906:Managing a Contingent Workforce

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Prior to joining Sutter Health, Mr. Evans was an attorney in private practice with Diepenbrock, Wulff, Plant & Hannegan in Sacramento, California, and Damrell, Nelson, Schrimp, Pallios & Ladine in Modesto, California.

Mr. Evans was the president of ACC's Sacramento Chapter for three years. His hobbies include traveling, languages, singing, and rugby. He represented the Oxford University 1st XV and the Oxfordshire County 1st XV in rugby, and coaches his local high school rugby team.

Born in the United Kingdom, Mr. Evans earned a bachelor's and a master's degree with honors from Oxford University, England. He obtained his law degree from the University of California at Davis, where he also received the BNA Law Student Award and the U.C. Davis Distinguished Scholar Award.

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Prior to joining QUALCOMM, Mr. Sailer was a partner in Gray Cary Ware & Freidenrich, where he represented employers in all areas of employment and labor law, with emphasis on employment law counseling and wrongful termination litigation.

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Mr. Sailer graduated from Swarthmore College with honors, and received his JD, cum laude, from the University of Michigan Law School.

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MANAGING THE CONTINGENT WORKFORCE

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Managing the Contingent Workforce

All employers probably have heard of the well-publicized lawsuit against Microsoft in which temporary contract workers claimed they were in fact, if not in name, actual employees of Microsoft and therefore entitled to benefits.[1] Their success has caused employers across the nation to pause and reconsider the benefits and risks of a contingent workforce. Although there are numerous advantages to utilizing a contingent workforce, a staffing arrangement does not avoid the risks of employer-liability. As the contingent workforce continues to expand, alternate staffing arrangements will continue to be closely scrutinized by courts and government agencies alike. Employers can take some comfort in the knowledge that proper management and carefully drafted agreements can help reduce many of the risks inherent in utilizing a contingent workforce.

Types of Contingent or Alternative Staffing Arrangements

The term "contingent employment" refers to those workers who are "contingent" on a company's need for them. According to January, 2004 Bureau of Labor Statistics data, the U.S. workforce consists of approximately 2.3 million contingent workers.

1. Placement Services - Placement services are provided by employment agencies and executive recruiters that bring together, for a fee, job seekers and potential employers for the purpose of establishing a regular, full-time employment relationship. No employment relationship is established between the recruiter and the job seeker.

2. Independent Contractors - Independent contractors contract to perform work or provide a service for the benefit of another and are paid by the job, are free to hire their own employees and determine their wages and are free to work for other contracts.

3. Payrolling - Payrolling involves an arrangement in which the client, not the staffing firm, recruits the worker but asks the staffing firm to hire the person and assign them to perform services for the client.

4. Temporary Help Services - Temporary help services hire their own employees and assign them to clients to support or supplement the client's workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

5. Long-term Staffing Services - Long-term staffing services (sometimes referred to as "flexible staffing") supply employees from the staffing firm to work on long-term, indefinite assignments. Long-term staffing can involve just one or a few individuals, or it can involve a significant portion of the staff required to operate some specific customer function on an on-going basis.

6. Managed Services - Managed services (sometimes referred to as "facilities management") are services provided by a firm that supplies employees to manage a specific client facility, function or functions on an on-going basis. The staffing firm not only has responsibility for ensuring the capabilities and skills of the individuals it supplies, but also has day-to-day supervisory responsibility for the employees and management accountability for the facility or function in regard to results and output.

7. Employee/Staff Leasing Services - Staff leasing services are defined as an arrangement by which employees of a staffing firm are assigned to work at a client company and in which employment responsibilities are in fact shared by the staffing firm and the client company, the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the workforce at a client company worksite or a specialized group within that workforce consists of assigned employees of the staffing firm.

8. Professional Employer Organization Services - Professional employer organizations ("PEO") grew out of the concepts of employee leasing and contract staffing (such as driver leasing in the trucking industry) and the concept of human resource outsourcing services (such as HR consulting, payroll processing, benefit administration, and safety risk management). The objective of a PEO service arrangement is for the PEO to bring the expertise and benefits of professional employer services to the management of the client workforce through a co-employment relationship.

Joint or Co-Employment Relationship

Several types of alternative staffing arrangements leave open the possibility that distinct companies may be considered joint employers. The result of a joint employment relationship is that the client company remains liable either jointly with, or secondarily to, the staffing firm under various employment laws.[2]

A joint employment relationship arises when both the client company and the staffing firm have the right to control the worker.[3] The commentary to the Restatement (Second) of Agency, § 226, recognizes that joint employment may exist in a given employment situation. The commentary to § 226 provides that a person may be the servant of two masters as to the same acts within the scope of employment for both if the service to one master does not exclude service to the other. The commentary also states that an employee who performs two acts simultaneously can also be acting in the service of two masters provided that service to one master does not constitute the abandonment of service to the other.

The starting point in determining the existence of a co-employment relationship is to know whether the worker is an employee of either entity or is an independent contractor. Although no single test exists for making such a determination, common law agency principles and tests utilized by the Internal Revenue Service are helpful in providing the necessary guidance.

Statutory Tests and Agency Guidance

Anti-Discrimination Laws in General

The threshold question of whether a contingent worker qualifies as an employee or an independent contractor is important under the anti-discrimination laws for two reasons. First, most discrimination statutes protect only employees from discrimination, and second, most discrimination statutes limit their applicability to employers with a specified number of employees. Whether a worker qualifies as an employee will determine whether the statute protects that worker. Whether a worker qualifies as an employee will also aid in determining whether the employer has the requisite number of employees for it to be covered by the statute.

Determining Employer Status

The Equal Employment Opportunity Commission ("EEOC") has taken the position that the determination of whether a worker is an employee or an independent contractor should be made in accordance with traditional common law agency principles.[4]

Each anti-discrimination statute defines employee as an individual employed by an employer.[5] The definition of employer is also similar under these statutes, distinguished only by the number of employees required to trigger coverage. Title VII and the ADA each define employer as a person engaged in industry who has employed fifteen or more persons during a specified period, whereas the ADEA defines employer as a person engaged in industry who has employed twenty or more persons during a specified period.[6] Each of the three statutes also specifically includes employment agencies under their coverage so that employment agencies do not have to meet the definition of employer to be liable for discrimination under the acts.

In response to the dramatic growth of the contingent workforce, the Equal Employment Opportunity Commission has published guidance on the application of federal anti-discrimination laws to contingent workers placed by temporary agencies or other staffing firms.[7] The specific laws addressed by the guidance are Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), and the Equal Pay Act ("EPA"). The guidance describes the relationship between a staffing firm and each of its workers as generally one of employer-employee because the firm is itself in business, typically hires the worker, determines when and where the worker should report to work, pays the wages, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker.[8]

Because the client usually exercises significant supervisory control over the worker, the guidance describes the relationship between the client company and the temporary worker as typically one of employer during the job assignment, along with the agency.[9]

When establishing which workers are counted in determining whether a staffing firm or its client is covered under Title VII, the ADA, or the ADEA the staffing firm and the client must each count

every worker with whom it has an employment relationship. Although a worker assigned by a staffing firm to a client may not appear on the client's payroll, he must be counted as an employee of both entities if they qualify as joint employers.[10]

Determining Employer Liability

According to the EEOC, joint liability and the sharing of EEO responsibilities arise when "both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees."[11]

In situations where the staffing firm furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make or change assignments, and to terminate the workers, the client would not qualify as an employer because it lacks the right to control the worker.

Obligations of Staffing Firms and Client Companies

Discrimination in Job Assignments, Referrals, and Requirements

A staffing firm will be liable as an employer if it makes job assignments in a discriminatory manner and liable as an employment agency if it makes job referrals in a discriminatory manner. Similarly, the client company will be liable if it sets discriminatory criteria for the assignment of workers. Staffing firms are encouraged to pay close attention to the client's criteria. A staffing firm that unknowingly makes job assignments based on a client's discriminatory criteria is nonetheless liable either for making discriminatory job assignments, or for discriminatory job referrals. It is no defense that the staffing firm merely made referrals and assignments based on the criteria received from its client.

In addition, a staffing firm's offer to place an individual on its roster for future temporary work assignments is not an "offer of employment." The offer occurs when a staffing firm is given an assignment with a particular client company. Thus, a staffing firm or its client violates the ADA if it asks disability-related questions or requires a medical examination before assigning an individual to a particular client.

Discrimination at the Work Site

Client companies are obligated to treat the workers assigned to it in a nondiscriminatory manner. If the client discriminates against the worker the client is liable for such discrimination. If the staffing firm knows or should know of the discrimination, the staffing firm is obligated to take corrective action within its control. The staffing firm is thus liable if it either participates in the client's discrimination, or if it knew or should have known about the discrimination and failed to take prompt corrective measures within its control.

Discrimination in Wage Payments

Staffing firms and client companies are obligated to pay wages without discriminating on the basis of race, sex, religion, national origin, age, or disability. Under the Equal Pay Act ("EPA"), men and women must receive equal pay for substantially equal work. If the EPA is violated, both the staffing firm and the client company are liable if they both qualify as employers of the worker bringing the complaint. In addition, if both the staffing firm and the client company are covered under Title VII, an EPA violation will also constitute a Title VII violation. A sex-based wage disparity supported by other evidence of wage discrimination violates Title VII even if the jobs in question are not substantially equal under EPA standards. Moreover, if an entity has fifteen or more employees, it need not qualify as an employer of the worker assigned to it in order to be liable under Title VII for wage discrimination, provided that the wage discrimination interferes with the worker's employment opportunities.

Allocation of Available Remedies for Unlawful Discrimination

If the combined discriminatory actions of a staffing firm and its client result in harm to the worker, both the staffing firm and the client are jointly and severally liable for the full amount of back pay, front pay, and past pecuniary damages. These remedies are not subject to the statutory caps. Punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against and borne by the staffing firm and the client company in accordance with each entity's respective degree of malicious or reckless misconduct. However, future pecuniary damages, damages for emotional distress, and punitive damages are subject to the statutory caps.

Title VII of the Civil Rights Act of 1964

Although Title VII is generally included in the above discussion of the anti-discrimination laws, there are certain aspects of Title VII, which should be mentioned.

Determining Employer Status

Under most circumstances, a plaintiff must show an employment relationship to sue under Title VII.[12] The control necessary to establish an employer-employee relationship for purposes of Title VII exists in the typical relationship between the staffing firm and the contingent worker.[13]

Courts that have been less willing to find that the relationship between the staffing firm and the contingent worker is one that qualifies as an employer-employee relationship for purposes of Title VII, have relied on the staffing agency's negligible day-to-day supervision of the worker. In *Williams v. Caruso*, 966 F. Supp. 287 (D. Del. 1997), the court held that a temporary employment agency was not a Title VII employer of a temporary worker whom it hired and placed in a job assignment. The court relied on its earlier ruling in *Kellam v. Snelling Personnel Services*, 866 F. Supp. 812 (D. Del. 1994), *aff'd mem.*, 65 F.3d 162 3d Cir. 1996), in which it refused to count the workers assigned by a temporary employment agency as its employees on the ground that the agency did not supervise the workers on a day-to-day basis. However, both of these cases have been rejected expressly by the EEOC as placing undue emphasis on the daily supervision of job tasks.[14]

A client company may also qualify as an employer of the contingent worker if it exercises the requisite degree of control over the worker. Whether the client in fact exercised the requisite degree of control must be determined on a case-by-case basis. An example of a case in which the client company was found to be an employer of the contingent worker is *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984). In that case, the client exercised complete control over the worker's work assignments, the means and manner of the worker's performance, and the hours of employment.[15] The worker was also subject to the direct supervision of the client's employees in all respects and at all times during the period of her assignment. In addition, the client had a right to discharge the worker.[16]

In other Title VII cases, courts have held that the client did not qualify as a joint employer because it did not exercise sufficient control over the worker. An example of this is *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814 (1st Cir. 1991). In that case, despite the fact that the client of the shipping services contractor set the time for ship unloading, had some disciplinary authority over the foremen, and directed the order of unloading, the court nevertheless found this to be insufficient to render the client company the employer of the workers.[17] In so holding, the court noted that the contractor selected, scheduled, and supervised the workers and handled disciplinary matters.[18]

Determining Liability in Absence of an Employment Relationship

Although it is evident that under Title VII, day-to-day management of a worker is critical in determining employment status, avoiding classification as the employee's employer may not be sufficient to avoid liability. Title VII, which uses the term "person aggrieved" instead of "employee" and provides no words of limitation to the contrary, but "purports to provide remedies for a class broader than direct employees."[19] This has led courts to hold that a direct employment relationship between a plaintiff and defendant is not necessary if the plaintiff can show that the defendant-employer controlled access to the plaintiff's employment opportunities, and denied or interfered with that access based on unlawful criteria.[20] This is of grave importance to employers who utilize contingent workers. A client company, which might not be a joint employer of the contingent worker, may nonetheless control access to the contingent worker's employment opportunities.

Several courts have stated that the term "employer" under Title VII should be "construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment."[21] For example, the D.C. Circuit in *Sibley Memorial Hospital v. Wilson* emphasized that the statute applies explicitly to labor unions and employment agencies, which would not directly employ a particular plaintiff, but which nonetheless have "a highly visible nexus with the creation and continuance of direct employment relationships between third parties."[22] Such a liberal construction is justified by "the broad, remedial purpose of Title VII which militates against the

adoption of a rigid rule strictly limiting 'employer' status under Title VII to an individual's direct or single employer."[23]

Every federal circuit to squarely address the issue has agreed with the D.C. Circuit in *Sibley*, holding that a plaintiff has standing to sue under Title VII when the plaintiff can show that the defendant interfered with the plaintiff's employment relationship, despite the absence of a direct employment relationship between the plaintiff and defendant.[24] Proper defendants may include those "who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and deny such access by reference to invidious criteria."[25]

Family and Medical Leave Act

The Family and Medical Leave Act ("FMLA"), enacted in 1993, is one of the first federal acts to deal directly with some of the complexities created by the compliance obligations of co-employers. The regulations promulgated in 1995 by the DOL, focused on co-employment issues more directly than any prior set of federal rules.

Although the FMLA defines employer more expansively than other statutes, its applicability is limited to those who employ 50 or more employees over a specified period of time.[26] The FMLA definition includes any person who acts, directly or indirectly, in the interest of an employer with respect to any of the employees of such employer.[27] The FMLA does not apply to all employees of an employer, but only to eligible employees. Eligible employees are those who have been employed for at least 12 months by the employer from whom leave is requested, and who worked at least 1,250 hours for that employer during the 12-month period preceding the request.[28]

Since the FMLA is one of the statutes whose applicability is triggered by a minimum number of employees, classifying a worker as an employee not only determines whether the worker is covered by the statute, but also aids in determining whether the company has the number of employees necessary for coverage under the act. With respect to determining eligibility, the DOL regulations state,

> [w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA . . . . [A] determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.[29]

Obligations of Staffing Firms and Client Companies

The DOL regulations state that if there is a joint employment situation between the staffing firm and the client company, both entities must count the contingent worker when determining whether the FMLA is applicable to the entity and the worker.[30] The regulations also distinguish between "primary" and "secondary" employers, indicating that:

> [F]actors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.[31]

The DOL regulations state that the primary employer, often the staffing firm, is solely responsible for giving FMLA notices to eligible contingent workers, approving required leaves and maintaining health benefits during leaves.[32] Although job restoration is the principal responsibility of the primary employer, the secondary employer, often the client company, must generally allow a contingent worker returning from FMLA leave to continue working at the client site.[33] Secondary employers are also responsible for:

> . . .compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA. . . . A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.[34]

The prohibited acts include interfering with an employee's attempt to exercise rights under the Act, and discharging or discriminating against an employee for opposing a practice, which is unlawful under FMLA.[35]

Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") is the only employment statute that incorporates an expansive and comprehensive definition of the term "employee."[36] Although it contains the circular definition of employee as any individual employed by an employer,[37] it also defines the verb "employ" as "to suffer or permit to work."[38]

Courts have long considered the economic dependence of the worker on the employer as the key concept in determining a worker's status as an employee for purposes of the FLSA.[39] This consideration has led the courts to evaluate each of the factors of the traditional common-law employee test in the light of that key concept.[40] The resulting test has come to be known as the economic realities test. The Supreme Court in *Darden* expressly declined to extend the FLSA's economic realities test beyond that statute, finding that the FLSA "stretches the meaning of 'employee' to some parties who might not qualify under such a strict application of traditional agency law principles."[41]

The Department of Labor has issued regulations interpreting the Fair Labor Standards Act. Regarding the issue of joint employment, the regulations state:

> A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case.[42]

According to DOL regulations, there are three situations in which joint employment will generally be found to exist.[43] Each situation requires that the worker perform work that either simultaneously benefits two or more employers, or that is for two or more employers at different times during the workweek, under any one of three arrangements.[44] The first is when the employers arrange to share the worker's services,[45] such as when the worker actually provides services to two or more employers. The second arrangement involves one employer acting in the other employer's interests regarding the worker,[46] such as an employer and a company or individual acting as an agent of the employer.[47] And the third situation is when the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer,[48] such as an individual employer and a corporation of which the individual employer is the sole stockholder.[49]

Obligations of Staffing Firms and Client Companies

Depending on the economic realities of the situation, an individual may be employed by more than one employer at the same time.[50] Staffing firms are generally responsible for complying with the recordkeeping requirements of the wage and hour laws, and for ensuring compliance with minimum wage, overtime, child labor and equal pay requirements. However, in a joint employment situation, client companies also face certain legal risks. The DOL regulations make clear that:

> [I]f the facts establish that the employee is employed jointly by two or more employers, *i.e.*, that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for all purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[51]

Occupational Safety and Health Act

The Occupational Safety and Health Act ("OSHA") covers all employers and does not incorporate complex eligibility schemes for employees.[52] The term "employer" is defined as a person engaged in a business affecting commerce who has employees.[53] OSHA defines employee as an employee of an employer who is employed in a business of his employer which affects commerce.[54] Although the definition of employee sounds circular, it basically covers any worker employed in a business, which affects commerce.

Obligations of Staffing Firms and Client Companies

While the broad definitions are likely to cover all employers and their employees, the Occupational Safety and Health Review Commission has taken the position that client companies that employ contingent workers are responsible for compliance with the Occupational Safety and Health Act.[55] The staffing firm may be cited only if necessary to correct the violation, or if it knew or should have known of an unsafe condition and had sufficient control over the operational aspects of the work and workplace. Since the client company has direct control over the workplace, under most circumstances, only the client company will be cited for violations of safe workplace standards under the Occupational Safety and Health Act.[56] Additionally, client companies are required to maintain records regarding illnesses and accidents involving temporary employees over whom they have supervisory control.[57] OSHA's recordkeeping requirements may, however, be assigned to the staffing firm.[58]

National Labor Relations Act

The National Labor Relations Act ("NLRA") defines an employer to include any person acting as an agent of an employer, directly or indirectly.[59] An employee is defined by the NLRA to include any employee, is not limited to the employees of a particular employer, and specifically excludes independent contractors.[60]

The National Labor Relations Board ("NLRB") uses the following test to determine whether distinct entities, such as a provider of temporary workers and a client company, can be considered joint employers for purposes of the NLRA:

> Where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute "joint employers" within the meaning of the NLRA.[61]

Factors considered in applying this test include the entities' control of or involvement in hiring, discipline, supervision, compensation, working conditions, promotions and demotions, and discharge.[62]

Obligations of Staffing Firms and Client Companies

An important consequence of whether a joint employment relationship exists under the NLRA is vicarious liability for unfair labor practices. The mere existence of such a relationship is not dispositive, however. In situations where a staffing firm is a joint employer with the client company, the NLRB will not impose joint liability for discrimination unless there is evidence: (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons, and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.[63]

Providers of contingent workers and client companies should be aware of the risks of removing a worker from an assignment during a union organization drive. Such action could be viewed as an effort to interfere with the worker's right to participate in union organizational activities or to join the union, and could result in an unfair labor practice charge against the staffing firm and its customer. To the extent workers on either side of the relationship are represented, providers of contingent workers and client companies should be aware of their potential responsibility to negotiate over changes in their supply or use of contingent workers.

Collective Bargaining Issues

In *NLRB v. Western Temporary Services, Inc.*, the NLRB and at least one circuit court have held that contingent workers and regular employees may belong to the same bargaining unit if there is sufficient community of interest between them.[64] However, employees of joint employers may not be included in the same bargaining unit unless both employers consent. In *Greenhoot, Inc*., 205 N.L.R.B. 250 (1973), the National Labor Relations Board found that, although joint employment relationships existed between a property management company and the owners of the individual buildings at which the employees worked, no consent for multi-employer bargaining was present and thus individual units, rather than a multiple location unit, were appropriate.

In *Western Temporary Services, Inc*., the client company ceased directly employing part-time workers and arranged to obtain all part-time workers from a temporary employment agency roughly contemporaneously with an organizing drive. The Seventh Circuit enforced the NLRB's order defining the bargaining unit to include both full- and part-time workers. Support for the NLRB's order was found in the facts that the workers were subject to common supervision and working conditions, used the same lunchroom, time clock and facilities, and worked together on tasks. The court discounted the facts that the part-time workers supplied by the agency did not perform the more skilled tasks and received different fringe benefits. As for the irregular basis of the part-time workers' assignment to the client company and the lower number of hours and higher rate of turnover, the court held that their average of four hours of employment per week over the six months preceding the election was sufficient to justify their inclusion in the unit.[65]

When contingent and regular employees are included in the same bargaining unit, disputes regarding which entity is responsible for bargaining over particular issues are likely to arise. Little guidance on how these responsibilities should be divided is available. In *Western Temporary Services, Inc*., the court observed that the client company and provider of temporary workers must each negotiate with the union "to the extent it controls [the workers'] conditions of employment."[66] Does this mean that negotiation over wages is the responsibility of the provider of contingent workers, as they generally are responsible for the payment of wages? Or does the client company, who negotiates with the provider over the fee it will pay for the contingent workers, also bear some responsibility over wages?

Organizing Contingent Workers

The technology sector's increased reliance on skilled temporary workers has given the labor movement a boost in the area of organizing contingent workers. Unions typically attract unhappy workers looking for protection. Skilled temporary workers who work alongside the regular workers doing essentially the same work for less pay, no job security, no stock options, and inferior benefits are increasingly starting to look for such protection. More skilled temporary workers are interested in what unions have to offer as evidenced by the call for union representation by 16 temporary workers at Microsoft.[67]

Labor leaders recognize that they have a long road ahead of them in the high-tech industry in general because of the high demand for skilled software workers, the worker-friendly workplace culture, the generous salaries, and often most important, stock-based incentive compensation. However, skilled *temporary* workers generally do not share in these advantages and this adds fuel to the union organizer's fire.

Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) makes it unlawful for an employer to hire any person not authorized to work in the United States. The Department of Labor regulations interpreting the Immigration Reform and Control Act define an employer as:

> [A] person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term *employer* shall mean the independent contractor or contractor and not the person or entity using the contract labor.[68]

Obligations of Staffing Firms and Client Companies

Customers using contractor's services have no obligation to *verify* the employment authorization of the contractor employees. However, it is important to note that the regulations further provide that: [a]ny person or entity who uses a contract, subcontract, or exchange . . . to obtain the labor or

services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act.[69]

Therefore, although a client company has no duty to verify a contingent workers' authorization, the client company may nonetheless be held liable for violating IRCA if it knowingly allows the staffing firm to supply it with a contingent worker who is an unauthorized alien.[70]

Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act ("WARN") provides that any business enterprise that employs 100 or more employees and who orders a plant closing or mass layoff without giving 60 days notice of the closing or layoff, shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for back pay and benefits.

Last year, in *Administaff Companies, Inc. v. New York Joint Bd., Shirt & Leisurewear Div.,* the U.S. Court of Appeals for the Fifth Circuit considered whether the WARN Act imposed liability on a PEO for a plant closing conducted by one of its client companies and found that it did not. The court held that liability under the plain language of the WARN Act is imposed on the employer who orders the plant closing. Since the PEO did not order the closing of the facility, it was not liable. The court also refused to adopt the "joint employer test" of the National Labor Relations Act to find the PEO liable under the joint employer theory, opting instead to apply the test of the Department of Labor. Under the DOL test, the court ruled that the PEO was not a single business entity with the client company, and therefore, was not responsible for the lack of proper notice.[71]

Obligations of Staffing Firms and Client Companies

Client companies should always be cognizant of their responsibilities under the WARN Act. Failure to do so may subject a client company to potentially large liability, depending on the number of employees terminated. Joint employers can also be liable under the Act if they enjoy common ownership or commingled funds. If a company is closely related to another, take into account the possibility that WARN may subject the company to liability for another's actions.

State Licensing Acts

Many states have enacted licensing acts for staff leasing or employee leasing companies. Although the statutes may vary significantly from state-to-state, in general, it may protect assigned employees by allowing the staff leasing service provider to sponsor and maintain employment benefit plans for the assigned employees, by recognizing the license holder and the client company as co-employers for purposes of workers' compensation insurance, and by designating the license holder as the employer of its assigned employees for the purposes of unemployment compensation taxes.

This paper is for general information only and is not intended to be a legal opinion or legal advice. For advice about specific legal matters, you should consult an attorney.

ENDNOTES

[1] Most plaintiffs' lawyers have heard of it too. The lawyers who sued Microsoft were featured in the September 1999 ABA Journal. Patricia Barnes, *Revolt of the Worker Bees: 'Permatemps' sue employers over*.

[2] Diana & Rome, *supra;* note 2, at 9.

[3] EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*" (December 3, 1997).

4 EEOC Enforcement Guidance No. 915.002, "Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms" (December 3, 1997).

5 42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4); 29 U.S.C. § 630(f).

6 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5); 29 U.S.C. § 630(b).

7 EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms"* (December 22, 2000); EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*" (December 3, 1997).

[8] *Id.*

[9] *Id.*

[10] EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*" (December 3, 1997).

[11] *Id.*; see also, David E. Dubberly, *Structuring and Managing Contingent Worker Arrangements*, 10-FEB S.C. LAW 38, 40 (1999)

[12] *Broussard v. L.H. Bossier*, 789 F.2d 1158, 1159 (5th Cir. 1986).

[13] EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*" (December 3, 1997).

[14] EEOC ENFORCEMENT GUIDANCE NO. 915.002, "*Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*" (December 3, 1997).

[15] *Amarnare* at 349.

[16] *Id.*; *see also, e.g., Poff v. Prudential Ins. Co. of America*, 882 F. Supp. 1534 (E.D. Pa. 1995) (where plaintiff was hired by a computer services contractor and assigned to work on-site at insurance company, fact issue existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff's work was accomplished to qualify as employer); *Magnuson*, 808 F. Supp. at 508-510 (where car company contracted with staffing firm for plaintiff's services and assigned her to work at its car dealership, fact issue raised as to whether car company, dealership, and staffing firm all qualified as her joint employers).

[17] *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 821 (1st Cir. 1991).

[18] *Id.*; s*ee also, e.g., King v. Dalton*, 895 F. Supp. 831 (E.D. Va. 1995) (Navy was not joint employer of worker assigned by contract firm to work on project due to insufficient direct supervisory control over the daily details of the plaintiff's work).

[19] *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

[20] *See Bender v. Suburban Hosp. Inc.*, 159 F.3d 186, 188 (4th Cir. 1998) (collecting cases); *NME Hospitals, Inc. v. Rennels*, 994 S.W.2d 142, 145 (Tex. 1999).

[21] *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507-508 (E.D. Va. 1992) (citing *Bostick v. Rappleyea*, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985) quoting *Spirt v. Teachers Ins. and Annuity Ass'n.*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in part and rev'd in part on other grounds*, 463 U.S. 1223 (1983)).

[22] *Rennels* at 145 (quoting *Sibley* at 1342).

[23] *Magnuson*, 808 F. Supp. at 508.

[24] *Rennels* at 145; s*ee e.g. Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 874-75 (6th Cir. 1991); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 294-95 (11th Cir. 1988) *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021-22 (9th Cir. 1983); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1062-63 (2nd Cir. 1982), *vacated on other grounds*, 103 S.Ct. 3565 (1983).

[25] *Sibley*, 488 F.2d at 1342.

[26] 29 U.S.C. § 2611 (4)(A)(I).

[27] 29 U.S.C § 2611 (4)(A)(ii)(I).

[28] 29 U.S.C. § 2611(2)(A).

[29] 29 C.F.R. § 825.106(a), (b).
[30] 29 C.F.R. § 825.101.
[31] 29 C.F.R. § 825.106(c).
[32] *Id.*
[33] 29 C.F.R. § 825.106(e).
[34] *Id.*
[35] *Id.*
[36] See, Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 576 (1996).
[37] 29 U.S.C. § 203(e).
[38] 29 U.S.C. § 203 (g).
[39] *See Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (stating that dependence on the employer creates employee status); *see also*, Middleton, s*upra* note 55, at 576.
[40] Middleton, s*upra* note 55, at 576.
[41] *Darden*, 503 U.S. at 320; Middleton, *supra* note 55, at 576.
[42] 29 C.F.R. § 791.2.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Greenberg v. Arsenal Building Corp., et al.*, 144 F.2d 292 (C.A. 2).
[48] 29 C.F.R. 791.2.
[49] *Durkin v. Waldron, et al.*, 130 F. Supp. 501 (W.D. La. 1955).
[50] 29 C.F.R. 791.2.
[51] *Id.*
[52] 29 U.S.C. § 652(5), (6).
[53] 29 U.S.C. § 652(5).
[54] 29 U.S.C. § 652(6).
[55] *Team America Corporation*, 1998 OSAHRC LEXIS 84; *Murphy Enterprises, Inc.*, 1995 OSAHRC LEXIS 107; U.S. DEPARTMENT OF LABOR MEMORANDUM TO REGIONAL ADMINISTRATORS from Richard P. Wilson, Deputy Director, Federal Compliance and State Programs (July 5, 1977). *See also, Koch Refining Company v. Juan Robert Chapa*, 11 S.W. 3d 153 (Tex. 1999).
[56] Diana & Rome, *supra* note 2, at 11.
[57] *Id. See also*, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, RECORDKEEPING GUIDELINES FOR OCCUPATIONAL INJURIES AND ILLNESSES (September 1986).
[58] Kallstrom, *supra* note 3, at 235.
[59] 29 U.S.C. § 152(2).
[60] 29 U.S.C. § 152(3).
[61] *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1124 (3rd Cir. 1982).
[62] *Biore v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).
[63] *Capitol EMI Music, Inc.*, 311 NLRB 997, 1000 (1993).
[64] *NLRB v. Western Temporary Servs.*, 821 F.2d 1258 (7th Cir. 1987); *Continental Winding Co. and Kelly Servs. Inc.*, 305 NLRB 122 (1991); *Manpower, Inc. of Shelby County*, 164 N.L.R.B. 287 (1967).
[65] *Western Temporary Servs., supra.*
[66] *Id.* at 1264.
[67] Steven Greenhouse, *Unions Need Not Apply*, N.Y. TIMES, Jul. 26, 1999.
[68] 8 C.F.R. 274a.1(g).
[69] 8 C.F.R. 274a.5.
[70] *Id.*
[71] *Administaff Co. v. New York Joint Bd., Shirt & Leisurewear Div.*, 337 F.3d 454 (5th Cir. 2003).

STAFFING AGREEMENT

This Staffing Agreement is made and entered into effective September 2, 1998, by and between [COMPANY] ("COMPANY"), a corporation, with offices located at [Address], and [Temporary Services Provider] ("Employer"), a corporation with offices located at [Address] and is made with reference to the following:

A. Employer is engaged in the business of providing to its clients a full complement of services through personnel employed by Employer.

B. Employer wishes to provide such services to [COMPANY] and [COMPANY] wishes to obtain such services from Employer in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, the parties agree as follows:

1. SERVICES

[COMPANY] shall, from time to time, contract with Employer for services to be performed by Employer's (or approved subcontractor's) employees (the "Leased Employee(s)"). To request such services, [COMPANY] shall issue a "Personnel Requisition" (a form of which is attached hereto as Exhibit A, and which may be modified by [COMPANY] in its sole discretion). The Personnel Requisition shall set forth any requirements for the services to be performed including, but not limited to the number of persons needed to perform the services, the qualifications of the Leased Employees who will perform the services and the types of services to be performed. Employer shall complete the Personnel Requisition, including designation the Leased Employees to perform the services and the Leased Employee's pay rate. The requisition is subject to [COMPANY]'s acceptance and shall be deemed accepted by [COMPANY] only upon its written acceptance, as indicated on the Personnel Requisition form for the designated Leased Employee. Should [COMPANY], in its sole discretion, choose to amend any of the requirements of the services to be performed, then it shall issue a new Personnel Requisition form.

2. STATUS OF LEASED EMPLOYEE

Except as provided in this Agreement and/or required by law, all Leased Employees shall remain subject to the supervision and control of Employer, notwithstanding the fact that they may be performing services on the premises of [COMPANY]. To the extent that the applicable laws allow, Employer becomes the employer of all Leased Employees.

a. For purposes of applicable California workers' compensation law, [COMPANY] shall be the "Special Employer" and have rights of control and supervision over the Leased Employees and rights to determine the manner and means by which the Leased Employees perform their duties for [COMPANY]**.** Employer shall be the "General Employer" and hereby specifically reserves the right to reassign or terminate the employment of any Leased Employee upon written notice to [COMPANY], in the event any such Leased Employee fails to comply with any of his/her obligations to Employer or [COMPANY].

b. [COMPANY] maintains full control of its work sites, including the direction of the Leased Employees while the Leased Employees are performing work for [COMPANY]. [COMPANY] agrees to comply with all applicable occupational safety and health laws and regulations covering such Leased Employees. Employer agrees to provide all necessary occupational safety and health training for each Leased Employee.

c. [COMPANY] shall not be obligated to provide Employer or the Leased Employees with any of the rights and privileges established for [COMPANY]' employees.

3. OBLIGATIONS OF EMPLOYER

The parties expressly intend and agree that Employer is acting as an independent contractor and not as an agent or employee of [COMPANY]. Employer shall be solely responsible for (i) payment of all compensation to the Leased Employees, including compliance with all applicable laws, (ii) the withholding of federal, state, and local taxes from such compensation and the payment of all such withheld amounts to the appropriate agencies or authorities, (iii) payment to the appropriate agencies or authorities of state unemployment insurance, federal unemployment insurance, FICA and state disability insurance, (iv) paying workers' compensation insurance and providing evidence of such coverage to [COMPANY], and (v) providing the Leased Employee with all necessary and appropriate benefits attendant to their employment by Employer. [COMPANY] shall have no liability for any of Employer's debts, liabilities or obligations. Employer agrees to indemnify, defend and hold [COMPANY] harmless from and against any of such payments for which [COMPANY] may become liable with respect to such matters. This Agreement shall not be construed as a partnership agreement.

Employer shall not use any subcontractors (i.e., other temporary employee service agencies) to perform any services under this Agreement without the prior express written approval of [COMPANY]. For approval to be given, the following may be required: (i) Certification that Employer has a valid contract with the subcontractor which meets the terms and conditions of this Agreement and has no conflicting provisions (Employer agrees to provide a copy of such contract upon [COMPANY]' request), and/or (ii) Certification that personnel to be obtained from subcontractor are employees of subcontractor.

Employer, at its sole expense and discretion, shall at a minimum pay any Leased Employee an amount equivalent to a 40 hour bonus longevity pay for each 1,500 hours such Leased Employee works on assignment at [Company].

Employer agrees that it and the Leased Employees will at all times comply with all safety and security rules and regulations reasonably established by [COMPANY].

In addition to the obligations set forth in this Agreement, Employer shall also comply with the additional requirements relating to Affirmative Action and Training, as set forth in Exhibits C and D to this Agreement.

4. REPLACEMENT OF LEASED EMPLOYEES

Employer shall have the right to remove any Leased Employee and to replace him/her with personnel of comparable or superior abilities. [COMPANY] shall have the right to request Employer to remove, replace or reassign any Leased Employee and Employer shall immediately comply with any such request, subject to compliance with applicable state and federal law and any relevant rules and regulations promulgated thereunder.

5. CONFIDENTIALITY

a. Use of Confidential Information Received. [COMPANY] may from time to time communicate to Employer, or Employer may otherwise gain access to, certain confidential business and/or technical information with respect to Calcium's operations, business plans and/or intellectual property (the "Information"). Employer shall treat all Information as confidential, whether or not so identified, and shall not disclose, or permit the disclosure of, any Information without the prior written consent of [COMPANY]. Employer shall limit the use and disclosure of the Information within its organization to the extent necessary to perform its obligations hereunder. Employer shall ensure that the Leased Employees or others to whom it gives, or whom may otherwise gain access to, the Information under the terms of this Agreement shall comply with the obligations of confidentiality set forth in this Section 5. To that end, Employer shall provide a copy of this Section 5 (as reproduced in the form of Exhibit B) to each

such Leased Employee. Employer shall require that each of its Leased Employees execute an Acknowledgment of Proprietary Information and Confidentiality Obligations in the form of Exhibit C attached hereto prior to the date that any such Leased Employee performs any services at [COMPANY] and shall provide a signed copy of each such form to [COMPANY]. The terms of this Agreement are in addition to the terms of any nondisclosure agreement currently in effect between [COMPANY] and Employer, and in the event of any inconsistency between the terms of such agreements, those terms which are most protective of the Information shall prevail.

b. Confidentiality of Work Product. Employer shall not disclose to any party, without the prior written consent of [COMPANY] any of (i) Employer's or Leased Employee's works of authorship, discoveries, inventions and innovations resulting from the services performed for [COMPANY], or (ii) any proposals, research, records, reports, recommendations, manuals, findings, evaluations, forms, reviews, information, data, computer programs and software originated or prepared by Employer or any Leased Employee for or in the performance of such services (the items listed in clauses (i) and (ii) being hereinafter referred to collectively and severally as "Work Product").

6. PROPRIETARY RIGHTS

a. Rights to Information. Employer acknowledges and agrees that all Information shall remain the property of [COMPANY], and no license, express or implied, to use any of [COMPANY]' intellectual property is granted under this Agreement.

b. Works Made for Hire. Employer and [COMPANY] agree that any Work Product which is a work of authorship, including but not limited to any computer program or software, is a "work made for hire" within the meaning of 17 United States Code Section 101 in that it is a work that has been specially ordered or commissioned by [COMPANY] for use as a contribution to a collective work, as part of an audiovisual work, as a translation, as a supplementary work, as a compilation and/or as an instructional text.

c. Assignment of Work Product. All Work Products shall be promptly communicated to [COMPANY]. As additional consideration for the compensation to be paid to Employer under this Agreement, Employer hereby assigns to [COMPANY] all of Employer's rights, title and interest in and to all Work Product, and to any and all intellectual property rights, including but not limited to, patents, copyrights or trademarks which have been or may be obtained with respect to such Work Product, effective immediately upon origination, creation, preparation or discovery thereof and regardless of the medium of expression thereof. Employer shall communicate to [COMPANY] or its representatives all facts known to it respecting such Work Product. Further, whenever requested, Employer immediately shall execute (or cause its subcontractor to execute) a confirmatory assignment of any particular items(s) of Work Product in a form satisfactory to [COMPANY], shall testify in all legal proceedings, sign all lawful papers and otherwise perform all acts necessary or appropriate to enable [COMPANY] and its successors and assigns to obtain and enforce all available legal protections for all such Work Product in all countries, for which [COMPANY] will reimburse Employer's reasonable out-of pocket expenses. All Work Products shall become the exclusive property of [COMPANY], and Employer shall be deemed to have assigned and relinquished all rights, title and interest in and to such Work Product by virtue of this Paragraph 6(b).

7. COMPENSATION

As full compensation for the satisfactory performance of services to be provided by Employer under this Agreement, [COMPANY] agrees to pay Employer an amount mutually agreed upon for each Leased Employee by [COMPANY]. The hourly amount agreed to by the parties shall be referred to as the Leased Employee's "Base Pay Rate," and the gross pay received by the Leased Employee in any pay period shall be referred to as the Leased Employee's Base Pay. In addition to the Base Pay, [COMPANY] shall pay a fee for such employees, as follows:

Direct Placement Rate: When Employer has recruited and placed the Leased Employee in a position at [COMPANY], Employer's fee shall be x% of the Leased Employee's Base Pay.

Payroll Rate: When the Leased Employee has been recruited and selected for a position at [COMPANY] primarily by [COMPANY] Employer's fee shall be x% of the Leased Employee's Base Pay if the Base Pay Rate is $x per hour or less, and x% of the Leased Employee's Base Pay if the Base Pay Rate is greater than $x per hour.

Transition Rate: For those Leased Employees who are currently on assignment to [COMPANY] and who will be continuing their assignment with Employer, Employer's fee shall be x% of the Leased Employees' Base Pay for work performed prior to [date], and x% of those Leased Employees' Base Pay for work performed thereafter.

If the Exempt Leased Employee provides less than 40 hours of service in a given week, then amount paid to the Employer shall be prorated by days worked. No payment, either straight time or overtime will be made for hours worked by Exempt Leased Employee over 40 hours in a week. *If and when [COMPANY] identifies that a Leased employee will be required to work over 40 hours per week on average, the weekly salary will be based on the actual average number of hours required to work per week and broken down to a 40 hour per week hourly rate.

If [COMPANY] elects to hire a Leased Employee as an employee of [COMPANY] before 6 months of employment with the Employer have elapsed, [COMPANY] will pay the Employer a one-time fee of x% of leased employee's expected annual salary, based upon their Base Pay Rate and 2,080 hours worked per year.

Employer shall submit to [COMPANY], on a weekly basis, original invoices requesting payment for services performed by the Leased Employees at [COMPANY], and such invoices will be paid by [COMPANY] within fourteen (14) days after receipt. Invoices shall include a list of the Leased Employees that performed services at [COMPANY] during the applicable invoice period and state the number of hours that each such Leased Employee worked. If a good faith dispute arises in connection with an invoice amount, [COMPANY] and Employer shall use their best efforts to resolve the dispute in a timely manner through negotiations. If the dispute is not resolved through good faith negotiations by the date payment is due, [COMPANY] may defer payment of that portion of the invoice to which the good faith dispute exists, until the dispute is resolved.

8. INSURANCE

a. [COMPANY]. [COMPANY] will maintain General Liability and Worker's Compensation insurance covering claims involving bodily injury to [COMPANY]' employees and property damage or loss incurred as a result of a Leased Employee carrying out his or her work assignment on behalf of [COMPANY], including the operating or driving of any machinery, equipment or vehicles.

b. Employer. During the term of this Agreement, Employer shall maintain the following:

(i) Worker's Compensation insurance including Employers Liability coverage to cover claims involving bodily injury to the Leased Employees with minimum limits of $1,000,000, which claims may arise out of or relate to work assignments carried out on behalf of [COMPANY].

(ii) Commercial General Liability insurance (occurrence, not claims made, form), including personal injury, contractual liability and advertising injury, with minimum limits of $1,000,000 single limit per occurrence and $2,000,000 combined aggregate per occurrence (where applicable). [COMPANY] shall be named as an Additional Insured for purposes of this Agreement.

(iii) A fidelity bond insuring against the dishonest act(s) committed by its employees assigned to [COMPANY]' premises under this Agreement. Employer shall maintain such fidelity

bond in the amount of not less than $500,000. This fidelity bond requirement shall be waived in the instance that Employer is providing 2 or less Associate Employees on assignment at [COMPANY].

Employer shall provide [COMPANY] with a Certificate of Insurance evidencing such coverage and naming [COMPANY] as Additional Insured on such policies as appropriate, prior to the start of any Leased Employee at [COMPANY]. The Certificates shall certify that the policy limits may not be reduced, terms changed or policy canceled with less than thirty (30) days prior written notice to [COMPANY]. Employer shall permit any authorized representative of [COMPANY] to examine and copy Employer's original insurance policies upon [COMPANY]' request.

Employer shall require each subcontractor to provide and maintain at all times during the term of this Agreement insurance equivalent to that which is required of Employer.

The insurance and fidelity bond required by this Section 8(b) shall be primary with respect to any other insurance available to [COMPANY] and shall contain a waiver of subrogation by Employer's (or any subcontractor's) insurance carrier against [COMPANY] and its insurance carrier with respect to all obligations assumed by Employer pursuant to this Agreement.

9. INDEMNITY

Employer shall indemnify, defend and hold harmless [COMPANY] and its Affiliates from and against any and all claims, costs, liabilities, damages, and expenses (including reasonable attorney's fees) (individually and collectively "Liabilities"), arising out of or in connection with (i) any breach of any warranty, representation, covenant, or obligation contained in this Agreement, (ii) any action or conduct by Employer against or with respect to a Leased Employee, or (iii) any claim against [COMPANY] by or on behalf of any Leased Employee. Such indemnified claims shall include, but are not limited to charges of discrimination, actions and lawsuits alleging failure to comply with applicable Federal and State wage and hour laws, wrongful termination, discrimination, denial of due process, or other labor-related causes of action resulting from Leased Employee discipline, termination or conduct. Employer shall afford [COMPANY] the right to approve any and all legal counsel used in the defense of, and to approve the settlement of, any such Liabilities, which approval shall not be unreasonably withheld.

10. CONSEQUENTIAL DAMAGES

Except for any liability of Employer arising under Sections 5 and 6 of this Agreement, in no event will either party be liable to the other for any special, incidental, indirect or consequential damages (including lost profits) arising out of this Agreement whether in an action for or arising out of breach of contract, for tort, or any other cause of action.

11. TERMINATION

This Agreement shall commence on the Effective Date and shall continue until terminated by [COMPANY] upon thirty (30) days prior written notice of termination.

12. RECORDS

[COMPANY] shall furnish to Employer such information concerning the work records, hours of service, performance and other information with respect to the Leased Employees as Employer shall reasonably require to comply with all legal requirements of Employer as the employer of the Leased Employees. Employer shall keep and maintain accurate and complete records concerning the Leased Employees, and shall furnish to [COMPANY] such information concerning the work records, hours of service, performance and other information with respect to Leased Employees. Employer shall provide copies of any records or documentation it has in its possession, which [COMPANY] may reasonably require.

13. COMPLIANCE WITH LAWS/ REPRESENTATION

Employer agrees and warrants that it will comply with all applicable permits and licenses and all requirements of applicable federal, state or local laws, regulations or standards affecting its properties, the Leased Employees or the operation of its business, including but not limited to the Fair Labor Standards Act, as amended, with respect to wages and hours, the Occupational Safety and Health Act, as amended, and Title VII of the Civil Rights Act or 1964, as amended. Employer has not made and will not hereafter enter into any agreement with third persons or take any action which shall restrict its ability to perform its obligations under this Agreement and nothing in this agreement is contrary to any rules and regulations applicable to Employer.

14. NOTICES

All notices and billings shall be in writing and sent by registered or certified mail, postage prepaid, or via facsimile with confirmation to the following addresses:

To [COMPANY]:	To Employer:
[COMPANY] Address City, State Zip Attn: Accounts Payable	[Employer] Address City, State Zip

15. GENERAL PROVISIONS

a. Survivability. The terms and conditions of this Agreement that by their sense and context are intended to survive after performance of the Services hereunder shall survive the termination or expiration of this Agreement

b. Assignment. Employer shall not assign any of its rights or obligations under this Agreement and shall not subcontract any of the services to be performed hereunder without the prior written consent of [COMPANY]. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and permitted assigns.

c. Applicable Law. This Agreement has been executed and delivered in the State of California and shall be construed and enforced in accordance with the laws of such State. Any dispute, claim or controversy arising out of or relating to this Agreement, or the breach or validity hereof, shall be settled only by a court of competent subject matter jurisdiction in the county of San Diego, State of California, and each party hereby consents to the personal jurisdiction of such court(s).

d. Entire Agreement; Modification. This Agreement, together with the exhibits attached hereto, which are incorporated herein by this reference, constitutes the entire agreement between the parties and supersedes all prior oral or written negotiations and agreements between the parties with respect to the subject matter hereof. No modification, variation or amendment of this Agreement (including any exhibit hereto) shall be effective unless made in writing and signed by both parties. Nothing in this Agreement shall be deemed to give any third party any claim or right of action against Employer or [COMPANY] which does not otherwise exist without regard to this Agreement.

e. Severability; Non-Waiver. In the event that any of the terms, conditions or provisions of this Agreement are held to be illegal, unenforceable or invalid by any court of competent jurisdiction, the remaining terms, conditions or provisions hereof shall remain in full force and effect. The failure or delay of either party to enforce at any time any provision of this Agreement shall not constitute a waiver of such party's right thereafter to enforce each and every provision of this Agreement.

f. Publication of Agreement. Except as may otherwise be required by law or as reasonably necessary for performance hereunder, each party shall keep this Agreement and its provisions confidential, without first obtaining the written consent of the other party, which consent shall not be unreasonably withheld.

g. Other Documents. Employer and [COMPANY] agree to execute such other and further documents or instruments as may be reasonably required to effectuate the purposes of this Agreement.

h. Authority. Each of Employer and [COMPANY] warrants and represents it has full power and authority to enter into and perform this Agreement, and the person signing this Agreement has been properly authorized and empowered to enter into this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date first above written.

[COMPANY]	[Employer]
By:_____	By:_____
Name:_____	Name:_____
Title:_____	Title:_____

Exhibit A

(Personnel Requisition form attached)

Exhibit B

CONFIDENTIALITY

a. Use of Confidential Information Received. [COMPANY] may from time to time communicate to Employer, or Employer may otherwise gain access to, certain confidential business and/or technical information with respect to [COMPANY]'s operations, business plans and/or intellectual property (the "Information"). Employer shall treat all Information as confidential, whether or not so identified, and shall not disclose, or permit the disclosure of, any Information without the prior written consent of [COMPANY]. Employer shall limit the use and disclosure of the Information within its organization to the extent necessary to perform its obligations hereunder. Employer shall ensure that the Leased Employees or others to whom it gives, or whom may otherwise gain access to, the Information under the terms of this Agreement shall comply with the obligations of confidentiality set forth in this Section. Employer shall require that each of its Leased Employees execute an Acknowledgment of Proprietary Information and Confidentiality Obligations in the form attached hereto prior to the date that any such Leased Employee performs any services at [COMPANY] and shall provide a signed copy of each such form to [COMPANY]. The terms of this Agreement are in addition to the terms of any nondisclosure agreement currently in effect between [COMPANY] and Employer and in the event of any inconsistency between the terms of such agreements, those terms, which are most protective of the Information, shall prevail.

b. Confidentiality of Work Product. Employer shall not disclose to any party, without the prior written consent of [COMPANY] any of (i) Employer's or Leased Employee's works of authorship, discoveries, inventions and innovations resulting from the services performed for [COMPANY], or (ii) any proposals, research, records, reports, recommendations, manuals, findings, evaluations, forms, reviews, information, data, computer programs and software originated or prepared by Employer or any Leased Employee for or in the performance of such services.

Exhibit C

AFFIRMATIVE ACTION REQUIREMENTS

Employer shall make good faith efforts to support [COMPANY]'s Equal Employment Opportunity / Affirmative Action efforts, including, but not limited to:

- Making good faith efforts to recruit and train qualified candidates in all areas identified by [COMPANY], including addressing those positions in which [COMPANY] has identified an underutilization of female or minority employees.

- Providing [COMPANY] with a monthly adverse impact analysis in a form to be specified by [COMPANY], detailing all recruiting and hiring activity for the previous month as well as the Affirmative Action Plan year-to-date. Such analysis will be provided to [COMPANY] no later than the seventh business day of each month.

- Providing [COMPANY] with a monthly list of qualified candidates interviewed by Employer on [COMPANY]' behalf, but not selected for placement. Such reports shall be in a form specified by [COMPANY] and submitted to [COMPANY] no later than the seventh business day of the month following the month to be reported..

- Providing [COMPANY] with a quarterly plan of outreach efforts, including the results of such efforts for the previous quarter and Affirmative Action Plan year-to-date. Plans and plan results shall be provided to [COMPANY] not later than the tenth business day after the quarter's close.

All the aforementioned reports / analyses shall be provided to a Director of Human Resources for [Company] with copies to [Affirmative Action Officer].

Exhibit D

ACKNOWLEDGMENT OF PROPRIETARY INFORMATION AND CONFIDENTIALITY OBLIGATIONS

1. Nondisclosure. In connection with my employment by, or my engagement as an independent contractor with Employer ("Employer"), I may gain access to certain confidential and/or proprietary information of [COMPANY] ("COMPANY") during the period of my assignment at [COMPANY]. This information may include, but may not be limited to, matters (i) of a technical nature (such as products, discoveries, specifications, inventions, software, computer programs, and similar items), (ii) of a business nature (such as cost, profit, marketing or customer lists), or (iii) pertaining to future operations and developments, all of which is of a confidential nature and which contains valuable trade secrets and know-how proprietary to [COMPANY] (the "Information"). Employer has entered into an agreement with [COMPANY] effective as of [Date] (the "Agreement") pursuant to which Employer has agreed to certain confidentiality obligations with respect to the Information. Therefore, as a condition of my receiving access to the Information, and for other good and valuable consideration including, but not limited to, the compensation paid by [COMPANY] to Employer in connection with my assignment at [COMPANY], I agree to the following:

(a) I acknowledge that I have been provided with the terms of Employer's confidentiality obligations with respect to the Information, I have read and understand such obligations, and agree to be bound by same.

(b) In particular, and without limiting the foregoing, I acknowledge and understand that the Information to which I will gain access is the confidential and proprietary information of [COMPANY] and I agree I will (i) not remove such Information from its site unless authorized by [COMPANY]; (ii) not disclose, or permit disclosure of, any Information without the prior written consent of [COMPANY]; (iii) promptly notify Employer and [COMPANY] of any such unauthorized use or disclosure of which I learn; (iv) limit use of such to the extent necessary to perform my assignment at [COMPANY]; and (v) return to [COMPANY] any and all copies of the Information in my possession or control, and any portion thereof, whether prepared by me or not, promptly upon receipt of notice from Employer or [COMPANY] requesting such return or upon termination of my assignment at [COMPANY]. I further acknowledge that my right of access to the Information expires upon termination of my assignment at [COMPANY], either by notice from Employer or [COMPANY]. I acknowledge and agree that my obligations set forth herein (and in the Agreement) regarding the non-disclosure non-use and/or return of the Information shall survive any such termination or expiration of my access to the Information.

2. Assignment of Work Product. I promise to promptly and fully disclose to [COMPANY] and hereby assign, transfer and convey to [COMPANY] all my entire right, title and interest in and to any and all (i) inventions, discoveries, developments, formulae, processes, improvements, ideas and innovations, and (ii) computer programs, sales brochures, reports, and other works of authorship (and all proprietary rights, including but not limited to trade secret rights, patent rights, copyrights, mask work rights and all other rights throughout the world in connection therewith) whether or not patentable or registrable under copyright or similar statutes, made, conceived, reduced to practice, authored, or fixed in a tangible medium of expression by me, either alone or jointly with others, which results from my work or association with [COMPANY](hereinafter collectively and severally referred to as "Work Product"). I do hereby release [COMPANY] including its successors, assigns, affiliates, subsidiaries, licensees, directors, employees, agents and representatives (collectively, the "Affiliates") from any and all claims by me by reason of any use or disclosure by [COMPANY] or the Affiliates of any Work Product.

3. Third Party Beneficiary. I acknowledge that [COMPANY] is a third-party beneficiary to this acknowledgment since this acknowledgment contains provisions which relate to my access to, and use of, the Information. I understand that such provisions are made expressly for the benefit of [COMPANY] and are enforceable by [COMPANY] in addition to Employer.

Signature:_____ Date:_____

Printed Name:_____

CLIENT SERVICE AGREEMENT

THIS AGREEMENT (the "Agreement") is between Staffing Firm, and Client. This relationship and the allocation of responsibilities are defined in this Agreement.

I. PERSONNEL

Staffing Firm and Client agree that Staffing Firm will provide personnel management services to Client through an allocation of responsibilities and that they will be co-employers of the worksite employees.

II. TERM OF AGREEMENT

This Agreement shall commence on the date shown below and remain in force until either Staffing Firm or Client terminates the Agreement by giving thirty (30) days prior written notice unless otherwise provided herein or as agreed to in writing.

III. ADMINISTRATION

3.1 Staffing Firm is responsible for the following:

a. reserving a right of direction and control over Staff, including a right to hire or terminate as to Staffing Firm's employment relationship with Staff, maintain Staff records, and a right to resolve Staff disputes not subject to a collective bargaining agreement;

b. payment of salaries, wages, and compliance with applicable rules and regulations governing the reporting and payment of all federal and state taxes on payroll wages paid under this Agreement, including, but not limited to: (i) federal income tax withholding provisions of the Internal Revenue Code; (ii) provisions of state and/or local income tax withholding laws, if applicable; (iii) provisions of the Federal Insurance Contributions Act ("FICA"); (iv) provisions of the Federal Unemployment Tax Act ("FUTA"); and, (v) provisions of applicable state unemployment tax laws;

c. providing employee benefits under the terms and conditions as amended from time to time, of those Staffing Firm sponsored plans set forth on Schedule B, if any are to be provided, and compliance with its obligations under the Health Insurance Portability and Accountability Act ("HIPAA") if applicable, and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), if applicable solely with respect to employee benefit plans sponsored by Staffing Firm;

d. procurement of workers' compensation insurance and administration of claims for Staff;

e. development and implementation of policies and practices in conjunction with Client relating to personnel management services only, including, but not limited to, enrolling, recruiting, interviewing, testing, selecting, training, evaluating, replacing, supervising, disciplining, reassigning, and terminating Staff; and

3.2 Client is responsible for the following:

a. the service provided or product produced by Client;

b. the direction and control over Staff as necessary to conduct Client's business, including a right to hire or terminate as to Client's employment relationship with Staff, and comply with any applicable licensure, regulatory or statutory requirement of Client and/or Staff;

c. development and implementation of policies and practices related to the services provided or product produced by Client, including, but not limited to hiring, training, evaluating, supervising, disciplining and terminating Staff;

d. compliance with any professional licensing, fidelity bonding, and/or professional liability insurance requirements;

e. compliance with Occupational Safety and Health Administration ("OSHA") regulations, Environmental Protection Agency ("EPA") regulations, child labor laws, Worker Adjustment and Retraining Notification Act ("WARN"), Fair Labor Standards Act ("FLSA"), including Equal Pay Act, Uniformed Services Employment and Reemployment Rights Act ("USERRA") and compliance with federal governmental contracting provisions, and any state and/or local equivalent of any of the foregoing;

f. compliance with National Labor Relations Act ("NLRA") and liability for all obligations, including organizing efforts and process expenses, related to Client's collective bargaining agreement and any benefits arising from such agreement;

g. the operation of Client's business, equipment or property, including motor vehicles;

h. the payment, through Staffing Firm, of commissions, bonuses, paid leaves of absence, and severance payments to Staff, if any;

i. the payment of any non-qualified deferred compensation or equity based compensation of any type, including, but not limited to, stock options, restricted stock and phantom stock, the number and value of options granted, whether such payment is actual or imputed for taxing purposes, and compliance with all applicable rules and regulations governing such compensation including, but not limited to, valuation, payment or reporting of such compensation;

j. development and implementation of policies and practices to establish and maintain Client's intellectual property rights including but not limited to patents, trademarks, copyrights, trade secrets and confidential information and to prevent any infringement or unauthorized use of Client's intellectual property rights by any third party;

k. development and implementation of policies and practices to avoid infringement or unauthorized use by Staff and/or Client of any intellectual property rights;

l. to the extent Client deems appropriate, entering into agreements with Staff concerning assignment of inventions and copyrights to Client and protection of Client's intellectual property rights;

m. compliance with administrative procedures established by Staffing Firm with respect to Staffing Firm sponsored employee benefit plans;

n. compliance with all applicable requirements of HIPAA and ERISA, if any, with respect to Client and/or its employees, including but not limited to, Client's business operations, Client-sponsored employee benefit plans and Client's workplace; and

o. compliance with Fair Credit Reporting Act ("FCRA") and any state equivalent in the event Client processes its own employee/candidate background checks.

3.3 Staffing Firm and Client will each be responsible for its own compliance with all federal, state and local employment laws, including, but not limited to, Title VII of the 1964 Civil Rights Act; Age Discrimination in Employment Act ("ADEA"); Title I of the Americans with Disabilities Act ("ADA"); Family and Medical Leave Act ("FMLA"); Consumer Credit Protection Act, Title III; 42 U.S.C. § 1981; § 503 of the Rehabilitation Act of 1973; immigration laws and regulations, and any state and/or local equivalent of the foregoing, as well as any and all personnel management policies and procedures that are maintained by Staffing Firm and referenced in paragraph 3.1e.

IV. SUPERVISION AND EMPLOYMENT AGREEMENT

One or more on-site supervisors shall be designated by Staffing Firm from among Staff. On-site supervisors shall be Staffing Firm’s contact for facilitating personnel management services provided by Staffing Firm.

V. WORK ENVIRONMENT

5.1 Client agrees that it will comply, at its sole cost and expense, with all applicable federal, state and local health and safety laws, regulations, rules, ordinances, and directives and rules relating to workplace, provide and ensure use of all personal protective equipment, and follow all recommendations concerning a safe work environment suggested by Staffing Firm’s workers' compensation insurance carrier.

5.2 Client agrees to immediately report to Staffing Firm all work-related accidents and injuries involving Staff.

5.3 Staffing Firm and Staffing Firm’s workers' compensation insurance carrier shall have the right to inspect Client's workplace, including, but not limited to, any job sites at which Staff work. To the extent possible, such inspections shall be scheduled at mutually convenient times.

VI. INSURANCE

6.1 Staffing Firm shall, at its expense, keep in force at all times during this Agreement, workers' compensation insurance covering Staff. Client shall be named an alternate employer. Upon written request by Client, Staffing Firm shall request that its insurance carrier furnish a certificate of insurance verifying coverage. The policy shall include a waiver of subrogation.

6.2 Client warrants and represents to Staffing Firm that it has in force at the Effective Date of this Agreement, and will maintain during this Agreement, the following insurance coverage and minimum limits. Such coverage shall be provided at the Client's sole cost and expense and shall be provided by a state approved insurance company and rated by A M Best Company at A- or better.

a. General Liability. Commercial General Liability coverage in standard form on an occurrence basis covering Client's operations with minimum limits of:
   (1) $2,000,000.00 General Aggregate
   (2) $1,000,000.00 Products/Completed Operations Aggregate and/or Error and Omissions (Malpractice)
   (3) $1,000,000.00 Personal and Advertising Injury
   (4) $1,000,000.00 Each Occurrence.
   Additional coverage may be required for special operations.

b. Automobile Liability. Comprehensive automobile liability insurance covering all owned, hired, and non-owned Client vehicles, with minimum limits of One Million and No/100 Dollars ($1,000,000.00) combined single limit per occurrence for bodily injury and property damage liability. Client warrants that all persons operating Client's vehicles are duly licensed and covered under the Client's automobile liability insurance policy without exception. Client agrees to furnish to Staffing Firm a list of drivers upon request. The policy shall be endorsed to include, at no additional cost to Staffing Firm, Staff who shall be operating motor vehicles for Client.

c. Workers' compensation insurance coverage on any of its employees that are not part of Staff and any Client subcontractor employees.

6.3 Policy Requirements. All Client insurance policies required herein shall provide for thirty (30) days written notice to Staffing Firm prior to cancellation or non-renewal of the coverage. All such insurance policies shall be endorsed to waive any and all rights of subrogation against Staffing Firm and name Staffing Firm as an additional insured, both at no additional cost or expense to Staffing Firm. Each of the policies shall be primary insurance and not excess over or contributory with any other valid, existing and applicable insurance carried by Staffing Firm.

6.4 Client shall submit certificates of insurance to Staffing Firm signed by authorized representatives of insurance companies evidencing all insurance required pursuant to this Article VI within thirty (30) days of execution of this Agreement and at any renewal or replacement of such policies.

6.5 Waiver of Subrogation. Each party to this Agreement hereby waives any claim in its favor against the other party by way of subrogation or otherwise, which arises during this Agreement, for any and all liability, loss or damage which is covered by policies of insurance required hereunder or covering property, to the extent that such liability, loss or damage is recovered under such policies of insurance. Since the mutual waivers will preclude the assignment of any aforesaid claim by way of subrogation or otherwise to an insurance company or any other person, each party agrees to immediately give to each of its insurance carriers, written notice of the terms of said mutual waiver, and to have its insurance policies properly endorsed, if necessary, to prevent the invalidation of said insurance coverage by reason of said waiver.

VII. SERVICE FEE

In exchange for the personnel management services provided by Staffing Firm, Staffing Firm and Client agree as follows:

7.1 The Staffing Firm service fee percentage ("Staffing Firm Service Fee Percentage") is established for each employee (Staff) based upon a) information provided by the Client, b) federal and state statutory requirements including taxes and fees, and c) Staffing Firm's insurance costs, and professional services and administrative fees ("Staffing Firm Allocations").

7.2 Each pay period Client shall pay Staffing Firm the total service fee ("Total Service Fee") comprised of the actual gross payroll of Staff during such pay period plus the applicable Staffing Firm Service Fee Percentage, plus any other charges related to services provided to Client including, but not limited to, medical premiums not collected from Staff who have not received an Staffing Firm payroll check. All charges shall be reflected on the Staffing Firm invoice.

7.3 Any invoice provided under this Agreement shall be due and payable by Client upon receipt. Client shall use a method of payment approved in advance by Staffing Firm.

7.4 Client shall reimburse Staffing Firm for services requested by Client not contemplated by Staffing Firm and not included as part of the Staffing Firm Service Fee Percentage. Staffing Firm shall advise Client if the requested service is an extra charge.

7.5 Client will notify Staffing Firm of any changes, errors or inaccuracies in any payroll, payroll report, within ten (10) days of such error or change.

7.6 Staffing Firm reserves the right to impose any terms of the then current Staffing Firm credit policy ("Credit Policy").

7.7 Each payroll period, Client shall provide a written report to Staffing Firm of all time worked by non-exempt Staff, days worked by exempt-salaried Staff, and commissioned Staff. Client will accurately report FLSA classification of all Staff, pay rate and any overtime worked by non-exempt Staff.

VIII. DEFAULT

8.1 Acts of default by Client are:

a. failure of Client to pay an invoice when due;

b. failure of Client to comply with any directive of Staffing Firm, when such directive is promulgated or made necessary by: (i) a federal, state or local governmental law or regulation; (ii) an insurance carrier providing coverage to Staffing Firm and/or its Staff; or (iii) specific circumstances which may affect the safety or violate the legal rights of Staffing Firm or Staff;

c. commission or omission of any act that usurps any material right or obligation of Staffing Firm as a co-employer of Staff including failing to cooperate with Staffing Firm in its fulfilling its obligations hereunder or violation by Client of any material provision of this Agreement;

d. Client has become a credit risk in Staffing Firm's reasonable estimation, based on factors which include, but are not limited to, a temporary or permanent layoff, solicited time off, or significant decrease in Staff or wage rates;

e. filing by or against Client for bankruptcy, reorganization or appointment of a receiver, supervisor, assignee, trustee, or liquidator over its assets or property, Client's failure to meet any of its financial covenants, or Staffing Firm's reasonable belief Client is insolvent;

f. failure to follow terms of Staffing Firm's credit policy after being given written notice of the failure;

g. failure to cooperate with Staffing Firm in its fulfilling any of its obligations under this Agreement after being given notice of the failure to cooperate;

h. a material money judgment against Client which remains unsatisfied for more than thirty (30) days and has not been appealed;

i. without the prior express written consent of Staffing Firm, making any form of press release or announcement to the general public regarding this Agreement, publicizing Staffing Firm or using its trade marks, and/or service marks, or otherwise disclosing to the general public in a public forum that the parties have entered this Agreement or have a relationship; or

8.2 Upon an act of default by Client, Staffing Firm shall have the option, in its sole and absolute discretion, of terminating this Agreement immediately in the case of a default under paragraphs 8.1a, b, c, d, e, f, g, i or j or after cure period provided in paragraph 8.1 h by written facsimile transmission or any other method of written communication to the address stated in paragraph 12.7.

IX. INDEMNITY

9.1 Staffing Firm hereby agrees to indemnify, defend and hold Client harmless from and against any and all liability, expense (including cost of investigation, court costs and reasonable attorneys' fees) and claims for damage of any nature whatsoever, whether known or unknown and whether direct or indirect, as though expressly set forth and described herein which Client may incur, suffer, become liable for, or which may be asserted or claimed against Client as a result of Staffing Firm failing to pay when due wages to Staff, federal, state and local payroll taxes, if any, and health insurance premiums in Staffing Firm sponsored plans for participating Staff or to secure workers' compensation insurance coverage for Staff.

9.2 Notwithstanding anything herein or in any other agreement or document to the contrary, Client expressly agrees that Staffing Firm shall under no circumstances be liable for any special, incidental or consequential damages of any nature whatsoever arising under or relating to this Agreement.

9.3 Client hereby agrees to indemnify, defend and hold Staffing Firm, Staffing Firm, Inc. and all subsidiaries of or companies affiliated with Staffing Firm, Inc. by shareholdings or other means of control, its and their current and/or former officers, directors, shareholders, employees and agents ("Staffing Firm Indemnified Parties"), harmless from and against any and all liability, or expense (including cost of investigation, court costs and reasonable attorneys' fees) and claims for damage of any nature whatsoever, whether known or unknown and whether direct or indirect, as though expressly set forth and described herein, which Staffing Firm Indemnified Parties may incur, suffer, become liable for or which may be asserted or claimed against Staffing Firm Indemnified Parties with respect to this Agreement, including but not limited to:

a. relating to any claims, incidents or causes of action that occurred prior to the Effective Date of this Agreement, regardless of whether the claims, incidents or causes of action were asserted prior to or after the Effective Date of this Agreement;

b. as a result of the failure of Client to follow the directives, procedures and policies of Staffing Firm as they relate to Staff which includes, but is not limited to, claims arising from the acts or failures to act of the Client and/or its employees, agents, former employees or former agents in accordance with (i) applicable federal, state or local laws or (ii) the terms and conditions of this Agreement;

c. arising from the Client's actions or omissions toward Staff, or their rights or terms and conditions of employment, (including but not limited to violations under FLSA, OSHA or WARN) or a breach of any of its duties under paragraph 3.2.

d. arising from actions of Staff toward non-employees of Staffing Firm whether based on contract, tort or statutory violation or under paragraph 10.2 hereof or arising from non-Staff Client employees or contractors;

e. arising from any product produced and/or services provided by Client;

f. arising from operation by Client, Client's employees or Staff of any form or type of motor vehicle and any violation of Department of Transportation, Interstate Commerce Commission and/or Motor Carrier Act;

g. arising from employee or Staff unionization and/or provision of benefits to any Staff member covered by a collective bargaining agreement, any organizing activity or claims based on NLRA;

h. arising from any Client employment agreement or offer letter Client has with Staff, or any policy or plan Client has regarding paid time off or other payment plans such as vacation, sick leave, severance, bonus or commissions and nothing in this provision creates any such policy or plan;

i. arising from any infringement, alleged infringement, unauthorized use or alleged unauthorized use of any intellectual property rights, including but not limited to patents, trademarks, copyrights, trade secrets and confidential information, by Staff or Client and by any product or services provided by Client;

j. as a result of the failure of Client to properly maintain and operate any separate employee benefit plan(s), including, but not limited to, a defined contribution or defined benefit pension plan or a welfare plan maintained by Client in accordance with all applicable federal and state laws and any accompanying regulatory guidance thereto, including, but not limited to, Client or Client's agents failure with respect to such plan(s) to make timely deposits to the appropriate plan(s) in an amount equal to the Staff requested wage deferral, to perform proper discrimination and coverage testing, file required annual informational or event specific returns or reports with the appropriate regulatory agencies, and timely pay any applicable premiums or vendor fees; or

9.4 In the event Staffing Firm incurs any expenses, fines and/or liabilities as a result of an act of default by Client, Client shall reimburse Staffing Firm for all actual expenses, fines and/or liabilities, including, but not limited to, reasonable attorneys' fees, court costs and any related expenses as they are incurred.

9.5 The indemnities in this section shall be deemed to be contractual in nature and shall survive termination of this Agreement.

X. REPRESENTATIONS, WARRANTIES AND AGREEMENT

10.1 Client agrees not to engage in any conduct that is, or could be in any way, inconsistent with the policies and procedures of Staffing Firm made known to Client or the fact that the Staff are the co-employees of Staffing Firm and Client.

10.2 Client agrees that Staffing Firm will have no responsibility or liability for any losses or claims that arise as a result of Staff's negligence, theft, embezzlement, or other unlawful or willful acts committed by Staff.

10.3 Client agrees to comply with all applicable Department of Transportation, Interstate Commerce Commission and Motor Carrier Act requirements and regulations if Client uses Staff to operate motor vehicles.

10.4 Client agrees to provide Staffing Firm with a copy of any notice, complaint or charge of a government agency and/or legal action concerning (i) Client's workplace; (ii) Client's compliance with any laws, rules, regulations or ordinances relating to the workplace; or, (iii) any Staff within five (5) days of its becoming aware of such notice, complaint, charge or legal action via facsimile transmission to the EEO Compliance Group.

10.5 Client agrees to notify Staffing Firm in advance if it has executed a collective bargaining agreement, is in the process of negotiating a collective bargaining agreement, experiencing organizing activities, or has any employees represented by a union.

10.6 Client acknowledges that any and all employee benefit plans maintained by Staffing Firm may be amended, modified or terminated at any time at the sole discretion of Staffing Firm or its affiliates. Such modifications include but are not limited to, increases or decreases of participant co-pays, deductibles, out of pocket maximums, covered services, and the like and such modifications shall not be restricted as a result of any provision(s) contained in a collective bargaining or other agreement entered into by Client.

10.7 In the event Client files a voluntary petition under Title 11 of the United States Code, or in the event that an involuntary petition is filed against Client under Title 11, all debts that the Client may owe to Staffing Firm shall be considered "administrative expenses" within the meaning of 11 U.S.C. § 503 (b)(1)(A) and Staffing Firm's claim or claims for such administrative expenses shall be entitled to the priority specified in 11 U.S.C. § 507 (a) (1). Client further agrees to use every effort and cooperate with actions, which will so classify these claims as administrative.

10.8 Client agrees to cooperate fully with Staffing Firm in any investigation including, but not limited to, the defense of any employment-related claim, involving Staff whether such investigation or claim is initiated by Staff, a government agency or by Staffing Firm.

10.9 Client warrants and represents that all individuals it has represented to Staffing Firm as Staff are: (i) its employees and (ii) included in the personnel management services of Staffing Firm including receiving wages and coverage under insurance and benefit plans.

10.10 Client warrants and represents to Staffing Firm that, prior to entering into this Agreement, Client has informed Staffing Firm of all compensation, pension and/or benefit plans that Client may currently provide, or has heretofore provided, for any owners, partners, shareholders, directors, officers, employees or agents of Client. Client acknowledges that if Client currently provides or has previously provided any pension or benefit plans to such individuals or their dependents, certain complex rules under ERISA and the Internal Revenue Code may apply to these plans, as well as to any plans maintained by Staffing Firm, as a result of this Agreement. If Client currently maintains or has maintained any such plans, Client acknowledges that Staffing Firm has advised Client to seek advice from a qualified professional regarding the effect of this Agreement on such plans. Client further warrants

and represents to Staffing Firm that it has fully disclosed to Staffing Firm the total number of individuals to whom it has any COBRA responsibilities as of the date of execution of this Agreement.

10.11 Client warrants and represents to Staffing Firm that prior to entering into the Agreement, it has not engaged to the best of its knowledge in any violations of federal, state or local laws or regulations regarding wage and hour, unfair labor practices or discrimination and that Client is current on the payment of all wages, payroll taxes, and workers' compensation assessments and penalties, if applicable.

10.12 Client acknowledges that at the time of termination of this Agreement, Staffing Firm will send Staff employment termination notices terminating Staffing Firm's relationship with Staff, which will not affect the employment relationship Client has with Staff.

10.13 Upon termination of this Agreement, Client will retain sole responsibility and liability for all accumulated unpaid sick leave, paid time off, vacation or similar liabilities for Staff.

10.14 Client agrees to notify Staffing Firm in advance if it owns or operates aircraft or watercraft or has any foreign operations or expatriates.

10.15 Client warrants it will not request Staff to perform any services outside that person's workers' compensation code or employee's ability or training if such service would expose the individual, Staff or other persons to injury.

XI. ARBITRATION

11.1 Except for unpaid invoices owed by Client to Staffing Firm, Staffing Firm and Client agree and stipulate that all claims, disputes and other matters in question between Staffing Firm and Client arising out of, or relating to this Agreement or the breach thereof, will be decided by arbitration in accordance with the Federal Arbitration Act (9 U.S.C. §§ 10 and 11) and the Commercial Arbitration Rules of the American Arbitration Association subject to the limitations of this Article XI. This Agreement to so arbitrate and any other agreement or consent to arbitrate entered into in accordance herewith as provided in this Article XI will be specifically enforceable under the prevailing law of any court having jurisdiction.

11.2 Notice of the demand for arbitration will be filed in writing with the other party to the Agreement and with the American Arbitration Association. The demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

11.3 No arbitration arising out of, or relating to, this Agreement shall include by consolidation, joinder or in any other manner any other person or entity who is not a party to this contract unless:

a. the inclusion of such other person or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration, and/or such other person or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings; and

b. the written consents of the other person or entity sought to be included and Staffing Firm and Client have been obtained for such inclusion, which consent shall make specific reference to this paragraph 11.3, but no such consent shall constitute consent to arbitration of any dispute not specifically described in such consent or to arbitration with any party not specifically identified in such consent.

11.4 The award rendered by the arbitrators will be final, judgment may be entered upon it in any court having jurisdiction thereof, and will not be subject to modification or appeal except to the extent permitted by §§ 10 and 11 of the Federal Arbitration Act (9 U.S.C. §§ 10 and 11).

XII. MISCELLANEOUS

12.1 This Agreement is between Staffing Firm and Client and creates no individual rights of Staff or any third parties, as against Client or Staffing Firm.

12.2 Client shall not assign this Agreement or its rights and duties hereunder, or any interest herein, without the prior written consent of Staffing Firm, except to a subsidiary or affiliate.

12.3 The prevailing party, in any enforcement action arising with respect to this Agreement, shall be entitled to recover from the other party all costs of such enforcement action including, without limitation, reasonable attorneys' fees, court costs and related expenses.

12.4 EXCEPT FOR ARTICLE XII OF THIS AGREEMENT, WHICH SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT (9 U.S.C. §§ 10 AND 11), THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS WITHOUT REFERENCE TO THE CONFLICTS OF LAWS PRINCIPLES THEREOF.

12.5 This instrument contains the entire Agreement of the parties and supersedes all prior and contemporaneous agreements or understandings, whether written or oral, with respect to the subject matter hereof. No amendment or modification to this Agreement shall be valid unless in writing and signed by both parties hereto. This Agreement is binding on the parties as of the last date it is signed by the parties if the execution dates are different.

12.6 If any provision of this Agreement, or any amendment thereof, is determined by a court of competent jurisdiction to be invalid the remaining provisions shall remain in effect and be so construed as to effectuate the intent and purposes of this Agreement and any amendments thereto.

12.7 All notices, requests and communications provided hereunder and required by Client except as required under paragraphs 5.2 and 10.4 shall be in writing, sent by facsimile with written confirmation of successful transmission, or hand-delivered with a signed receipt, or mailed by prepaid United States registered, certified, or express mail, return receipt requested, or overnight courier service and addressed to the party's principal place of business as set forth in this Agreement (or to such other address provided in writing by such party).

If to Staffing Firm: If to Client:

12.8 The waiver by either party hereto of a breach of any term or provision of this Agreement shall not operate or be construed as a waiver of a subsequent breach of the same provision or of a breach of any other term or provision of this Agreement by any party.

12.9 Force Majeure. Neither Staffing Firm nor Client shall be required to perform any term, condition, or covenant of this Agreement so long as such performance is delayed or prevented by force majeure, which shall mean acts of God, strikes, lockouts, labor restrictions by any governmental authority, civil riot, floods, and any other cause not reasonably within the control of Staffing Firm or Client and which by the exercise of due diligence by Staffing Firm or Client is unable, wholly or in part, to prevent or overcome.

12.10 Authority. Each party represents and warrants that each has actual authority and power to enter this Agreement and to be bound by the terms and conditions hereof. Any individual signing this Agreement on behalf of a Client represents, warrants and guarantees that he or she has full authority to do so. This Agreement is binding upon Staffing Firm only if signed by the President or a Vice President.

Effective Date of the Agreement: _____.

This Agreement is executed by Staffing Firm on _____ day

of _____, _____.

This Agreement is executed by Client on _____ day

of _____, _____.

STAFFING FIRM

CLIENT

BY: _____
(Signature) Title or Position

BY: _____
(Signature) Title or Position

