5-years.
- Acts like a court, deciding cases arising under the National Labor Relations Act, which is not limited to unionized workers.
- Supervises elections on union representation
- Investigates charges and sometimes brings litigation itself

## ■ Flip-flopping and agenda for contingent employees

- Because the Board changes with the political winds, its decisions frequently reverse those of previous boards. Naturally, the current Board is very pro-labor.
- For example, the current board plans to effect the third 180-degree change in a rule about combined bargaining units for temporary and direct employees.

# National Labor Relations Board

## ■ New tools of proactive agenda

- Rulemaking was always possible but was seldom used. The Board plans rules to, among other things, allow combined bargaining units of contingent and direct employees.
- Litigation

## ■ The Boeing dispute

- Boeing planned a new plant in South Carolina, a traditionally non-union state. No jobs were to be moved.
- The NLRB filed a complaint against Boeing charging that the plan was retaliation for earlier strikes.
- Although the case was settled, it demonstrates the tendency of this Board to stretch its power beyond what the law provides.

# National Labor Relations Board

## ■ New election rules

- The Employee Free Choice Act would have made union organizing much easier. But it got pre-empted by healthcare reform, and then Republicans won the House, killing any chance of passage.
- With little prospect of EFCA to stack the deck for labor, the NLRB is trying to get the same result with new election rules.
- Under proposed rules, elections are supposed to happen faster, with many fewer procedural safeguards and a cutoff of review to the Board itself.

## ■ Class action waiver opinion

- The NLRB has decided that it is an unfair labor practice to require employees to waive class actions when they agree to arbitration. This actually may be a reasonable decision.



# National Labor Relations Board

## ■ Liability of investors for unfair labor practices

- In *Oaktree Capital Management LP v. NLRB*, the Fifth Circuit Court of Appeals upheld the NLRB's opinion that a company that merely invested in the employing company could also be liable for unfair labor practices if it shared various controls with the employer company.

## ■ Social Media rules

- The NLRB general counsel has declared social media policies as occasions for NLRA violations. Affected policies include: non-disparagement, confidentiality, the use of company trademarks and logos, employee disclaimers, discussion of work-related concerns, communication with news media, “unprofessional” content, employee affiliation claims, and securities blackouts.
- Contingent workers given access to the using company's computer systems are affected by these policies.

# National Labor Relations Board

## ■ Recess appointments

- President Obama recently made three “recess appointments” of NLRB board members, bypassing the Senate’s confirmation process.
- Republicans strenuously objected to these appointments, and some responsive legal actions were taken. Issues exist on whether the Senate was in recess when the appointments were made and whether the recess appointment power even exists when the vacancies first occur when the Senate is in session.
- Last Tuesday, President Obama relented and sent the nominations to the Senate. It isn’t clear whether he has actually abandoned his position. Until at least one is confirmed, the Board will lack a quorum to act.

## ■ Challenge to its existence

- There is a movement to completely abolish the NLRB.

# Misclassification

- Colorado is the latest state to forge a cooperative enforcement alliance with the federal government.
- *Sprunk v. Plan B Club* is yet another exotic dancer class action filed in California. This illustrates the trend to industry specialization among plaintiff's attorneys. You don't want to become their favorite hunting ground.
- Some good news – in California, a class of insurance agents were held to be independent contractors. In a classic application of the factors used to determine independent contractor status, the court, in *Arnold v. Mutual of Omaha*, held that the agents were truly independent. However, the case underscores the need to do a thorough analysis rather than a wishful and superficial appraisal of these arrangements.

# Wage & Hour

- Wage & hour cases used to focus just on overtime and exemptions, but now less central issues arise, like meal and rest breaks, preliminary and postliminary activity, salary basis, client interviewing, etc. Wage & hour compliance needs to be more thorough than ever.
- For example, in the California case *Pryor v. Aerotek*, issues of preliminary work and rounding error were raised. The class was denied certification, but those decisions are very fact-specific, and many class actions on such issues go forward.

# PEO Laws -- Why You Should Care

- Differences between PEO and staffing relationships.
  - PEOs usually don't recruit the employees.
  - PEOs operate in a benefit-rich tradition that is often the reason for their use.
  - PEOs usually don't try to find new work for employees after they are discharged or laid off.
  - PEOs typically cover entire workforces or entire departments/divisions of workforces.
  - PEOs may replace some of their customers' HR functions.
- Difference in the industries' philosophies of regulation.
  - PEOs embrace government regulation, while temporary help firms do not.

# PEO Laws -- Why You Should Care

## ■ Types of PEO laws

- Licensing and Registration -- 36 states
- Workers' Compensation -- 43 states
- Unemployment Compensation -- 40 states

■ The definitions of PEO in these laws would cover many regular staffing accounts – especially large and long term arrangements.

■ There hasn't been much enforcement of these laws against staffing firms, but there could be at any time.

■ It's in the interest of staffing providers and users to know whether this exposure exists and to provide for the responsibility for compliance.

# Miscellaneous

## ☐ ACA (healthcare reform) briefs at the Supreme Court

- The health care cases are being briefed now and will be argued before the Court in March. The briefs are high quality and not too technical to read. You can see them at this website: <http://acalitigationblog.blogspot.com/2011/11/timing.html>
- If much of the law survives, it will affect the cost of coverage for all employers and is likely to sharply increase the cost of contingent employees.
- I repeat my suggestion for the users and providers of contingent employees to negotiate now for how they will allocate these costs. Existing staffing contracts do not fully deal with the new costs, even if they deal specifically with other government-imposed costs.



# 5-MINUTE WARNING

Please have your questions ready.



# Miscellaneous

## ☐ Texas Workers' Compensation case

- Users of contingent employees want assurance that they won't be liable for injuries to contingent employees that are covered by the staffing firm's workers' compensation insurance.
- Most states provide that assurance, either by statute or by case law, but some of the rules are a little tricky or incomplete.
- The Supreme Court of Texas, *in Port Elevator-Brownsville v. Casados*, 314 S.W.3d 529 (Texas 2012), recently held that a temporary employee couldn't recover negligence damages from the customer where he was assigned (a good result) – but not because of the staffing firm's worker's compensation insurance.
- The court found that the customer's worker's compensation policy covered all joint employees, even though they weren't listed in the policy, no premium was paid for them, and no coverage was intended for them. (This is a bad result.)

# Miscellaneous

## ☐ Texas Workers' Compensation case (continued)

- Since joint employees can't be excluded from Texas workers' compensation policies, customers' insurance carriers will need to either charge for that newly-confirmed exposure or somehow maintain administrative proof that the staffing firms used by their customers have named the customers as additional insureds or purchased separate coverage for them.
- It would have been much better if the court had held that, as long as one joint employer is covering the employee for workers' compensation, both joint employers are immune from suit.
- Although this case affects only Texas, it highlights the need for users of contingent employees to check how the law in their state works to protect contingent employee users from suit and to then ensure that the necessary measures are taken to qualify for that protection.

# Miscellaneous

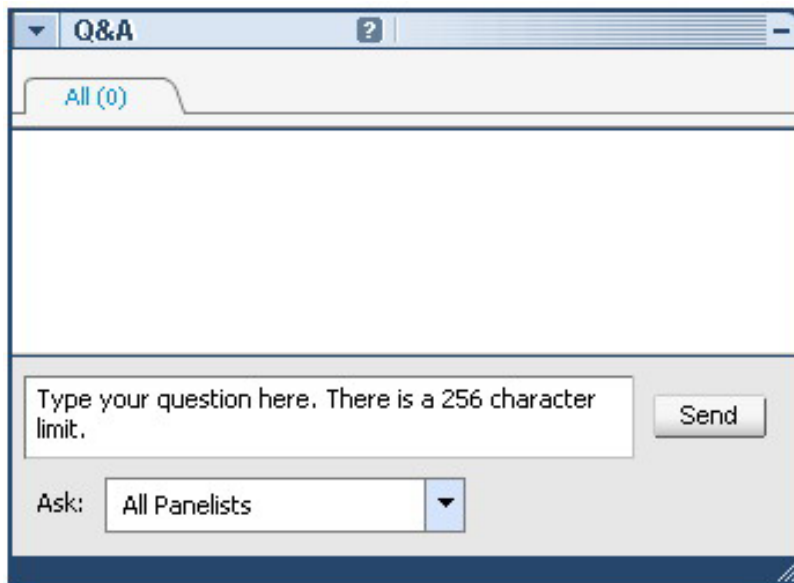
- Cost-sharing in contingent staffing
  - Penalties under PPACA
  - Sharp increases in unemployment insurance costs
  - State mandates – health care, sick leave, other paid leave
  - Union organizing costs
  - Timing of indemnity claims in co-defendant situations

# Miscellaneous

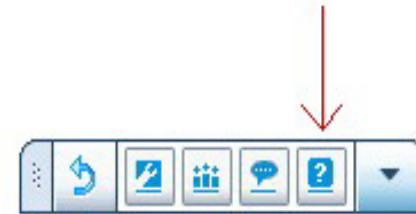
- Court holding that contingent workers can't be fired
  - The warehousing industry in the Inland Empire of California is a focus of union organizing and corporate campaign interest.
  - Following a state audit, temporary warehouse workers filed suit for various wage & hour claims.
  - The staffing firm announced that it would fire all of the workers, even though the work still needed to be done. The using company started making arrangements with a new staffing firm.
  - The California court found that there was joint employment, found that retaliation was likely present, and issued an injunction preventing the firings.

# QUESTIONS?????

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