

North America

## Contingent Workforce Legal, Legislative and Regulatory Update

**Moderator:**

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

**Speaker:**

**Neil Alexander, Shareholder, Littler Mendelson**



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**June 21, 2012  
10 am PT/ 1 pm ET**

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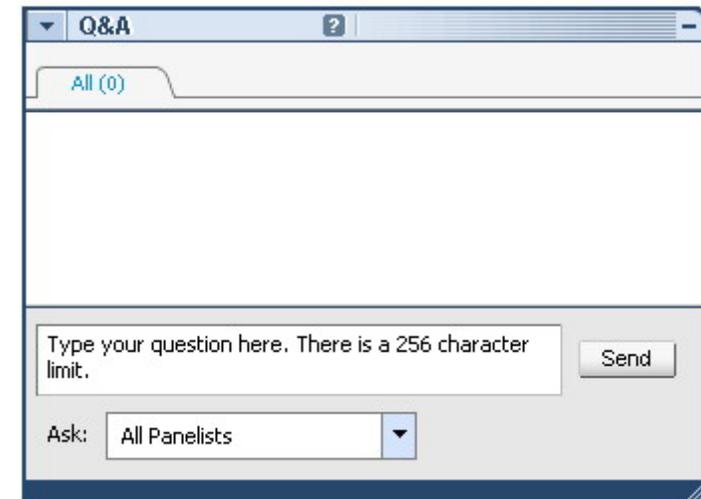
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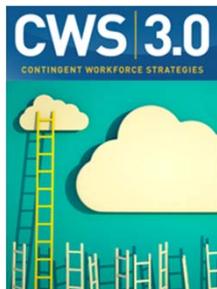


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  - 19 of the worlds 25 largest staffing firms are members
  - More than 55 Buyers of contingent labor are members of our CWS Council, representing over \$100 billion in annual contingent workforce spend
  - Customers in more than 25 countries
- **Founded 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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## Our Speakers Today



**Speaker: Neil Alexander, Shareholder,  
Littler Mendelson**



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

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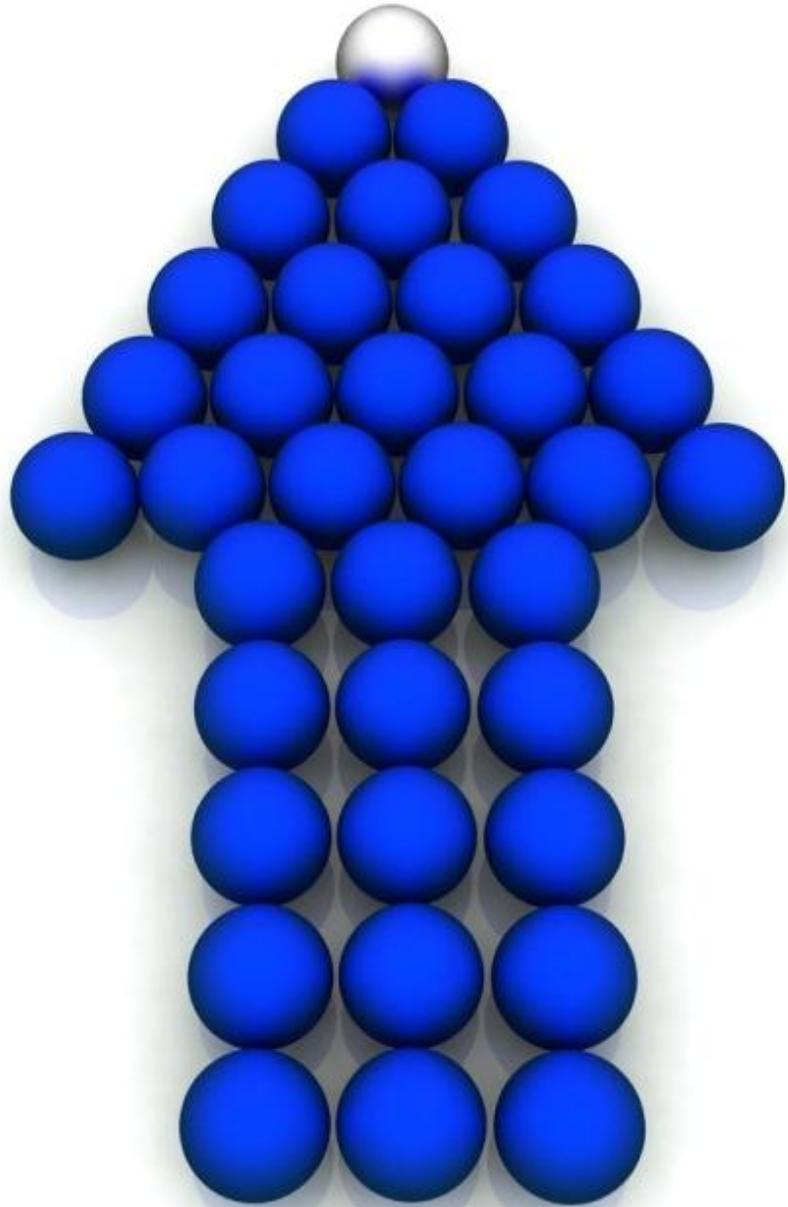
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***LEGS/REGS  
June 2012  
Employment  
Law Update***



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# One Year Ago...

What Shape is the Recession?

?

☆

4

V

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5

U

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6

W

X

The "X" Shaped Recession



**Robert Reich:**  
"This economy can't get back on track because the track we were on for years—featuring flat or declining median wages, mounting consumer debt, and widening insecurity, not to mention increasing carbon in the atmosphere—simply cannot be sustained. The X marks a brand new track—a new economy. What will it look like? Nobody knows. All we know is the current economy can't 'recover' because it can't go back to where it was before the crash. So instead of asking when the recovery will start, we should be asking when and how the new economy will begin."

# The “X” Shaped Recession



## Robert Reich:

“This economy can’t get back on track because the track we were on for years—featuring flat or declining median wages, mounting consumer debt, and widening insecurity, not to mention increasing carbon in the atmosphere—simply cannot be sustained. The X marks a brand new track—a new economy. What will it look like? Nobody knows. All we know is the current economy can’t ‘recover’ because it can’t go back to where it was before the crash. So instead of asking when the recovery will start, we should be asking when and how the new economy will begin.”

# What Has Happened Since Last Update?

- **The “X Shaped” Recession Continues**
- **We still don’t know what it looks like for sure**
- **But, four key features seem to be emerging...**



## 4 Trends

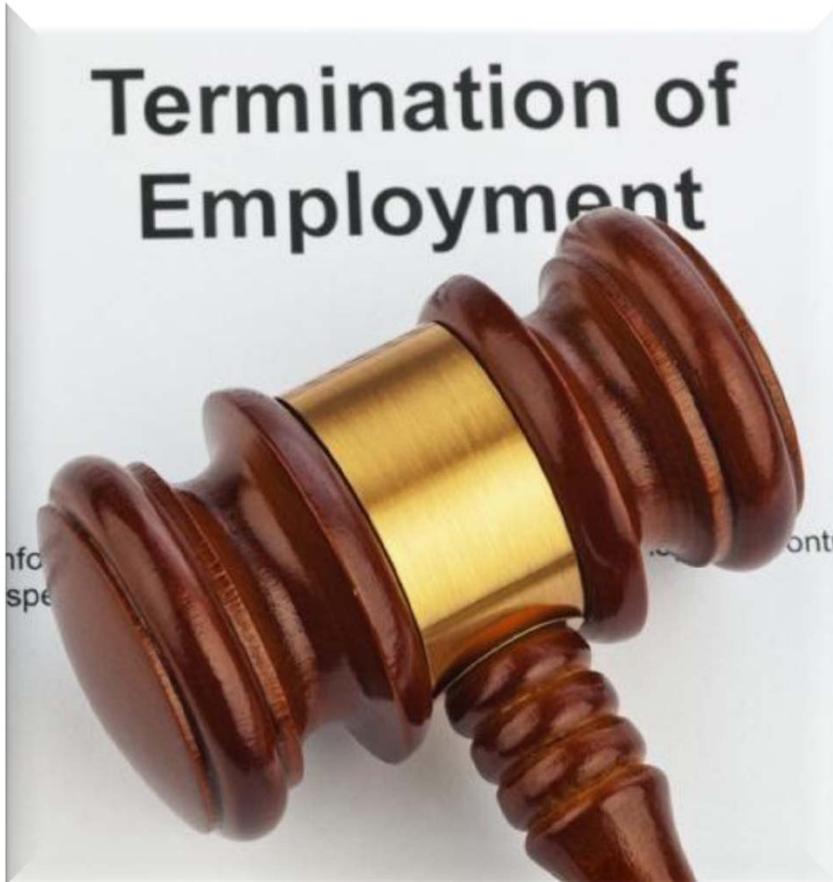
- **Businesses are holding on to cash**
- **The credit crunch continues**
- **Employers are using super-selective hiring practices**
- **Job Growth remains sluggish**

# What Does This Mean for Employers?

- **During the X Shaped Recession, employers have continued to fire employees**
- **Terminated employees have found it more difficult to find replacement employment**
- **Increased use of temporary workers, independent contractors and other contingent workers**

# What Does This Mean for Employers?

## Termination of Employment



- **Employment litigation filings increased dramatically since the crash of 2008**
- **EEOC charges filed have increased by 50% over last 5 years**

# What Does This Mean for Employers?

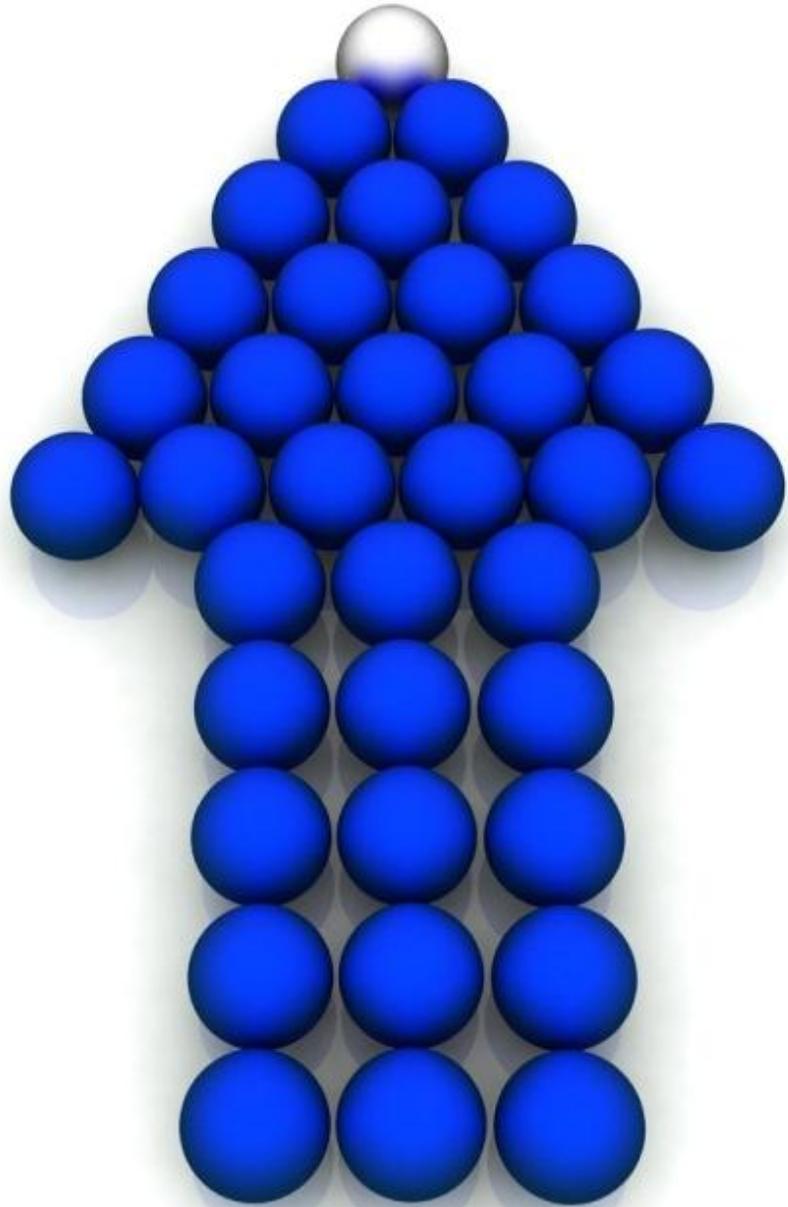
- **The cases first filed in '08-'09 are now making their way to the Appellate courts**
- **We have a lot of new developments in various key areas of Employment and Labor law**



# DISCLAIMERS



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



***Neverending  
Story:  
Independent  
Contractor Case  
Law and  
Legislation***

# Legislation in Rhode Island and Maine create presumption that workers are employees

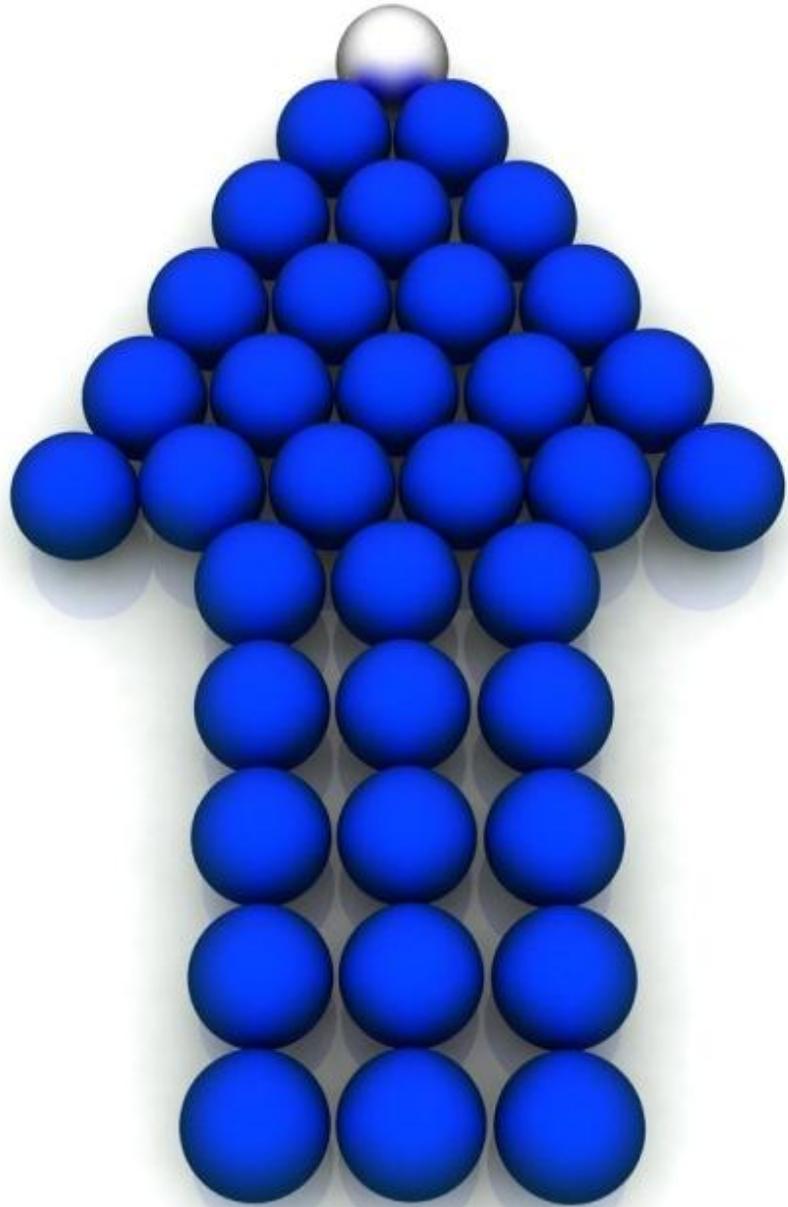
- **Rhode Island's HB 7966 (proposed):** A worker is presumed to be an employee unless free from control and direction in connection with the performance of services under his or her contract and either: (i) the service is performed outside the usual course of the business of the procurer of service or outside of all the places of business of the procurer of the service; or (ii) the worker is engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.
- **Maine's Public Law, Chapter 643, LD 1314 (enacted):** A worker is presumed to be an employee “unless the employing unit proves that the person is free from the essential direction and control of the employing unit, both under the person's contract of service and in fact and the person meets specific criteria.”

# IC Cases Not Always Bad News

- *Lamson v. EMS Energy Mktg. Serv. Inc.*, No. 2:11-cv-00663 (E.D. Wis. Apr. 12, 2012)
- Independent contractor was terminated roughly a month after he started when the Company obtained his background check and credit check information.
- EMS did not follow the Fair Credit Reporting Act (“FCRA”) when it obtained and used the plaintiff’s credit report. Plaintiff brought suit.

# FCRA Only Protects Employees

- **The Company moved for summary judgment, claiming that the law did not apply to the plaintiff because he was an independent contractor**
- **The court held that the FCRA only protects employees and does not apply to independent contractors.**
- **Central to the court's decision in this case was their finding that the plaintiff was in fact an independent contractor and not an employee. If the plaintiff had been an employee, the Company's failure to follow the FCRA when it obtained and used his credit report would have resulted in liability.**



# ***Employment Discrimination***

# Working at a Law Firm



- An office worker is hired by a small law firm in 2002
- She claims that while working there, the named partner engaged in harassing, discriminatory behavior.
- She eventually was terminated, also in 2002

# His Explanation



- **He admits that he uses profanity, but it is not directed at anyone in particular**
- **He also states that he has a policy of not tolerating discrimination or harassment**

# The “Me Too” Evidence



- Plaintiff offered “me too” evidence from other employees
- At times when she was not employed, or not present, the named partner behaved in a similar manner
- Testimony offered from four other employees
- Remember: Plaintiff did not hear/see this...

# “Me Too” Sexual Harassment



- **Supervisor makes brazen comments**
- **Touched and slapped employees' buttocks and legs**
- **Frequent use of profanity, directed at individuals**
- **Inappropriate gender specific comments**
- **Inappropriate racial comments**

# “Me Too” Demeaning Comments



# Trial Court Ruling



- **This evidence is excluded.**
- **These alleged events took place when the office worker was not employed, and did not impact her work environment.**

# Reversed on Appeal!

- **Because the named partner claimed that he engaged in profane tirades without bias, the “me too” evidence could be used by the jury to evaluate his credibility, motive, and intent.**
- **Case is sent back for another trial (remember the year when the office worker was fired?)**
- ***Pantoja v. Anton*, 198 Cal. App. 4th 87 (2011)**
- **Significant because the reversal overrules trial court significant evidentiary discretion**

# Lessons Learned

- **The “I am a jerk to everyone” defense is not a very good defense!**
- **Every day counts!**
- **Every statement made in the workplace is important!**
- **Contingent Worker Considerations: Remember that everyone in the work environment is protected – what is your policy and practice for CW reporting of complaints, investigations, etc.**
- **Never give up!**





***Disability  
Discrimination –  
No Fault Attendance  
Policies***

# EEOC on the Lookout... Attendance Policies



- **Company has a “no fault” attendance policy: if you are absent, tough luck!**
- **EEOC: well, that’s tough luck for you, Employer!**
- **For staffing firms, client demands/preferences do not trump ADA obligations**
- **Accommodation options still need to be explored**

# EEOC Attacks Attendance Policies

- **EEOC: What about the ADA?**
- **Where absence caused by “disability,” the blanket “no fault” policy is flawed.**
- **Charges were filed, and eventually a consent decree was negotiated**

# EEOC Attacks Attendance Policies

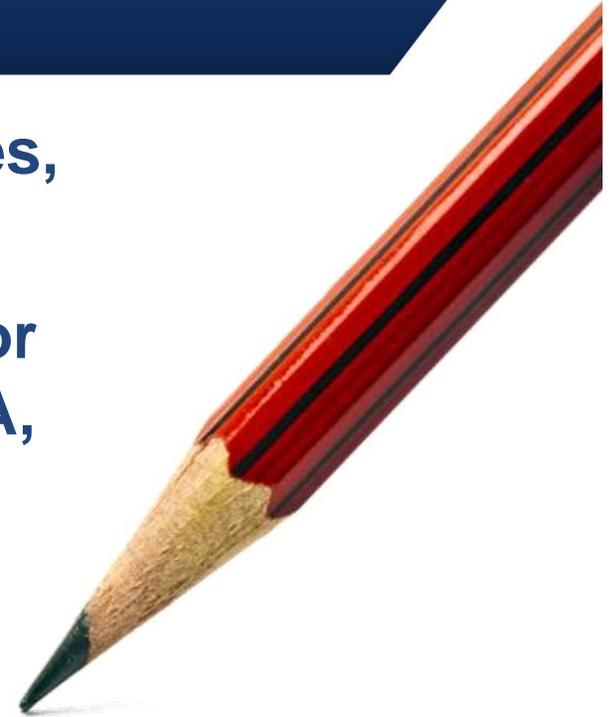
- **Consent Decree:**
  - No admission of liability and \$20 million in monetary relief: largest disability discrimination settlement in a single lawsuit in EEOC history...
  - But it's not just about the money...

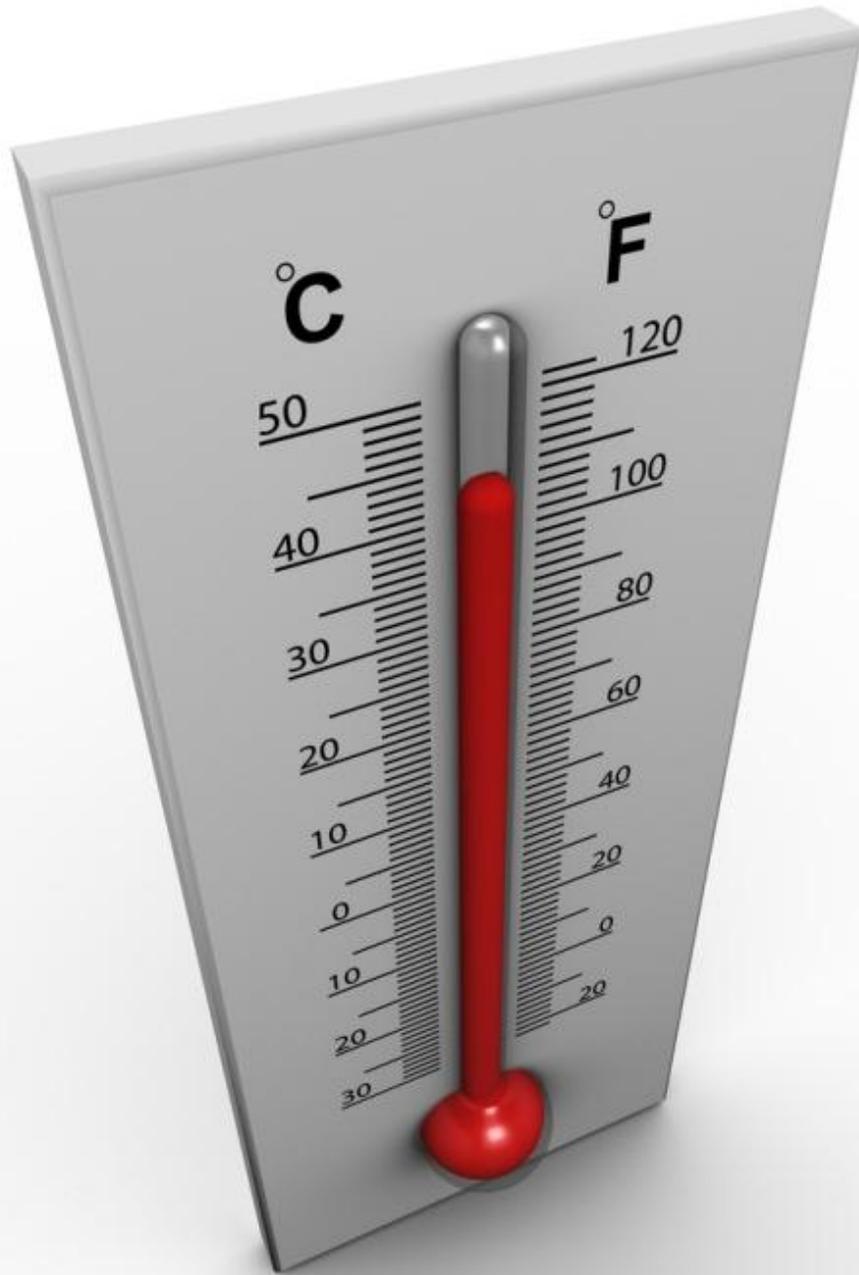
# Show Me the Equity

- **Training, revision to attendance, ADA policies:**
  - to include reasonable accommodations for persons with disabilities, including excusing certain absences
  - to state excusing absence as “nonchargeable” may be reasonable accommodation
  - Designee to determine on a case-by-case basis if absence “nonchargeable”
- ***EEOC v. Verizon Del. LLC*, D.Md., No. 1:11-cv-01832 (Consent Decree filed July 6, 2011; approved Sept. 9, 2011)**

# What Should You Do?

- **Review staffing firm and buyer policies, practices regarding absenteeism**
- **Make sure no fault policies account for protected absences under ADA, FMLA, Military Leave and Workers' Compensation**
- **Recognize that these obligations still exist in the staffing worker model**
- **Accommodation obligations may be modified but the interactive process can not be ignored**





***Disability  
Discrimination –  
“Hot Temper”***

# Is “Hot Temper” a Disability?



- **Employee engages in threatening misconduct: Employee swore and yelled at fellow employees, threatened to add them to her “Kill Bill” list, and sent threatening email messages.**
- **Employee is terminated**

# Hot Temper



- **Claim: all conduct resulting from a disability is considered part of the disability and cannot be grounds for termination.**
- **Employee sues for disability discrimination**

# California Court Rules Discharge May Be Based on Disability - Caused Threats

- **The Court cautiously rejected this argument:**
  - An employer is not required to retain an employee who threatens or commits acts of violence against coworkers, even if a disability caused the misconduct.

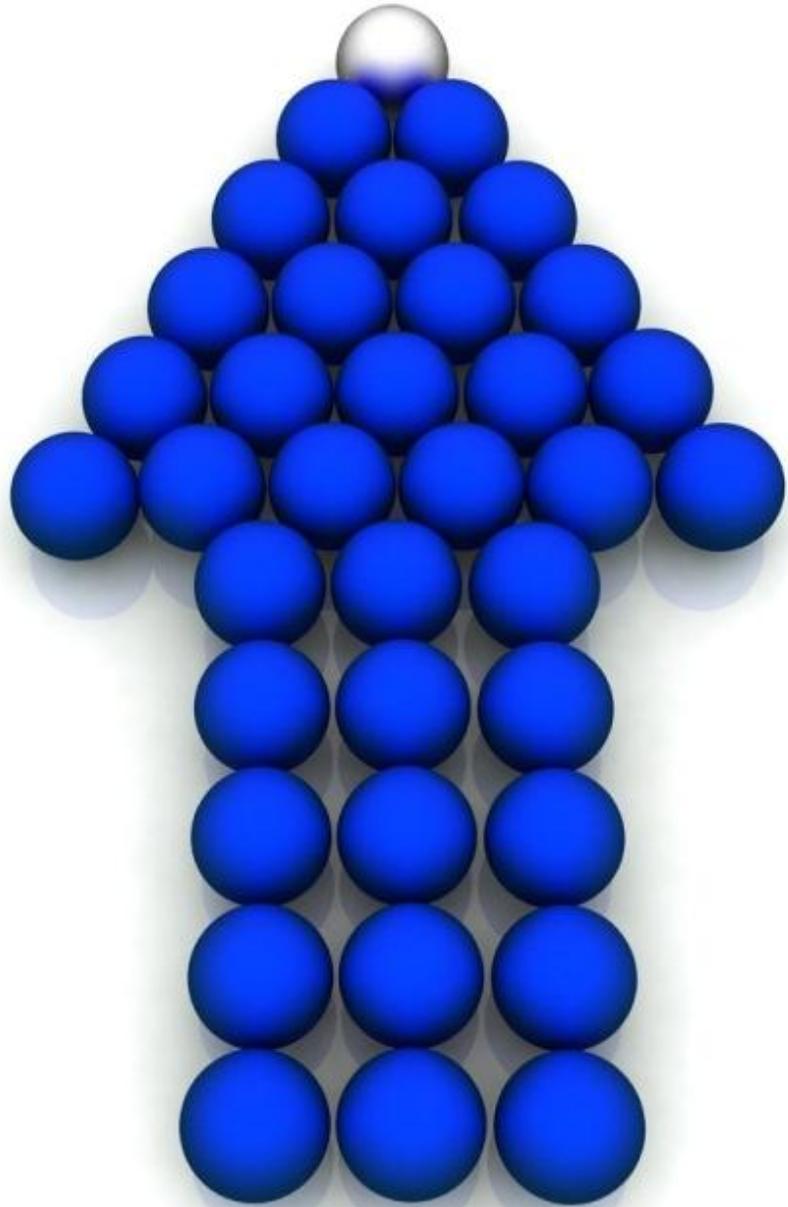


# California Court Rules Discharge May Be Based on Disability - Caused Threats

- **The Court did not address situations where the conduct is not violent, but solely performance based**
  - An employer could address these issues through accommodation.

- ***Wills v. Superior Court*, 195 Cal. App. 4th 143 (2011).**

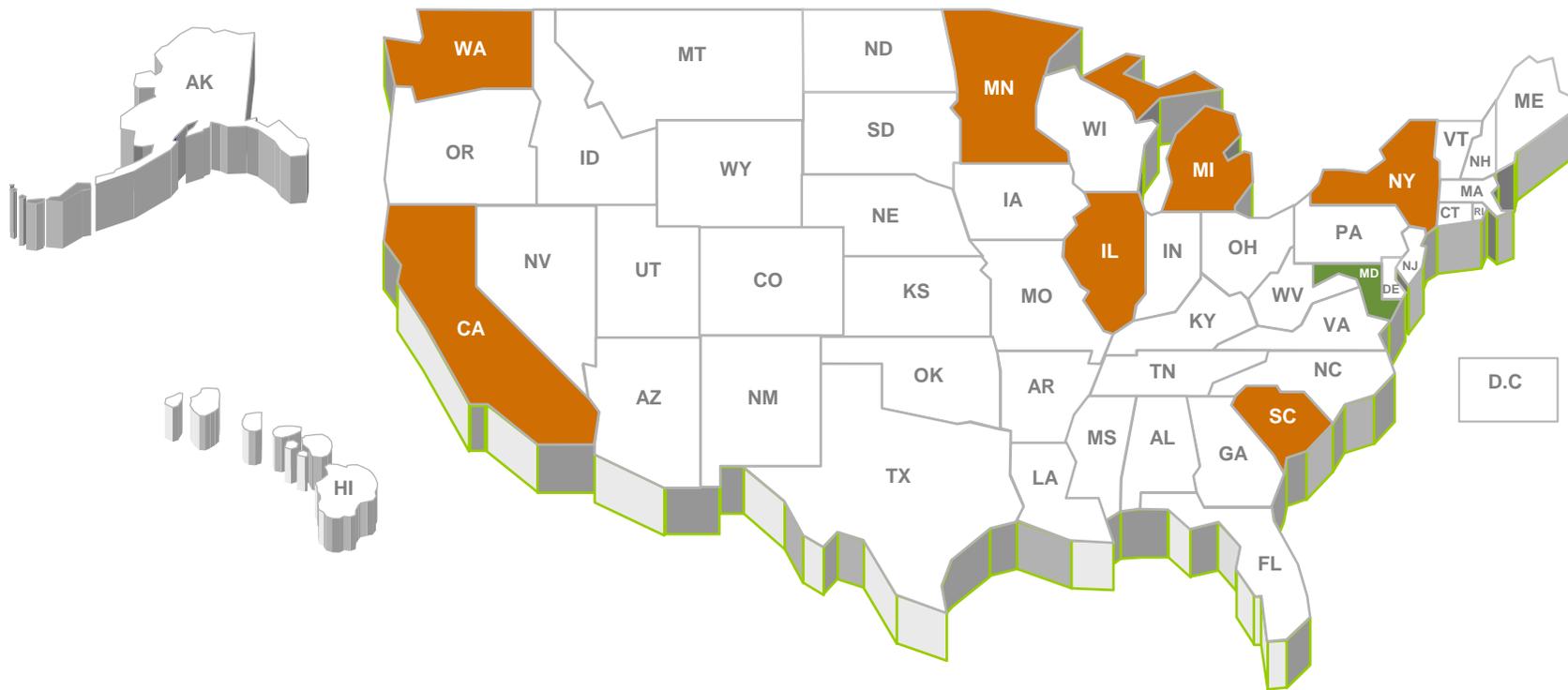




***State Law  
Roundup:  
Pending and  
Enacted  
Legislation***



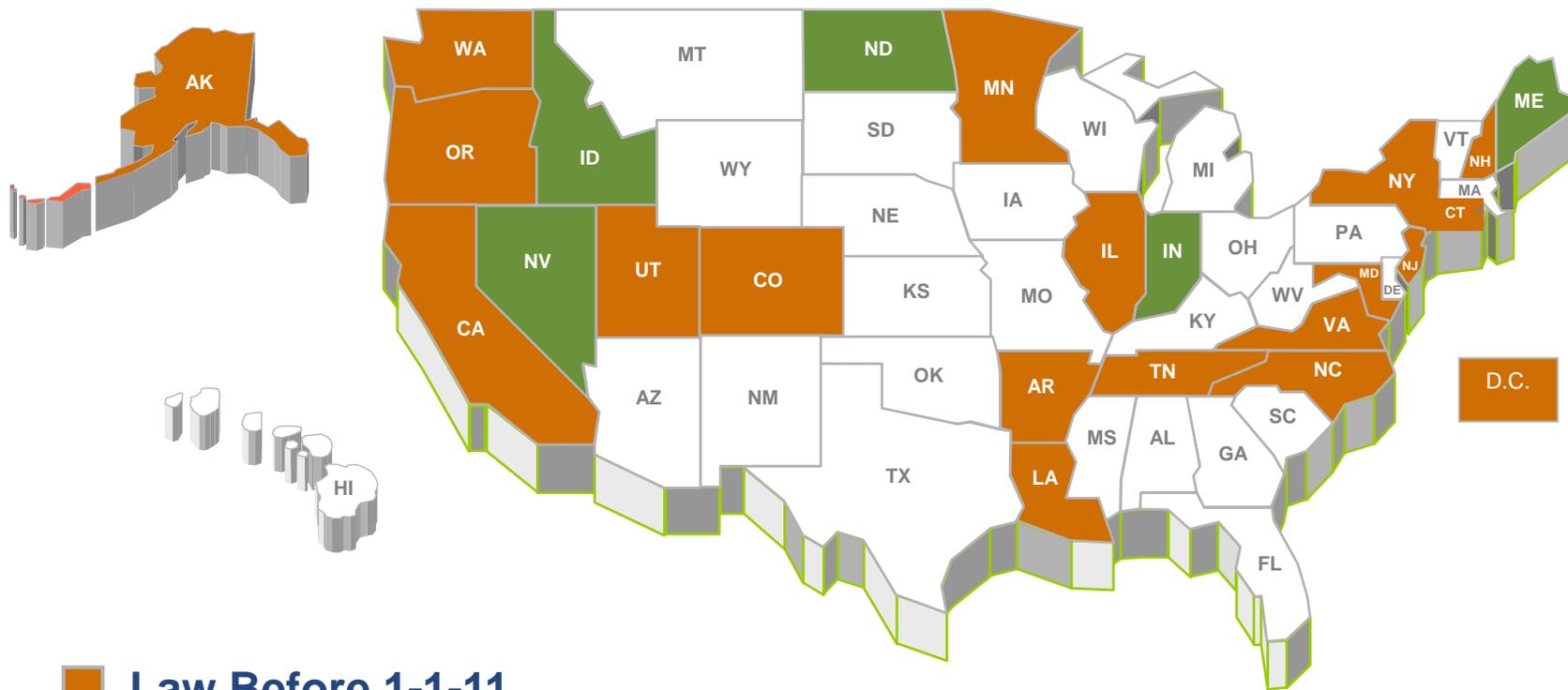
# Pending Legislation Prohibiting an Employer From Requiring Applicants to Provide Their Social Networking Passwords



 Pending

 Enacted

# States with *No Texting While Driving Statutes*

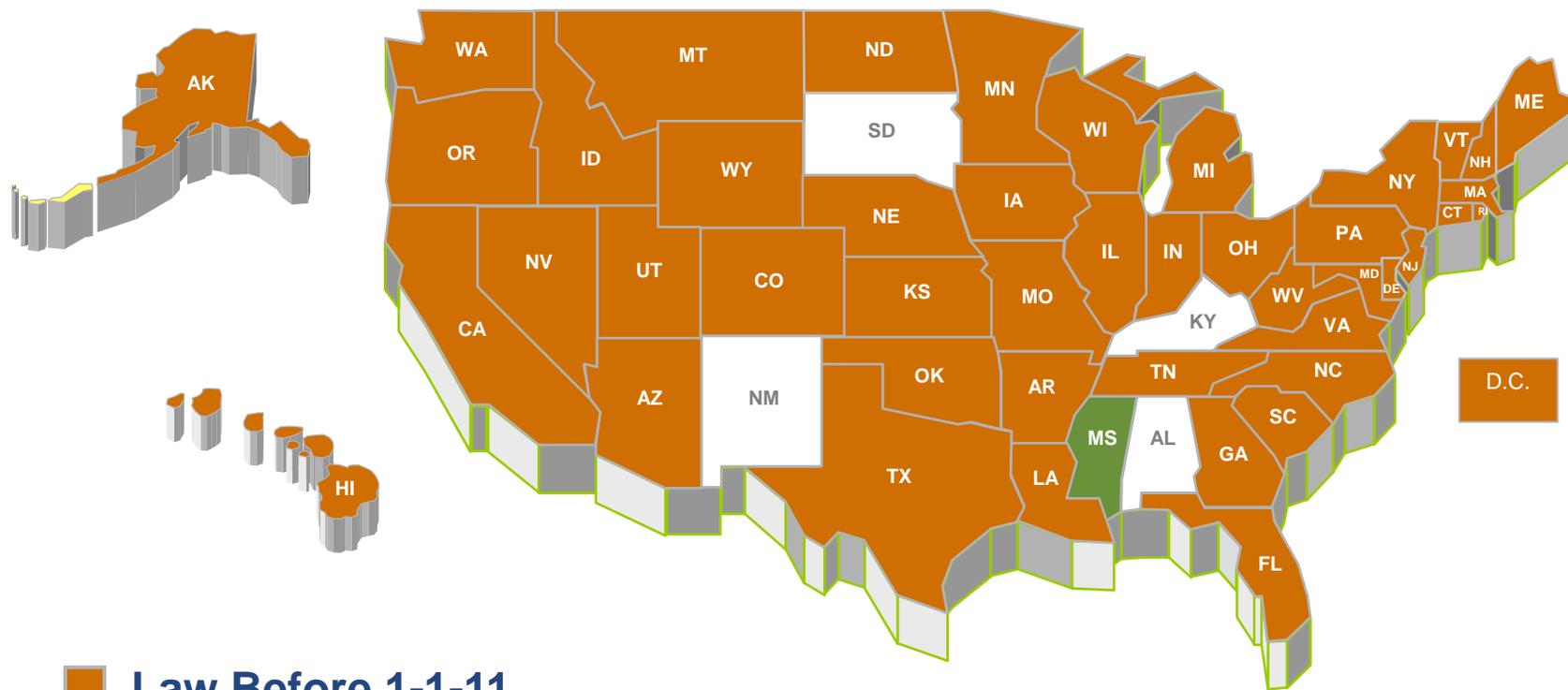


Law Before 1-1-11

Law After 1-1-11

No Laws

# Data Security Breach Notification Laws

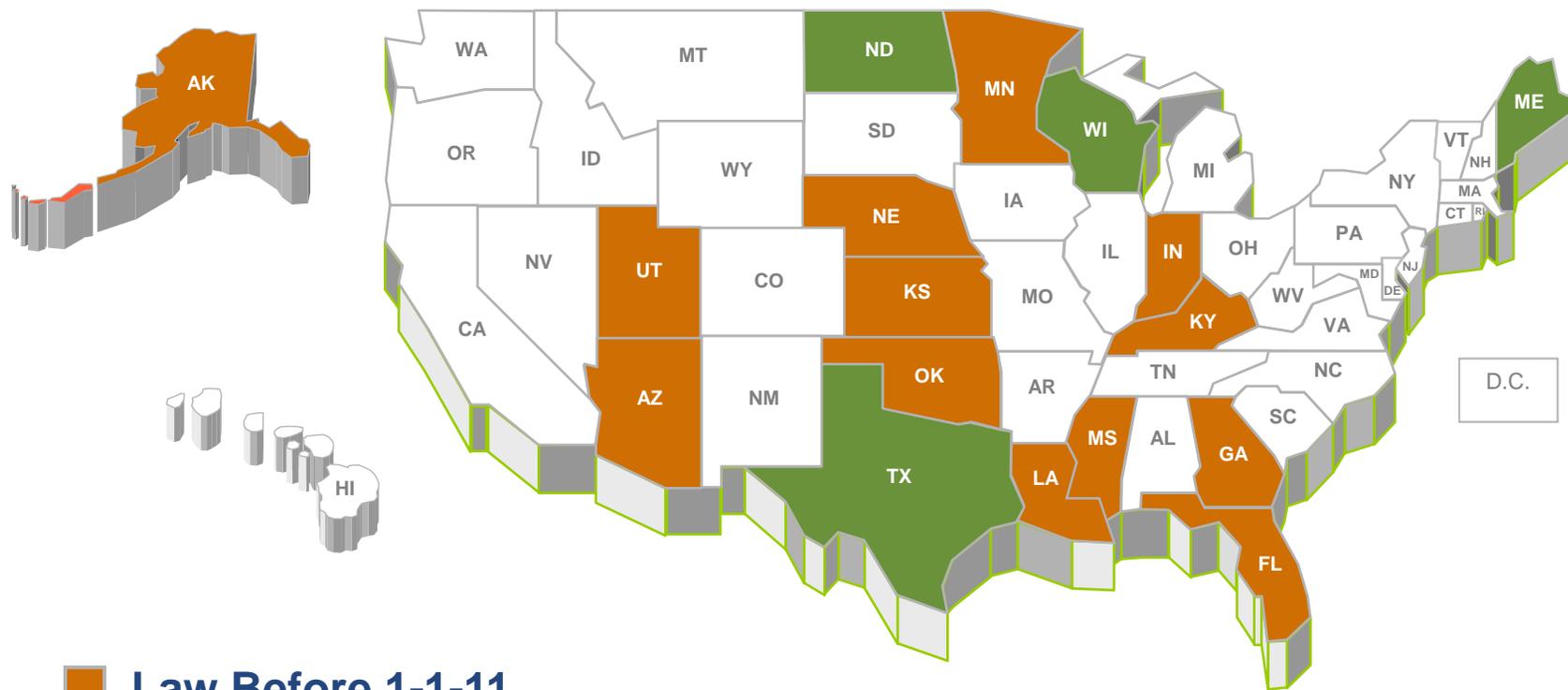


Law Before 1-1-11

Law After 1-1-11

No Laws

# Permits Storage of Firearms in Parked Cars on Employer Premises

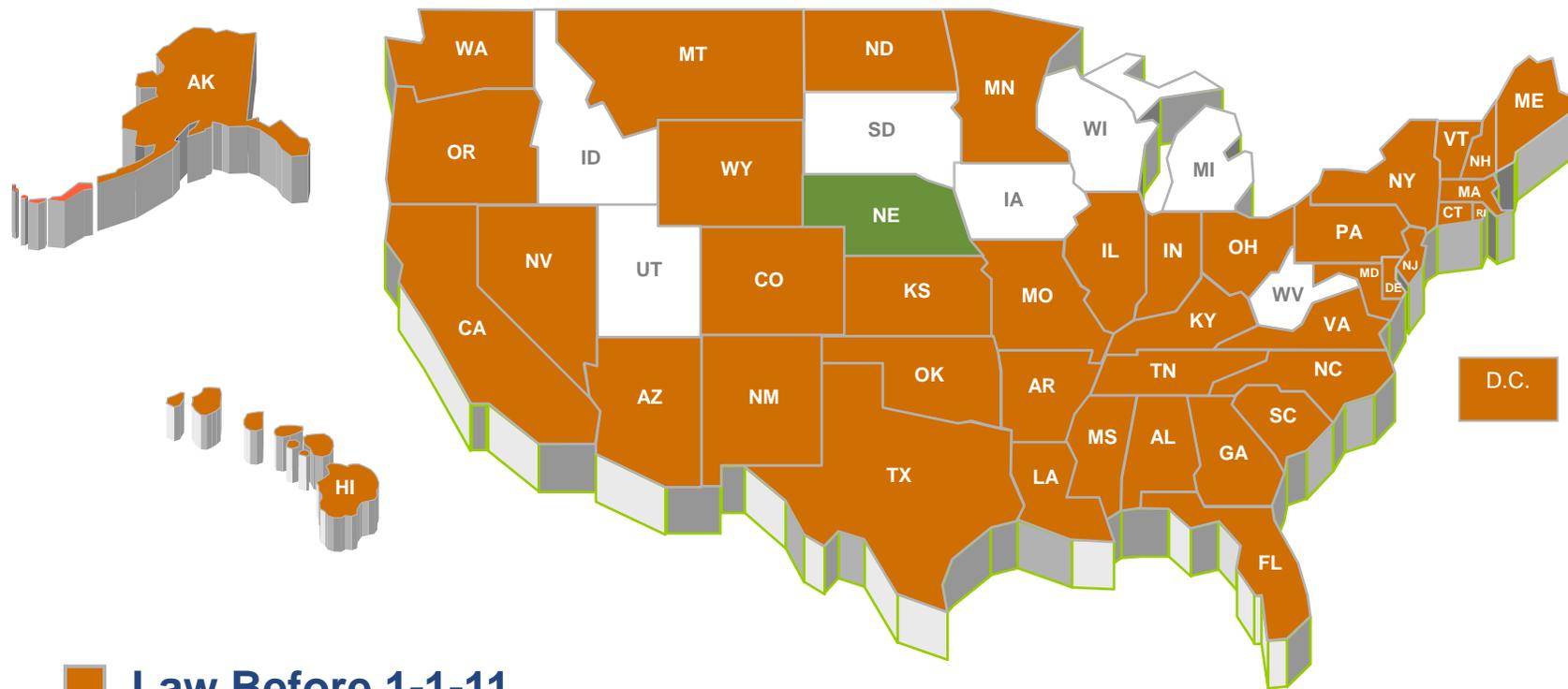


 Law Before 1-1-11

 Law After 1-1-11

 No Laws

# Breastfeeding in the Workplace

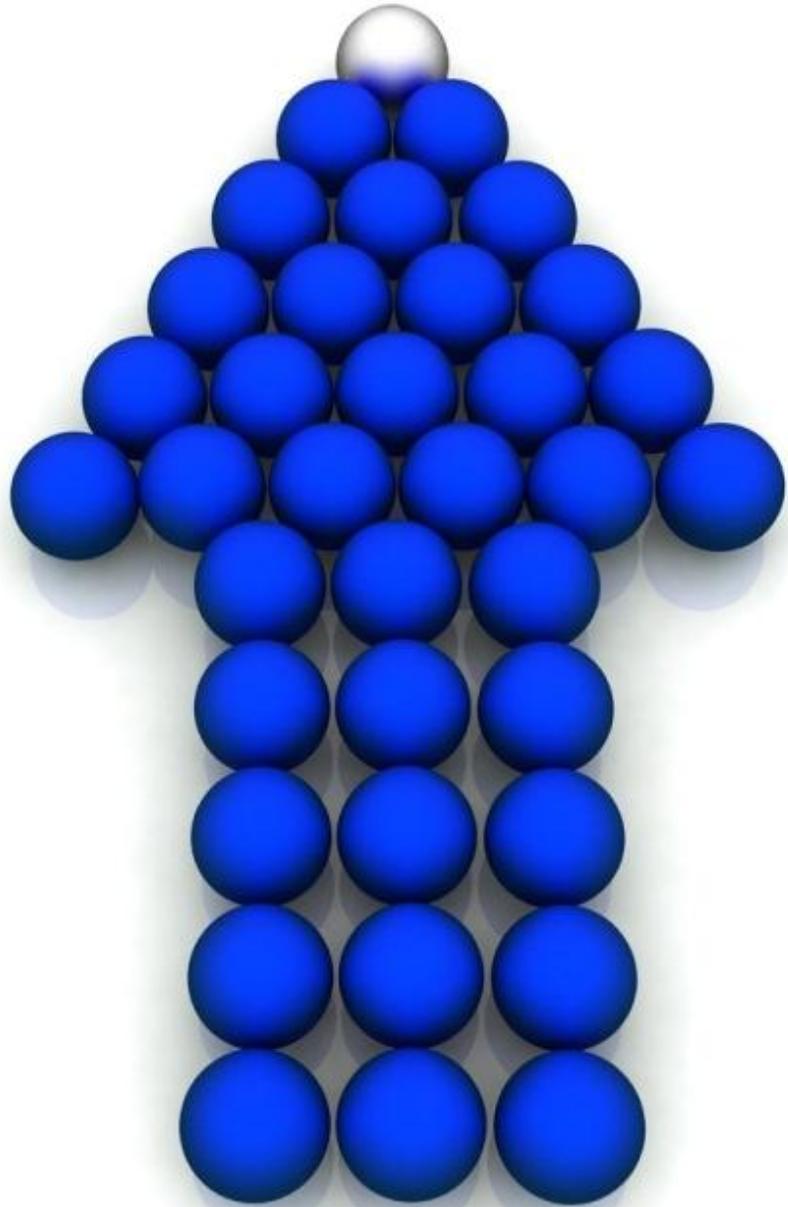


Law Before 1-1-11

Law After 1-1-11

No Laws





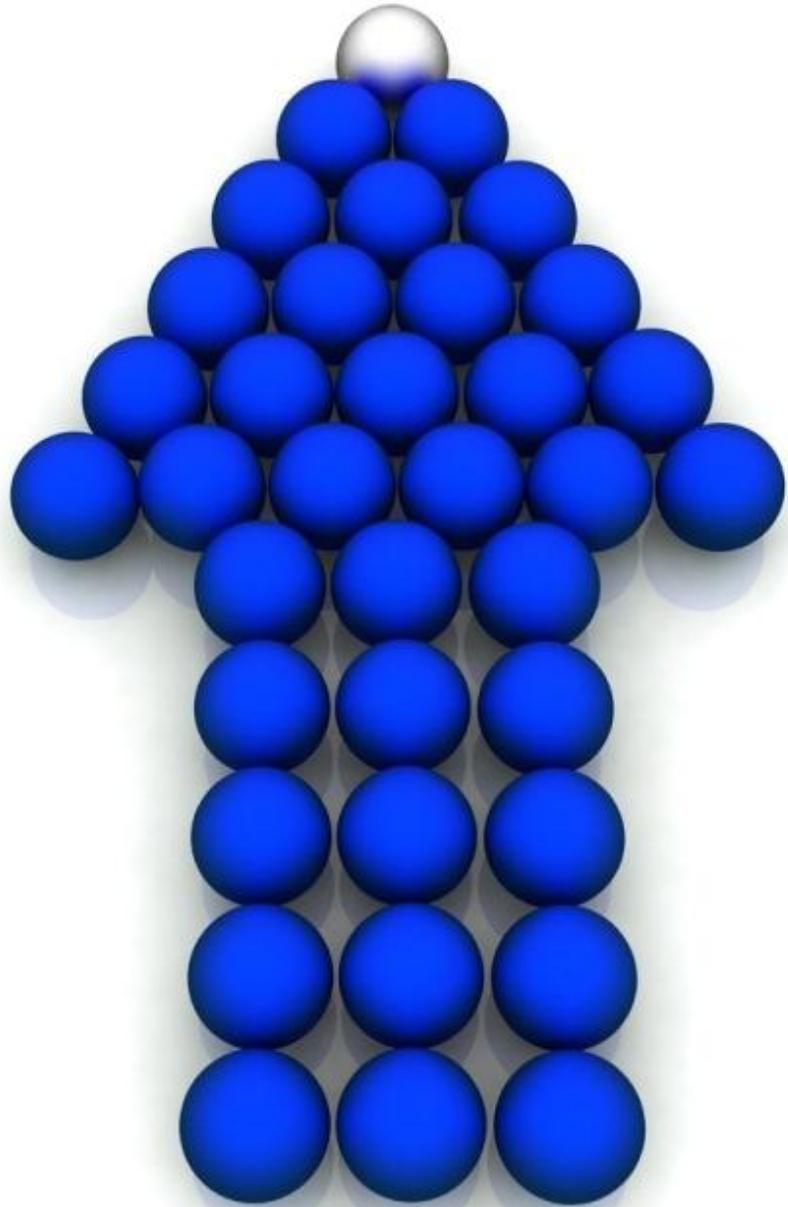
# *Staffing Cases of Note*

# Staffing Agency Settles Large Overtime Suit

- *Lazarin et al. v. Pro Unlimited Inc. et al.*, No. 5:11-cv-03609 (N.D. Cal. Jul. 22, 2011)
- The class of temps filed a lawsuit against computer network company Juniper Networks Inc., and its staffing agency Pro Unlimited Inc., claiming they were improperly classified under federal and state law as exempt from overtime wages.
- Pro Unlimited provides staff augmentation services to Juniper. The temps alleged they signed agreements with Juniper and Pro that stated that they were exempt from overtime requirements and prohibited them from recording or being compensated for time worked over eight hours in a day.

# Staffing Agency Settles Large Overtime Suit

- **Plaintiffs specifically alleged that the defendants misclassified them because they were not guaranteed a weekly wage that was not subject to deduction based on the time worked each week, and that these less-than-salary-equivalent payments allegedly reflect a pattern or practice of salary basis violations, rendering them nonexempt from federal and California overtime requirements.**
- **The staffing firm recently agreed to pay \$1.25 million to settle a class action filed by the workers who alleged they were denied overtime pay.**



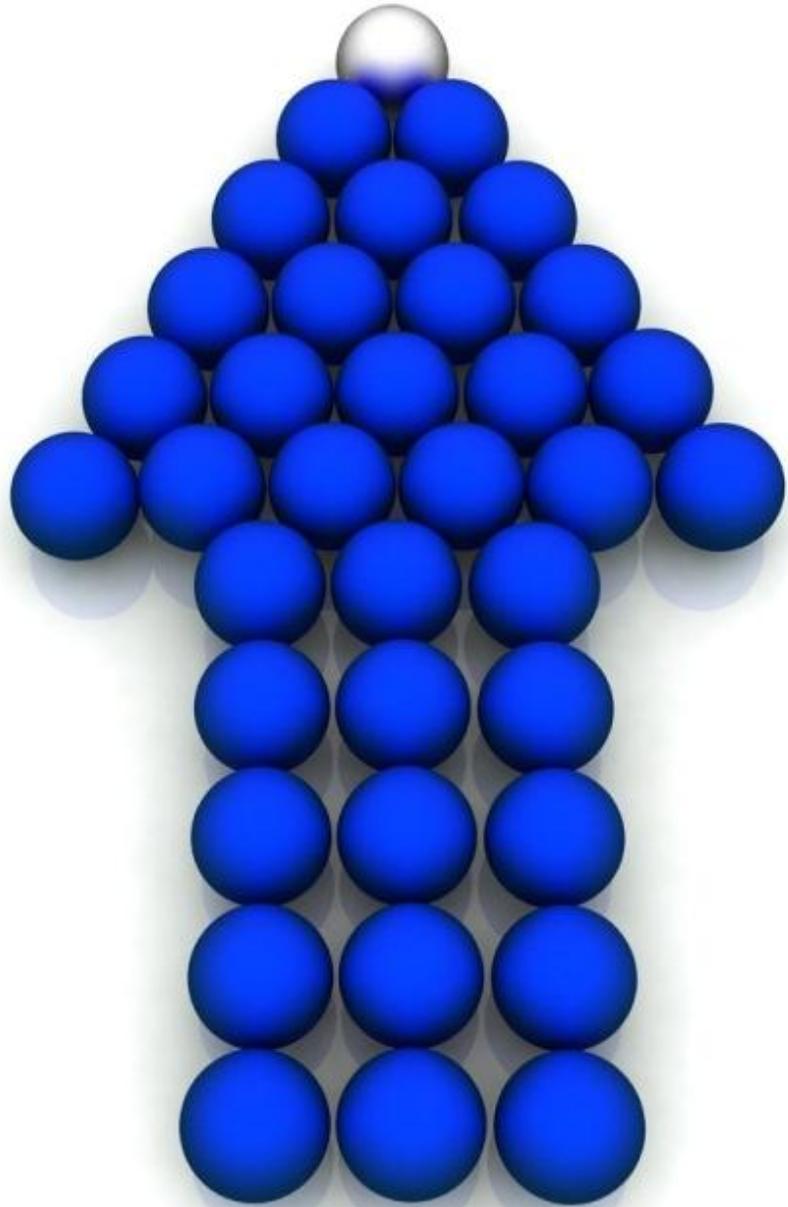
***The Fate of  
Healthcare  
Reform***

# Healthcare Reform Supreme Court Decision Expected Soon

- **The Patient Protection & Affordable Care Act (PPACA) aims to significantly broaden and standardize the coverage provided by employers. On March 26-28, 2012, the U.S. Supreme Court held oral arguments to determine the fate of the health care reform law.**
- **Specifically, the Court considered challenges brought by Attorneys General of 26 states and National Federation of Independent Business on the following:**
  - **Is ‘individual mandate’ constitutional**
  - **If the individual mandate is unconstitutional, which parts – if any – of the law can survive without it?**
  - **Does the Anti-Injunction Act (AIA) bar challenges to the individual mandate?**
  - **Is the law’s expansion of the Medicaid program constitutional?**

# What Can Employers Do To Prepare?

- **The current U.S. Supreme Court Term ends June 28, so the Court may issue its ruling at any time on the PPACA-related cases.**
- **If all or much of the law survives, it will affect the cost of coverage for all employers and should significantly increase the cost of contingent employees.**
- **Providers of contingent employees should 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.**



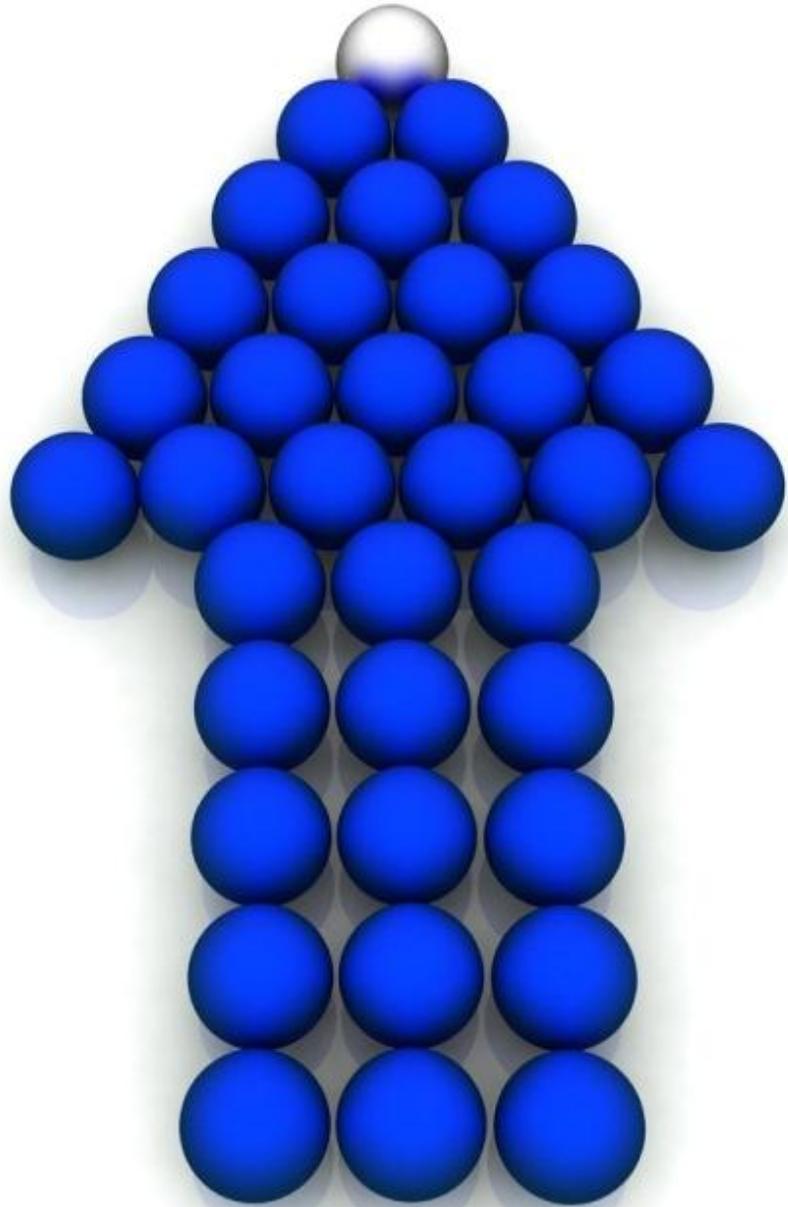
***Indemnification  
Issues in  
Staffing  
Agreements***

# Indemnification Issues in Staffing Agreements

- **Federal/State Agencies increasingly filing companion administrative charges against both staffing firms and buyers**
- **Do you or does your staffing firm have insurance (EPLI, D&O)?**
- **Are you or your staffing firm promising indemnification of non-covered claims?**
- **What types of claims typically have no insurance or can't be insured?**
- **Can your staffing firm absorb the liability exposure and pay attorneys out of pocket for non-covered claims (financially viable)**

# Indemnification Issues in Staffing Agreements

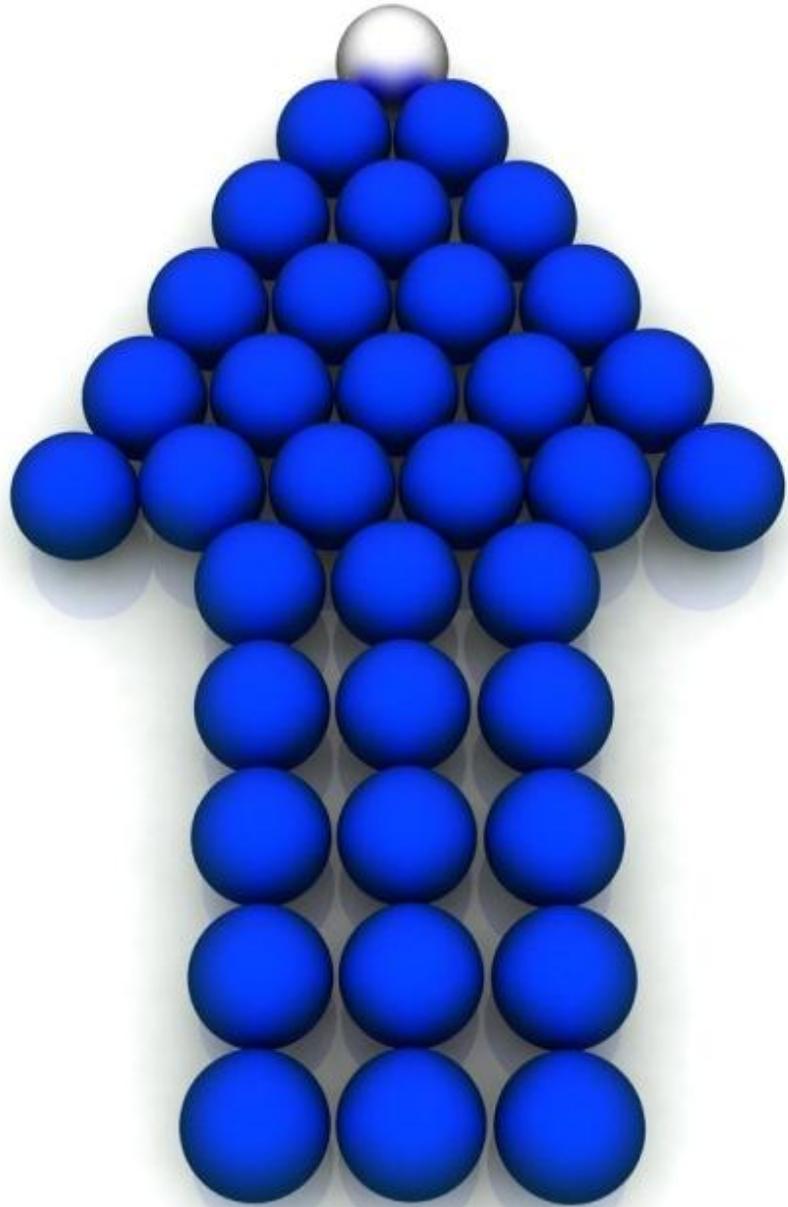
- **Fault-based or workplace exposure based indemnification**
- **Look at which company (staffing firm or buyer) is performing the services**
- **What steps are being taken in the applicant screening process to mitigate risks?**



*E-Verify*

# E-Verify

- **Preparing the I-9**
- **Avoiding Common Mistakes**
- **Social Security No-Match Issues**
- **Are Converted Employees Subject to New Screens**



*Thank You*

# Time for Your Questions



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July 11, 2012

Europe-Choosing the Right Contingent Workforce  
Programme for Your Needs

July 19, 2012

Who owns the Contingent Workforce?  
Procurement or HR or both?

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# THANK YOU!

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