



Oct. 8, 2013

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Best Practices for Business and Contractual Relationships

Between Staffing Firms, Managed Service Providers, Vendor Management System Providers, and Clients¹

Introduction

The American Staffing Association is the voice of the U.S. staffing industry. ASA and its affiliated chapters advance the interests of staffing and recruiting firms of all sizes and across all sectors through legal and legislative advocacy, public relations, education, and the promotion of high standards of legal, ethical, and professional practices. ASA members provide the full range of employment and workforce services and solutions, including temporary and contract staffing, recruiting and permanent placement, outplacement and outsourcing, training, and human resource consulting.

ASA recognizes and supports staffing firm clients' desire to streamline their workforce procurement processes and make them more efficient. Managed service providers (MSPs) can play a role by managing their clients' temporary staffing procurement processes; coordinating their temporary labor programs; and centrally managing their staffing needs by recommending, selecting, and engaging directly with staffing firms on behalf of their clients. Similarly, vendor management system (VMS) providers can provide clients with software tools customized to facilitate the purchase and management of staffing services by providing hiring managers and staffing firms with the ability to place and fill online orders for temporary employees.

When utilizing such providers, clients should take proactive steps to ensure that the quality of staffing firms' services is not compromised. While staffing firms have a wealth of expertise in providing talent with the right skills, and at the right time and price, people are not commodities—providing temporary and contract workers who have the requisite experience, attitude, behavioral attributes, and cultural fit is more art than science. Because the relationship among clients, MSPs, VMS providers, and staffing firms is interconnected, all parties must work closely together to achieve the optimum result. Such result can be achieved through balanced contracts that accurately reflect the needs and concerns of all parties.

¹ The information in this document should not be relied on as, and is not intended to be, legal advice. Staffing firms, MSPs, VMS providers and clients requiring legal or other advice regarding the matters discussed in the best practices should consult with experienced legal counsel. ASA's best practices are voluntary, and each staffing firm, MSP, VMS provider, and client must make its own decisions as to the business practices and contractual and other issues discussed herein.

Equitable, Balanced Contracts Benefit Clients, MSPs, VMS Providers, and Staffing Firms

Although clients generally are not parties to contracts between staffing firms and MSPs or VMS providers, many clauses in client contracts with MSPs and VMS providers flow down to contracts between the MSPs/VMS providers and staffing firms.² Therefore, clients should ensure that staffing contracts are fair and equitably reflect all parties' needs and perspectives. Such a balanced approach ultimately will benefit all involved—MSPs and VMS providers can devote less time and resources to negotiating and modifying their contracts with staffing firms, and staffing firms will be better able to satisfy clients' needs efficiently.

In this regard, ASA believes that clients should engage with their MSPs and VMS providers to ensure that their contracts, as well as flow-down agreements between MSPs or VMS providers and staffing firms

- **Apportion risk fairly.** Similar to any other contractual relationship, liability should rest with the party causing such liability. Staffing firms stand behind, and should be responsible for, the services they provide—screening, hiring, and compensating assigned temporary workers. However, staffing firms are not guarantors of specific work product or outcomes provided by the assigned temporary workers. In fact, they have no control over nor provide input regarding the manner in which such work is accomplished. Similarly, MSPs and VMS providers stand behind their services but, like staffing firms, they do not control or direct assigned workers with respect to work performed. Accordingly, each party should be responsible for only those services that it renders, and staffing firms, MSPs, and VMS providers should not be asked to assume responsibility for the acts or omissions of clients or temporary workers supervised by clients.
- **Accurately reflect, and do not contradict, applicable law or public policy.** Any contractual clauses to the contrary, such as those that misstate the legal relationship between the staffing firm and client, or the MSP or VMS provider and client, are at best inaccurate and at worst harmful to the parties; also, such clauses may be unenforceable and uninsurable by the parties.

Because current client contracts with MSPs and VMS providers, and flow-down agreements with staffing firms, do not always reflect the above approach, clients are encouraged to consider, discuss, and, where appropriate, amend the following common contract clauses to achieve balanced working relationships and improve the quality and efficiency of the procurement process.

² Some MSP and VMS arrangements are structured so that the staffing firm contracts directly with the client. While the best practices set forth herein specifically address the more typical arrangement whereby the staffing firm contracts directly with the MSP or VMS provider, the best practices' underlying principles are equally applicable to both types of contractual arrangements.

Contract Clauses Giving Rise to Significant Liability or Financial Ramifications: Apportionment of Risk; the Legal Relationship between the Parties; Payment Terms; and Temporary Employee Screening, Private Information, and Termination

I. Indemnification:

Of all contract clauses, broad indemnification clauses present perhaps the greatest liability risk for staffing firms, MSPs, and VMS providers. At their broadest, such clauses may require these parties to indemnify clients and hold them harmless from any and all causes of action, including the alleged or actual negligence or intentional acts of the client—such as discrimination, harassment, workplace safety violations, and other conduct over which the staffing firm and MSP or VMS provider likely will have no control.

Indemnity clauses also typically require the staffing firm or MSP or VMS provider to indemnify the client for damages arising from temporary workers' workplace injuries, notwithstanding the fact that the client likely will be immune from such damages pursuant to the exclusive remedy doctrine of workers' compensation law. Moreover, such clauses often require indemnification for any acts or omissions of any assigned temporary worker, regardless of whether the worker was acting pursuant to the client's direction and control. Finally, these indemnity clauses often are not mutual—meaning that the staffing firm and MSP or VMS provider will be required to indemnify the client, while the client will not be required to contractually indemnify the staffing firm or MSP or VMS provider.

Considerations and concerns: Staffing firms, MSPs, and VMS providers are not insurers—they should not be expected to cover risks beyond those inherent in their respective businesses. For staffing firms, such risks include (i) those related to being an employer, such as payment of wages and benefits, payroll taxes, etc.; and (ii) liability for client loss or damage caused by the staffing firm's failure to properly screen or otherwise qualify the assigned employee for the job. For MSPs/VMS providers, such risks include those arising from the management of the procurement process.

Staffing firms, MSPs, and VMS providers, therefore, should not be expected to assume risks related to the client's business, including liability for the client's products and services, and should not be responsible for the conduct or work product of temporary employees working under a client's supervision and control. Rather, each party should be responsible for the risks associated with its own business, and each should have the duty to indemnify the other for those risks only. In this manner, staffing contracts will fairly apportion risk among all parties.

The ASA sample [General Staffing Agreement](#) between staffing firms and clients contains indemnity provisions founded upon these principles and can generally serve as a model in the MSP/VMS context. Pursuant to this agreement, staffing firms are obligated to recruit, screen, interview, assign and pay their employees, and withhold and pay requisite employee taxes, among other things. Clients are obligated to properly supervise and control assigned temporary workers, as well as control the

clients' premises, processes, or systems. Parties are responsible for indemnification in connection with a breach of their respective duties.

To the extent permitted by law, STAFFING FIRM VMS, or MSP, as the case may be, will defend, indemnify, and hold CLIENT and its parents, subsidiaries, directors, officers, agents, representatives, and employees harmless from all claims, losses, and liabilities (including reasonable attorneys' fees) to the extent caused by STAFFING FIRM's, VMS's, or MSP's own breach of this Agreement; its failure to discharge its duties and responsibilities set forth in paragraph __; or the negligence, gross negligence, or willful misconduct of its officers, employees, or authorized agents in the discharge of those duties and responsibilities.

To the extent permitted by law, CLIENT will defend, indemnify, and hold STAFFING FIRM, MSP, and VMS, and their parent, subsidiaries, directors, officers, agents, representatives, and employees harmless from all claims, losses, and liabilities (including reasonable attorneys' fees) to the extent caused by CLIENT's breach of this Agreement; failure to discharge the duties and responsibilities set forth in paragraph __; or the negligence, gross negligence, or willful misconduct of CLIENT's officers, employees, or authorized agents in the discharge of those duties and responsibilities.

Also, staffing firms, MSPs, and VMS providers should not be expected to indemnify clients in connection with claims pertaining to temporary workers' workplace injuries because (i) most injuries will be covered by the staffing firm's workers' compensation coverage, which also likely will protect the client pursuant to the exclusive remedy provision of workers' compensation law; and (ii) in most cases, the client will control the work site and safety policies and procedures.

II. Limitations on Liability:

Some contracts do not include a limitation of liability clause or, if they do include such clause, it applies to the client only, thus leaving the staffing firm, MSP, or VMS provider potentially liable for all types of damages and awards.

Considerations and concerns: Equity dictates that either all parties are held liable for such damages, or no party is held liable. In commercial agreements, it is common and advantageous to specify that no party shall be liable for special, indirect, consequential, or punitive damages, all of which can result in significant liability if not otherwise excluded. In this regard, the ASA sample General Staffing Agreement provides

Neither party shall be liable for or be required to indemnify the other party for any incidental, consequential, exemplary, special, punitive, or lost profit damages that arise in connection with this Agreement, regardless of the form of action (whether in contract, tort, negligence,

strict liability, or otherwise) and regardless of how characterized, even if such party has been advised of the possibility of such damages.

III. Attempted Disavowal of Co-Employment:

Staffing contracts often include clauses that attempt to disavow any co-employment or joint employment relationship with respect to assigned temporary workers. Such clauses also may attempt to hold the staffing firm, MSP, or VMS provider responsible for supervision, direction, and control of assigned temporary workers, even though they do not provide and are not compensated for on-site supervision.

Considerations and concerns: Notwithstanding any contract provision to the contrary, whether a co-employment relationship exists will be determined by applicable law. No contract clause will be determinative. Because the existence of co-employment is a legal determination made by a regulatory agency or court, and because contracts often require the parties to “agree” to the disavowal of co-employment status, such contract language places the staffing firm, MSP, VMS provider, or client into potential breach status the moment the agreement is signed.

Under applicable law, a staffing firm and its client will share co-employment or joint employer obligations in most staffing arrangements. This is because staffing firms

- Verify employee work status under immigration laws
- Are the employer of record for wages and benefits
- Withhold and remit all payroll taxes (e.g., Social Security and Medicare)
- Provide workers’ compensation insurance coverage
- Have the right to hire and fire
- Hear and act on complaints from employees regarding working conditions and other work-related matters

Clients, in turn

- Generally supervise and direct employees’ day-to-day work
- Control working conditions at the work site
- Determine the length of employees’ assignments
- Provide work site safety training to employees

Therefore, staffing firms and clients are presumed to be, and generally are, co-employment or joint employers for purposes of equal employment opportunity, family and medical leave, wage and hour, workplace safety, and disability laws.³ The ASA

³ See, for example, [“EEOC NOTICE Number 915.002, 12/03/97, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms”](#); [“EEOC NOTICE Number 915.002, 12/22/00, EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms”](#); and U.S. Department of Labor Opinion Letter No. 874, Oct. 1, 1968, “Joint Employer Obligations for Minimum Wage and Overtime Pay.”

fact sheet “[Employment Law in Staffing Arrangements](#)” can further aid in clarifying and explaining this co-employment relationship under various laws.

To the extent a staffing firm exercises no supervision and control over assigned temporary workers, staffing contracts should be consistent with this fact. None of the parties to these arrangements benefit from factual misstatements and inaccuracies; in the typical staffing arrangement, clients—not staffing firms, MSPs, or VMS providers—supervise and control assigned temporary workers. As a result, in setting forth the client’s duties and responsibilities in the typical staffing arrangement, the ASA sample General Staffing Agreement states that the client shall “properly supervise assigned employees performing its work and be responsible for its business operations, products, services, and intellectual property.”

Similarly, indemnification clauses may require the staffing firm, MSP, or VMS provider to indemnify the client from any claim or ruling that the client is a co-employment or joint employer.

Considerations and concerns: Such clauses are overbroad and unreasonable, as claims arising from a client’s status as a co-employment or joint employer may pertain to the client’s own harassment, discrimination, workplace safety policies and procedures, and unlawful conduct directed toward assigned temporary workers. Such broad indemnity clauses, therefore, unfairly protect the client from its own wrongful conduct and could result in significant liability for the indemnifying party. Instead, each party should be responsible for its own conduct.

Clients often seek to disavow co-employment status to shield themselves from temporary employees’ benefits claims—such disavowal is neither wise nor necessary, however, as clients can avoid benefits liability by explicitly amending their benefits plans to exclude assigned temporary workers (see the ASA issue paper “[Assignment Limits and Client Concerns about Benefits Liability: Issues and Answers](#)” for more information). Indeed, the best protection against this potential problem is for client policies and benefit plan documents to contain clear provisions that exclude assigned employees and independent contractors. Moreover, the ASA sample General Staffing Agreement may serve as an example of additional protection for clients, obligating staffing firms to

Require assigned employees to sign agreements (in the form of Exhibit B) acknowledging that they are not entitled to holidays, vacations, disability benefits, insurance, pensions, retirement plans, or any other benefits offered or provided by CLIENT

IV. Guarantee Provisions:

Guarantee provisions often include conflicting, vague, and overbroad language whereby the staffing firm guarantees the performance of its temporary employees and thus is at risk of providing services without getting paid. There may be either no cap on the guarantee period or a long guarantee period. Such clauses commonly require staffing firms to provide credits in

connection with deficient performance and, if the staffing firm provides replacement workers, the clock may effectively be reset with respect to credit hours.

Considerations and concerns: Deficient performance is highly subjective and, if an open-ended guarantee is required of the staffing firm, such guarantee could be (and, in fact, has been) used arbitrarily by clients to escape payment obligations. Although staffing firms control and stand behind their own services, namely providing assigned employees qualified to work under a client's supervision, they do not control a client's business. Assigned temporary employees work among the elements and tools of the business that a client controls, including management, equipment, materials, systems, finance, design, quality control, procedures, planning, marketing, and distribution.

Consequently, staffing firms should not be expected to assume client business risks of which they have no knowledge, control, or financial interest, nor guarantee the performance of temporary employees beyond, perhaps, a short initial time period during which the client can assess the temporary employees' work and thus reduce the likelihood that a poor performer will negatively impact the client's project or business.

V. No-Pay Provisions:

Contracts often state that the client will have no obligation to satisfy staffing firm invoices if the invoices are delayed for any of a variety of reasons set forth in the contract.

Considerations and concerns: Staffing firms are similar to any other supplier in that they deserve to be paid for their services in a timely manner; accordingly, clients should be contractually obligated to pay for services so long as the staffing firms have fulfilled their contractual obligations in a timely manner.

Staffing firms and MSPs or VMS providers all have obligations in the payment process and should cooperate to ensure that time records, data, and invoices are submitted in accordance with the client's requirements. In this regard, contracts should clearly specify the time by which each party's obligations must be fulfilled; so long as the staffing firm fulfills these obligations, it should be entitled to prompt payment.

VI. Burdensome Payment Terms:

Clients increasingly demand extended payment terms when satisfying staffing invoices and, in so doing, insist on inappropriate payment structures and time frames that ultimately can result in increased costs to the client.

Considerations and concerns: Staffing firms, MSPs, and VMS providers work diligently to minimize every element of cost associated with providing staffing resources to serve clients in the most efficient and cost effective manner. It is not generally in the client's best interest to introduce extended payment terms, as it is financially inefficient.

Specifically, extended payment terms increase the cost to deliver services. Staffing firms are able to offer the most competitive rates to those that pay their invoices shortly after staffing employees are paid. In this regard, many staffing firms use their accounts receivable as collateral to obtain financing and pay their temporary employees. Extended payment terms are associated with “riskier” borrowing from the lender’s perspective, thus driving the firm’s interest rates and, in turn, bill rates, higher.

VII. Recourse With Respect to Receivables:

Staffing contracts often do not address nonpayment by clients when staffing firms, MSPs, and VMS providers fulfill their contractual obligations in a timely manner and, if they do address nonpayment, the contracts may not allow the staffing firm to pursue payment directly from the client.

Considerations and concerns: If the client fails to remit payment in a timely manner through no fault of, or breach of contract by, the staffing firm, MSP, or VMS provider, these parties should have the contractual right to pursue payment directly with the client. Accordingly, staffing contracts should specify the time in which the client must remit payment and clearly establish the parties’, and particularly the staffing firm’s (since it will not be a party to the MSP’s or VMS provider’s contract with the client), right to pursue payment directly when the client fails to fulfill its contractual obligations.

Moreover, in the event the client files for bankruptcy or a trustee asserts that client payments were made during a preference period and thus subject to clawback, staffing contracts should afford staffing firms, MSPs, and VMS providers the right (i) to the extent allowed by law, to retain payments made by the client; and (ii) to assert good faith defenses to any preference action.

Similarly, clients should do business with MSPs and VMS providers that are financially stable and well capitalized. The MSP or VMS contract should also provide that the MSP or VMS provider is acting as the client’s agent for the payment of staffing firms and, if the MSP or VMS provider does not pay the staffing firm (through no fault of the staffing firm) on time, the client may pay the staffing firm directly or through another third party (see the ASA issue paper “[Protecting the Financial Interests of Staffing Firms and Buyers in VMS and MSP Arrangements](#)” for more information).

VIII. Background Checks:

Clients often seek to limit staffing firm discretion regarding assigning employees who have been convicted of crimes, have poor credit histories, or had been unemployed—either by setting forth a blanket prohibition against assigning such candidates or by setting strict parameters that would exclude many of these candidates.

Considerations and concerns: The U.S. Equal Employment Opportunity Commission has issued guidance regarding the permissible use of criminal

background checks and the circumstances under which they can give rise to disparate impact discrimination liability under Title VII of the Civil Rights Act of 1964. According to the EEOC, blanket hiring exclusions for convicts can violate Title VII, and employers such as staffing firms are obligated to look at a variety of contextual factors pertaining to the conviction when making a hiring decision. The EEOC takes a similar position regarding the disparate impact of refusing to hire candidates who have poor credit histories or are unemployed. Moreover, states and localities are increasingly enacting laws regarding the permissible use of criminal backgrounds and credit histories when making employment decisions. Therefore, to the extent clients exclude from consideration such candidates, both the client and staffing firm could incur liability as co-employers. Instead, staffing firms should be allowed to exercise their judgment and expertise in scrutinizing candidate backgrounds and qualifications, and lawfully assign the best workers for temporary assignments.

In this regard, staffing contracts should require all parties to comply with all laws and regulations applicable to their businesses, and provide equal employment opportunities based on bona fide job qualifications, without regard to race, color, religion, national origin, sex, age, disability, or any basis prohibited by applicable law. Similarly, staffing contracts should afford staffing firms the right to determine the experience and qualifications of applicants and employees as the staffing firms deem appropriate to the circumstances, or as may be required by law.

IX. Furnishing Candidate or Worker Information:

Clients also may require the staffing firm, MSP, or VMS provider to furnish candidates' or employees' personal information, such as portions or all of a candidate's or employee's Social Security—number which, in many states, is subject to identity theft protection laws. Additional personal information sought by clients often includes background check and drug test results, Forms I-9, and other confidential information.

Considerations and concerns: It often is unclear why clients desire or need such information. Not only does the client increase its potential co-employment exposure by obtaining this information, it also increases its risk of liability for the unauthorized use or disclosure of otherwise legally protected information. From the staffing firm's perspective, furnishing information such as E-Verify query results and Forms I-9 may cause it to violate the law.⁴

If a staffing firm does furnish certain personal information—for example, in cases where the MSP provides onboarding services for the client—the staffing firm must obtain appropriate written consent from candidates and employees and ensure compliance with applicable privacy laws. Therefore, it would be reasonable for the parties to state in their contracts that such information will be kept confidential and secure by the MSP, VMS provider, and client and, to the extent it is not, such failure will constitute a breach of contract. Moreover, if a staffing firm assumes the risk of furnishing this information, it would be appropriate for the MSP, VMS provider, or

⁴ See U.S Department of Labor Technical Assistance Letter dated Aug. 19, 2008.

client, as the case may be, to assume the risk of misusing or divulging this information and indemnify the staffing firm for such contingencies.

X. Employee Termination Clauses:

These clauses typically prohibit the staffing firm from terminating or reassigning an assigned temporary worker unless such action is at the request of the client.

Considerations and concerns: Staffing firms are committed to providing the most qualified temporary workers to clients and have no interest in arbitrarily removing them from assignments. Indeed, doing so generally would run counter to all parties' interests. However, staffing firms are the common law employers of assigned temporary workers and should be able to make termination and reassignment decisions in cases involving malfeasance, harassment, subordination, and other wrongful conduct on the part of the temporary worker.⁵ Therefore, staffing contracts should provide that, in such instances, the client and staffing firm shall communicate through the MSP or VMS provider to reasonably protect and further both the firm's and client's interests and arrive at a mutually agreeable staffing solution.

Additional Contract Clauses and Issues Warranting Client Consideration:

XI. 'Tempnapping' or Conversion Fee Clauses:

Staffing contracts often state that, in the event the staffing firm's contract is terminated, the firm will be obligated to assist in transferring its temporary employees to another staffing firm's payroll or allow the client to hire the employees directly. In either case, the firm will have no recourse and will not be entitled to conversion or other fees.

Considerations and concerns: Staffing firms expend significant time and expense in recruiting, screening, and training their temporary employees. They typically protect their investment through time cards or more formal written client agreements that require clients to compensate staffing firms when they hire the employee directly or retain their services through another staffing firm. Indeed, the ASA sample General Staffing Agreement provides

If CLIENT uses the services of any Assigned Employee as its direct employee, as an independent contractor, or through any person or firm other than STAFFING FIRM during or within ___ days after any assignment of the Assigned Employee to CLIENT from STAFFING FIRM, CLIENT must notify STAFFING FIRM and (a) continue the Assigned Employee's assignment from STAFFING FIRM for his or her next _____ consecutive work hours for CLIENT; or (b) pay STAFFING FIRM a fee in the amount of ___ times the final billing rate for that Assigned Employee, or \$_____, whichever is higher.

⁵ Any restriction on a staffing firm's ability to terminate or reassign its temporary workers, imposed by the client, will increase the likelihood that the client will be found to be a co-employer or joint employer of such workers.

If a staffing firm has not breached its staffing contract and the contract has not been terminated for cause, there is no compelling or equitable reason to eliminate this duty to compensate the staffing firm, at the end of a contract term, in the case of an MSP or VMS arrangement.

While staffing firms should be entitled to collect conversion fees, the parties may consider alternative arrangements, such as having the firm waive such fee if the client agrees to retain the temporary employee on the staffing firm's payroll for a specified period. Another option is for the staffing firm and client to limit the prohibition of conversion fees to certain types of assigned workers, and negotiate a higher conversion fee for the remaining workers. However, the basic underlying equitable principle, that staffing firms should be able to recoup their investment in their temporary employees if they have abided by the terms of the staffing contract, should be adhered to.

XII. Certificates of Insurance:

These clauses typically require the staffing firm, MSP, or VMS provider to present a certificate of insurance evidencing coverage required under the contract, as well as 30 days' written notice of cancellation or material change.

Considerations and concerns: Many certificates of insurance no longer contain the 30-day notice provision; rather, they state that notice of any cancellation or termination will be provided in accordance with applicable policy provisions, and many, if not most, carriers will no longer provide notice of cancellation or termination to an insured's clients. In such cases, the staffing firm, MSP, VMS provider, or broker might be amenable to agreeing to provide such notice, and such notice should be an acceptable alternative.

XIII. Employee Nonsolicitation Provisions:

These clauses prohibit the staffing firm, MSP, or VMS provider from soliciting the client's employees during the term of the contract and usually for some period of time thereafter.

Considerations and concerns: Equity dictates that these clauses should be made mutual such that all parties' investment in their employees is protected. Additionally, the contract should clearly specify what constitutes a solicitation, and exclude those circumstances in which an employee contacts the staffing firm, MSP, VMS provider, or client of his or her own volition and as a result of no direct outreach to the employee; e.g., as a result of Internet job postings or other general advertising.

XIV. Client Nonsolicitation Provisions:

Staffing firms may be required to contractually forego the right to solicit the noncovered business of those clients that the firm services through a MSP or VMS relationship.

Considerations and concerns: Staffing firms understand and appreciate the fact that

clients enter into MSP or VMS relationships so that the MSP or VMS provider, and not the client, is solicited by staffing firms. However, if a staffing firm services a client through such a relationship, it should retain the right to directly solicit the client's business that is not covered by the MSP or VMS relationship. The staffing firm also should not be prohibited from soliciting business from other clients that also may be serviced by the MSP or VMS provider, but for which the staffing firm is not under contract.

XV. Overtime:

These clauses often state that all overtime hours must be preapproved by the client in order for the staffing firm to receive payment for such overtime.

Considerations and concerns: Under the federal Fair Labor Standards Act, staffing firms and clients, as likely co-employers, generally will have joint and several liability for overtime to nonexempt employees if they know or should have known that the overtime was worked. Therefore, staffing contracts should mirror this legal obligation and provide for client payment if it knew or should have known that the temporary employees worked overtime, irrespective of whether prior approval was obtained.

XVI. No Client Contact:

These clauses often contain an absolute prohibition against the staffing firm contacting or communicating with the client for the duration of the contract.

Considerations and concerns: Staffing firms understand and appreciate that clients generally outsource all contact with staffing firms to the MSP or VMS provider because they want the efficiency of a single point of contact. In the vast majority of circumstances, such communications should and will go through the MSP or VMS provider. However, there may be circumstances in which the staffing firm and client may have a need to communicate directly—for example, to provide reasonable accommodations under the Americans With Disabilities Act; prevent harassment and discrimination and, to the extent any such harassment or discrimination is alleged, reasonably cooperate to investigate and take any necessary remedial measures; discuss and address certain payment disputes along with the MSP or VMS provider; and ensure a safe work site for temporary workers and promptly investigate and address any work-related accident. Therefore, staffing firms should be allowed to contact the client in specified circumstances, so long as the MSP or VMS provider is apprised of the need for such communication.

XVII. Service Level Agreements (SLA):

SLAs often require 100% compliance and response times within several hours.

Considerations and concerns: 100% compliance with service levels is unreasonable and often impossible under any circumstances. For example, submission of qualified candidates' resumes may take significantly longer than a matter of hours (a time frame

specified in contracts) when the candidate's skill sets are unique or in high demand. Additionally, unreasonable compliance goals and response times can negatively impact the quality of a client's available supplier pool. Generally, the MSP or VMS provider can provide guidance as to what are considered reasonable response times and compliance goals, and clients can use that guidance to set reasonable service level expectations.

Conclusion

To maximize the benefits of staffing arrangements under MSP or VMS contracts, clients should understand the interconnected relationship between themselves, MSPs, VMS providers, and staffing firms. Clients should work closely with their MSP and VMS providers to consider, discuss, and implement the foregoing best practices—the end result will be well-balanced contracts that reflect the needs and concerns of all parties, including staffing firms that are critical to client satisfaction. Ultimately, a contractual environment that is equitable for all parties can help contribute to the creation and retention of a strong, dedicated, staffing supplier base.