

# Contingent Workforce Legal Update for 2014

Presented by:

Adrienne Nelson, Director, Global Services,  
Staffing Industry Analysts

George Reardon, Special Counsel,  
Littler Mendelson



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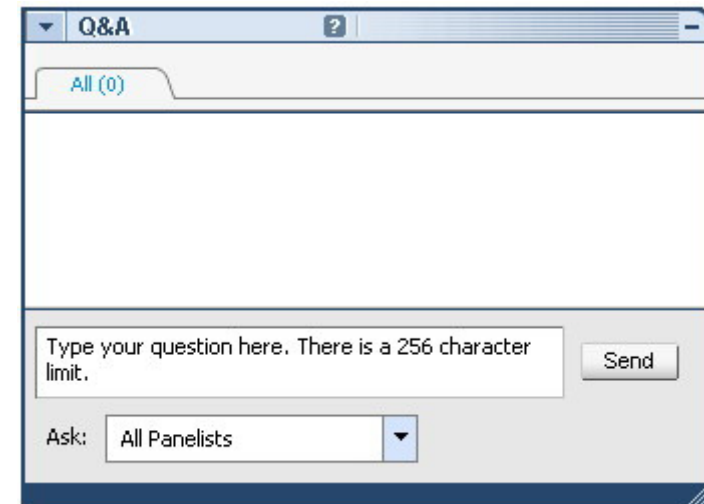


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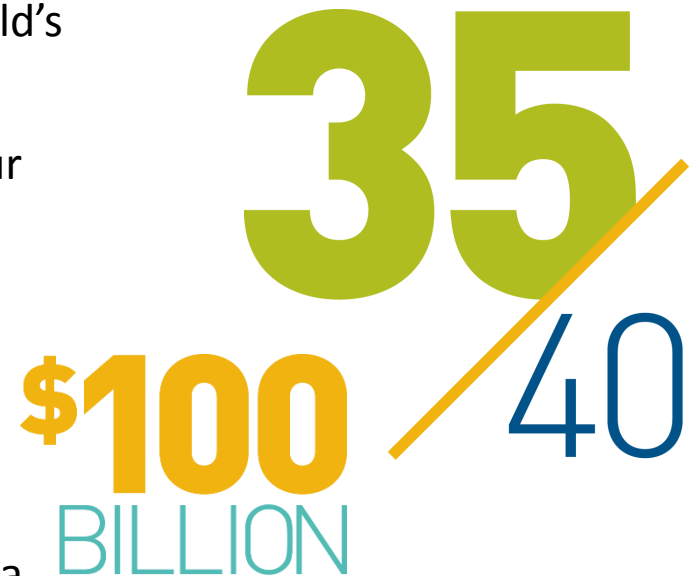
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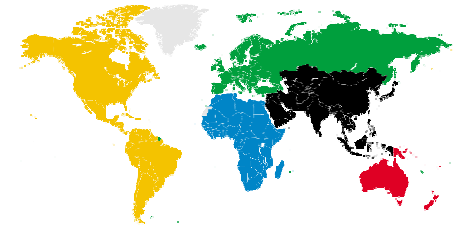
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13-14 May, 2014 | Lancaster London | London, England  
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# Our speakers today...



**Speaker:**  
**George Reardon, Special Counsel**  
**Littler Mendelson**



**Moderator:**  
**Adrienne Nelson, Director, Global Services**  
**Staffing Industry Analysts**



# Contingent Workforce Legal Update for 2014

February 13, 2014

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# Today's Agenda

- **Overall Motif: Federal vs. State Law and Government**
- **Aggressive National Labor Relations Board**
- **Affordable Care Act: Still The Elephant In The Room**
- **OSHA Campaign On Temporary Workers**
- **Other Surging Issues**



# Lawyer's Disclaimer

- This presentation is not intended as legal advice.
- The law can change dramatically overnight by a new court decision, statute, or regulation.
- The facts of real situations make a big difference.
- Managers should consult legal counsel for advice and representation in specific situations.



# Federal vs. State



- There is a federal/state struggle over employment law that partially – but not perfectly -- reflects the liberal/conservative dichotomy.
- Many states are resisting the exercise of federal authority and expansion of employment law, but some states want to move faster than the federal government in certain areas.



# Arenas for Federal/State Conflict

- Second Amendment – affects businesses and workplaces.
- Immigration policy
- Drug legalization
- Marriage
- Traditional labor law
- Insurance and benefits
- Corporation law
- **Moral: Urge your company to support its interests at all levels of government.**



“Ready for your first lesson in conflict resolution?”

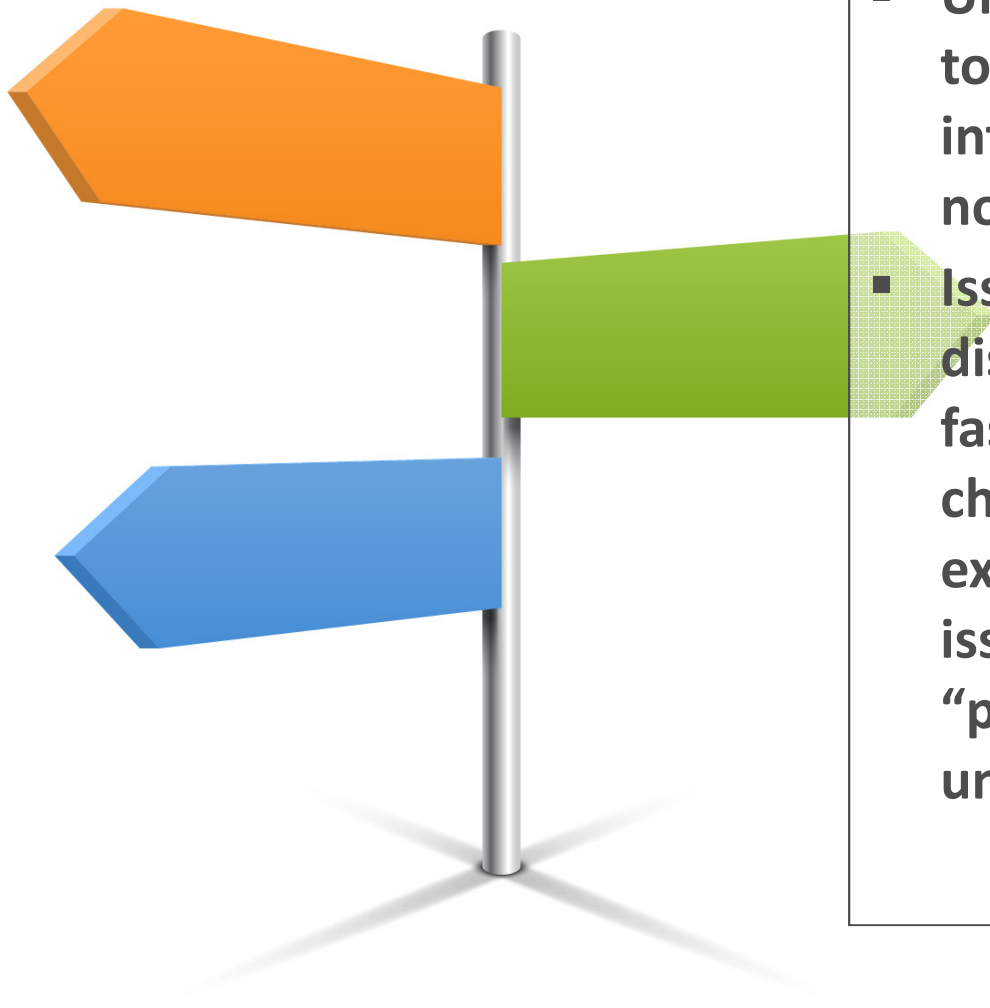
# National Labor Relations Board



- For some time, there has been a dispute over the exact rules for the exercise of the President's recess appointment power.
- The *Noel Canning* case – about recess appointments to the NLRB – has been argued before the Supreme Court and should be decided soon.
- President Obama has now filled the Board with non-recess appointees, so its ongoing authority is not diluted by the recess appointment issue, however it gets resolved.
- The Board has an aggressive agenda to pursue.
- It is fair to say that the agenda is very favorable to organized labor and unfavorable to employers.



# Where the NLRB is Headed



- Unionized firms are accustomed to labor law, but the Board intends to invigorate it for nonunionized firms as well.
- Issues – at-will employment, disclosure of right to organize, fast track organizing, card check, disallowing employer’s expenses educating on union issues, regulation of “persuaders,” micro bargaining units.

# Where the NLRB is Headed



- Appeals of NLRB decisions go to federal circuit courts of appeals.
- President Obama has expanded the D.C. Circuit Court of Appeals and, by the end of his second term, unrestrained by Senate filibusters, will have appointed a large percentage of the entire federal judiciary – lifetime appointments.



# Contingent Employees: The Single Unit Issue



- When contingent employees work alongside direct employees, can they be organized into the same bargaining unit?
- Unions may want more potential members, and some employers may want employees likely to vote “no” in an organizing election, but staffing firms never want combined units.
- Until 2000, the rule was that either employer could veto a combined unit. In 2000, the Clinton-era Board reversed the rule, and in 2004, the Bush-era Board reversed it back.
- The Obama-era Board plans to reverse it again, making combined units possible against the wishes of both employers, if the workforces are jointly employed and share a “community of interest.”

# Contingent Employees: The Single Unit Issue

- In preparation for that new rule, users of contingent employees should take measures to reduce the “community of interest” between their direct employees and contingent workers.
- **The community of interest factors (per *Kalamazoo Box*) include:**
  - methods of wages or compensation
  - hours of work
  - employment benefits
  - supervision
  - qualifications, training, and skills
  - job functions and work time spent away from the employment location
  - frequency of contact with other employees
  - integration with work functions of other employees or interchange with them
  - history of bargaining
- **Note that employees’ length of service is not one of the factors.**

# Affordable Care Act: The Recently-Issued Final Employer Mandate Regulations

Last Monday, IRS issued final regulations on the “employer mandate” of the Affordable Care Act. Long term, they don’t change much.

## “TRANSITIONAL RELIEF”

- For plan years starting in 2015 (which can stretch into 2016), employers with 50-99 full-time employees (calculated in 2014) won’t be subject to penalties, but only if they certify to the IRS under oath that they haven’t (without good business reasons) achieved that size by reducing headcount or hours and that they haven’t reduced the value of their health coverage more than 5%.
- To avoid the “doesn’t offer to all” penalty for plan years starting in 2015, all large (over 50) employers only need to offer coverage to 70% of their full-timers, instead of 95%.
- Large employers with 100 or more full-timers will get to deduct 80 employees, instead of 30, in calculating the “doesn’t offer to all” penalty.

# Affordable Care Act: The Recently-Issued Final Employer Mandate Regulations

## PENALTIES FOR WAITING AND LOOKBACK PERIODS

- Many observers have assumed that ACA employer penalties won't apply to employees while they wait up to 90 days for their employer-sponsored coverage to begin or while they serve an initial lookback period to determine their full-time status and eligibility for coverage.
- That is still true, but now only for employers who offer “minimum value” coverage.
- Employers who do not offer coverage at all or who offer only “skinny,” “bare bones,” or “MEC” coverage will have a higher exposure to penalties than they were expecting.



# Affordable Care Act: Your Concerns Come From Your Suppliers

- **Cost**
  - Penalty/insurance cost sharing
  - “Spreading”
  - Transparency of pricing
  - Grossed-up cost of non-deductible penalties
- **Tenure**
  - Full-time/part-time
  - Long term service – who controls tenure?
- **Nature of the contingent employment Relationship – the IRS common law test**
- **Billing and Contracts – timing, coverage, apportionment**



# “Play or Pay” Penalties

- “Play or Pay” penalties, which the ACA calls “assessable payments,” are what large employers must pay – starting January 1, 2015 -- for not providing affordable, qualifying health coverage to substantially all of their full-time employees. Most staffing firms will be large employers under the ACA.
- **Even though you may not be paying these penalties for your direct workforce, they will increase the cost of your contingent workforce.**



# “Full-Time” Doesn’t Mean “Permanent”

- Some people confuse the full-time/part-time distinction with the temporary/permanent distinction.
- ACA doesn’t distinguish between temporary employees and so-called “permanent” employees. Both kinds of employees will be “full-time” if they average 30 or more hours per week.



# Will Commercial Staffing Firms Offer Coverage To All Full-Time Employees?



- Although there is currently a lot of talk about staffing firms offering coverage, and some large self-insured firms may make that happen, I believe that most commercial staffing firms will not be able to offer fully-qualifying coverage to all full-time employees in the long run.
- Some reasons for this: market forces, underwriting principles, carrier unavailability, administrative cost, cost of coverage, and COBRA obligations.
- To my knowledge, no carriers firmly offer “minimum value” health coverage to commercial (office/industrial) temporary employee populations.
- Pure professional staffing firms might be able to cover all full-time temporary employees.



# The Potential For High Or Runaway Insurance Expense For Temporaries



- Insurance carriers have already lost their rights to exclude pre-existing conditions, cancel policies, and charge for risk traits like age and gender.
- The staffing industry is asking them to offer coverage to a population for which they have no claims data and to waive their usual group insurance requirements for minimum percentage participation and for minimum employer premium subsidy. Claims experience is almost certain to be very bad.
- If coverage is offered, initial premiums will be set high for safety but may still skyrocket after that.
- You don't want to commit to pay these costs.

# Hours and Tenure Management

- **Some staffing firms plan to aggressively limit hours and long-term tenure, to prevent employees from achieving full-time, insurance-eligible status. If they don't offer a health plan, this strategy will probably be legal.**
- **However, this strategy requires the staffing firm to be able to pull people from assignments.**



- **Customers may be able to keep people longer, if they agree to pay the penalties.**
- **This departs from the tradition of unlimited assignments, without special cost, at the customer's discretion.**
- **However, it frees the staffing firm from costs that it would otherwise need to pass on to customers.**

# How Much Are The Penalties?



- Depending on the temporary's average hours and the staffing firm's tax bracket:
  - The annual pre-tax cost of the “no offer” penalty for each full-time employee is **\$2,000 to \$3,125**. The hourly cost is between **\$.96 and \$2.00**.
  - The annual pre-tax cost of the penalty for offering coverage that is unaffordable or under minimum value **\$3,000 to \$4,687**. The hourly cost is between **\$1.44 and \$3.00**.
- This is the **extra margin the staffing firms** must get from customers to break even.

# Where Will The Penalty Money Come From?



- There are only three possible sources for penalty money:

1. **Lower margins** for staffing firms – how much is left for them to give up?
2. **Lower pay rates** for assigned employees – but recruiting, retention, and markup pricing are issues.
3. **Higher bill rates and markups** to customers.

# Should Penalties And Insurance Costs Be Spread Over All Bill Rates?



- Some suggest that staffing firms should spread the full-time penalties and insurance costs over the rates for all assigned employees. (Maybe you won't notice.)
- **But**, if they do that, their full-time employees will be underpriced and their part-time employees will be overpriced, because part of the penalties paid for full-timers will be added to the part-timers' rates.
- Although overall prices tend to drive sales, VMS/MSP managers and firms might do well to ask how suppliers are allocating their ACA penalty and insurance costs.
- If staffing firms spread the ACA costs, **buy the underpriced full-timers and avoid the overpriced part-timers.**

# Market Distortion

- **Big buyers often deal mostly with big suppliers. But ACA gives a financial advantage to smaller staffing firms.**
- **Customers can share these financial advantages. Although few staffing firms seem to be small, there are techniques for obtaining small firm advantages in a large vendor environment.**
- **Those techniques include, among others:**
  - Franchised branches of large firms employing people locally
  - First-year start-up firms
  - Second year firms with sub-50 first years
  - Subcontractors alternating large and small
  - Accommodation staffing by permanent placement firms
  - Branchising within large firms



# Strategic Use of VMS/MSP Programs



- VMS/MSP programs, as your vendor “traffic cops,” can manage the techniques just mentioned.
- They can manage work and employee scheduling strategies that can preserve full-time service without incurring indirect ACA costs for full-time employees.
- They are also well-positioned to monitor the ACA cost-management policies of your vendors.
- It is unlikely that your VMS/MSP program is planning yet to use these techniques, so you may want to educate them and motivate them to do so.

# Challenges In Billing For ACA Penalties And Insurance Costs

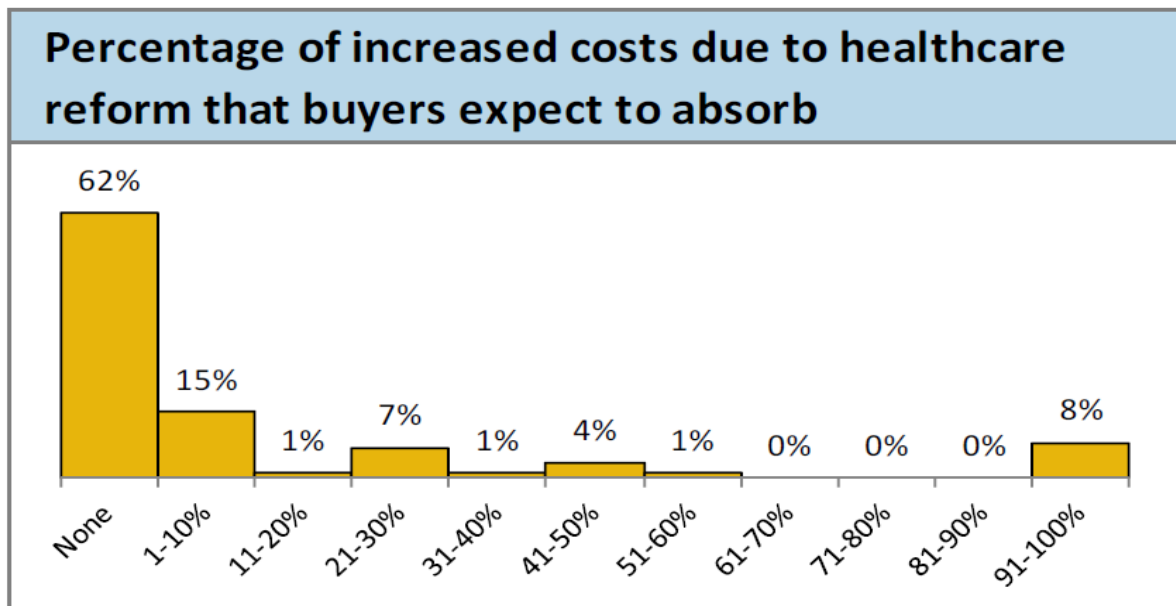


- **Even if these strategies avoid some penalties and insurance costs, you may end up being billed for others.**
- **If you agree to share in these costs, several administrative problems arise.**
  - Existing staffing contracts don't effectively pass on these kinds of cost. And contracts that will be in force when the employer mandate begins in 2015 are being negotiated and signed now. Billing for ACA penalties and insurance costs requires special language.
  - Employees may change status from full-time to part-time and back.
  - The real cost to be recovered for penalties is a grossed-up before-tax cost that will be hard to define.



# How To Fix Staffing Contracts For The ACA Penalties And Insurance Costs

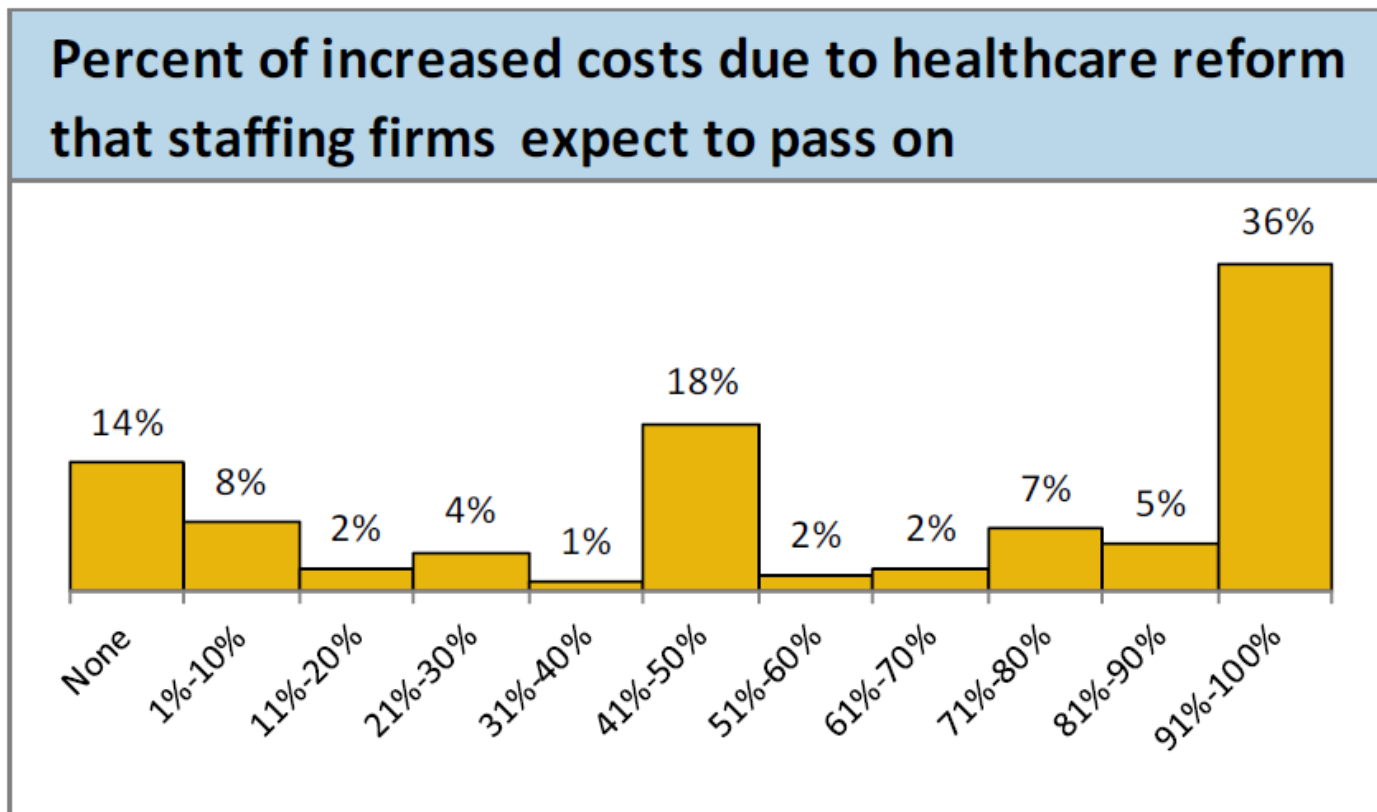
- Whatever the final regulations say on full-time status, most staffing firms will be incurring some ACA penalties and insurance costs for the employees they assign to you.
- Staffing Industry Analysts did separate surveys of staffing providers and staffing customers to determine what their respective expectations are regarding who will pay these new costs.
- Here is what buyers expected to pay:



Source: Staffing Industry Analysts, © Crain Communications 2012

# How to Fix Staffing Contracts For The ACA Penalties And Insurance Costs (cont'd)

Here is the chart showing what staffing suppliers expected to pay:



Source: Staffing Industry Analysts, © Crain Communications 2012

# How to Fix Staffing Contracts for the ACA Penalties And Insurance Costs (cont'd)

- There is a huge disconnect in these expectations. If staffing firms bill you for these costs starting in 2015 without any prior discussions about it, there may be disruptive disputes between staffing firms and their customers. That would be bad for everyone.
- So this item should be discussed and resolved now.
- VMS/MSP, if you have it, is the natural vehicle for these discussions.
- Your internal or external legal function needs to be involved in the amendment of staffing contracts that will be in effect in 2015 and the negotiation of those that are now being formed.



# The Common Law Employer Issue

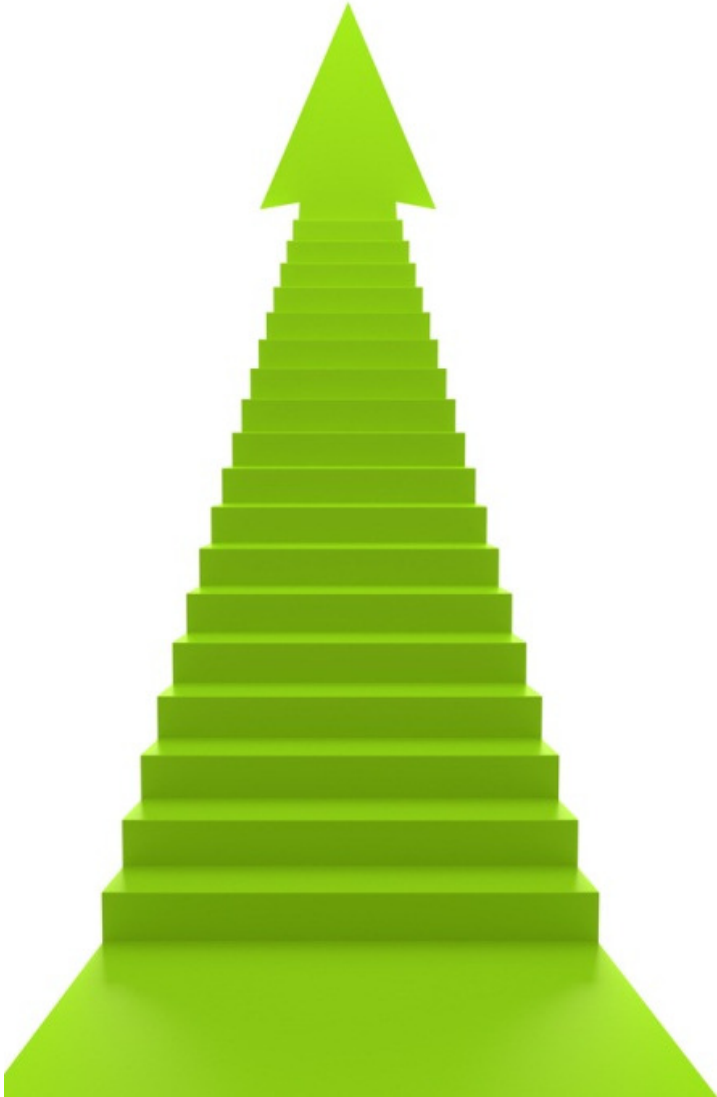
- Final IRS regulations announce a common law rule for determining who is the employer of workers for ACA purposes.
- The right to control the details of the work is the key factor, as it is in similar regulations (for FICA, FUTA, withholding, and reporting income at its source) that use the same test.
- In most staffing relationships, the customer controls the details of the work and also provides the tools and premises for it.
- By comparison, staffing firms control few aspects of the work.
- A finding that contingent workers are the common law employees of customers under ACA could affect the customer's large employer determinations, coverage eligibility practices, administrative obligations, penalty costs, and other aspects of the ACA.

## The Common Law Employer Issue (cont'd)

- We don't know what IRS intends to do with this rule.
- The similar rules for FICA, FUTA, and withholding aren't routinely applied in practice. Staffing firms, not their customers, do all of those functions without objections from IRS.
- IRS may be holding this rule in reserve as a way to deal with what it considers "abusive" avoidance of ACA coverage or penalty obligations.
- IRS positions and even regulations are not unassailable law, and IRS has a long record of having its positions reversed in court.
- Some court cases show that it is very hard to move the common law relationship from staffing firms to their customers.
- Nevertheless, it will be worthwhile to modify staffing agreements and some operational practices to reflect more of an "outsourcing" model than a "staff augmentation" model.

# Next Steps for ACA

- Determine the ACA awareness level of your VMS/MSP program.
- Inquire about and verify contractual provisions for avoiding, sharing, or absorbing the staffing vendors' ACA penalty and insurance costs.
- Analyze the hours and tenure patterns of your contingent workforce (or require your VMS/MSP or vendors to do it.)
- Seek opportunities to structure workforces and schedules to minimize ACA penalties and insurance costs according to the mentioned strategies.
- Have the strategies ready to go live by January 1, 2015, or for some purposes, as soon as possible.



# 5-MINUTE WARNING



**Please Prepare  
Your Questions**



# OSHA Campaign On Contingent Workers

- **The Occupational Safety And Health Act passed in 1970 contained little guidance about how it applied to contingent workforce situations.**
- **Gradually, it was understood that staffing customers, and not staffing firms, were principally responsible for workplace safety, since they control the workplace and the work itself.**





# OSHA Campaign On Contingent Workers

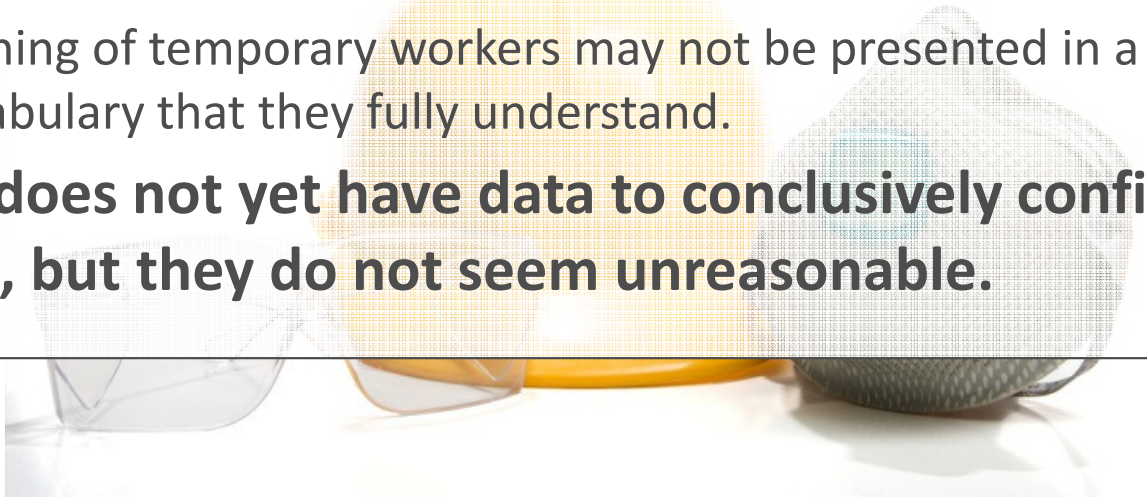
- Staffing firms took an interest in safety, because their worker's compensation claims experience is a critical component of their cost structure and competitiveness. But, aside from initial site inspections, few staffing firms felt responsible for being proactive on safety issues.
- In early 2013, the Occupational Safety and Health Administration launched a Temporary Worker Initiative focused on what that agency perceives as a heightened level of workplace safety risk for temporary employees.



# OSHA Campaign On Contingent Workers



- **OSHA believes that temporary workers are at increased risk of injury because:**
  - They are new to each assignment and are relatively inexperienced at the work required.
  - Over time, they are new in their jobs a higher portion of the time than permanent employees, because they change assignments frequently.
  - Host employers (staffing customers) are less likely to devote training resources to temporary workers.
  - Temporaries are more likely to lack personal protective equipment.
  - Training of temporary workers may not be presented in a language and vocabulary that they fully understand.
- **OSHA does not yet have data to conclusively confirm these beliefs, but they do not seem unreasonable.**



# OSHA Campaign On Contingent Workers

- **The OSHA Temporary Worker Initiative has several fronts and goals:**
  - New requirements for identifying temporary workers in existing reports
  - Increased specific agency attention to temporary workers and data-gathering about them
  - Identifying and proliferating Best Practices (for example, those recently published by the American Staffing Association)
  - Promoting greater active engagement of staffing firms in workplace safety
  - Increased documentation – safety and health programs, hazard assessments, project orientation, training
  - Increased safety communication among staffing customers, suppliers, and workers
  - Clarification of guidance on responsibility for recordkeeping, training, and hazard communication
- **OSHA guidances, like the EEOC guidance documents, follow a general principle that recognizes the different practical positions of providers and customers.**

# OSHA Campaign On Contingent Workers

- OSHA also urges that much greater detail about safety issues be included in the staffing agreements between providers and customers.
- The agency seems to be taking an approach similar to the EEOC approach, which is to “deputize” the staffing industry to help it enforce compliance with the law.
- So far, this campaign seems pretty wholesome.
- It remains to be seen whether the implementation will reach impractical extremes.
- Some of the publicity over it implies that temporary workers are injured disproportionately, which has not been established.



# Other Surging Issues

- **Wage and benefit mandates**

- Minimum and living wages
- Paid sick leave
- Health insurance

- **Background, drug, and credit checking**

- “Ban the box” laws
  - Mostly public employers and government contractors, but also private employer restrictions in some cities and states
  - Some regulations allow later inquiries but not on applications
- Vigorous enforcement
  - Federal and state
  - Hot states include Wisconsin and New York
  - Omit blanket criteria in staffing contracts



# Other Surging Issues

## ■ Misclassification

- FLSA exempt or non-exempt
  - Don't ignore state law
  - Learn and check salary basis
  - Balance risk with actual benefits
  - Don't believe "demeaning" myth
- Independent contractor or employee
  - Government at all levels conspiring against ICs
  - Consider other risks, like workplace injury, intellectual property, etc.
  - Balance risk with actual benefits
  - Meticulous documentation puts you higher up the tree

## ■ Other selection criteria

- Integrity testing
- Unemployment history





*Presented by:*

**George Reardon, Esq.**

Littler Mendelson, P.C.

Houston, TX Office

713.652.4753

[GReardon@littler.com](mailto:GReardon@littler.com)

[www.littler.com](http://www.littler.com)

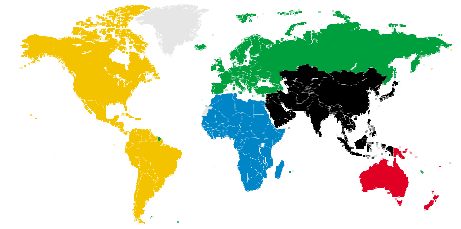
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# Questions and Answers







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# Thank You!