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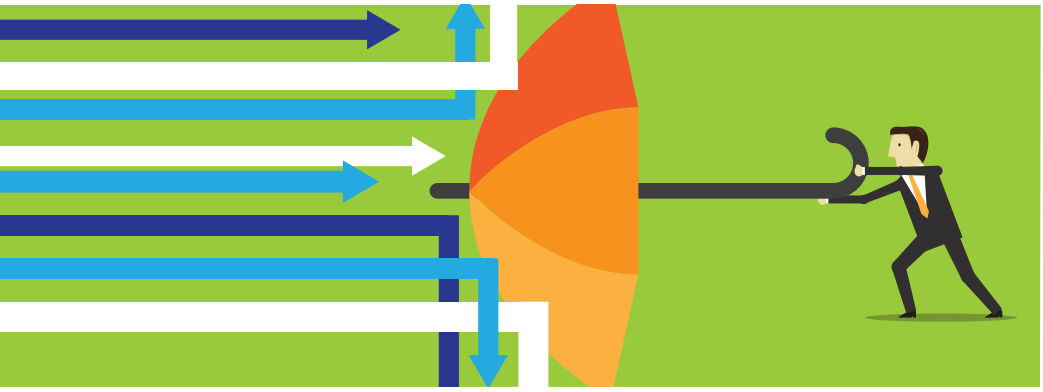
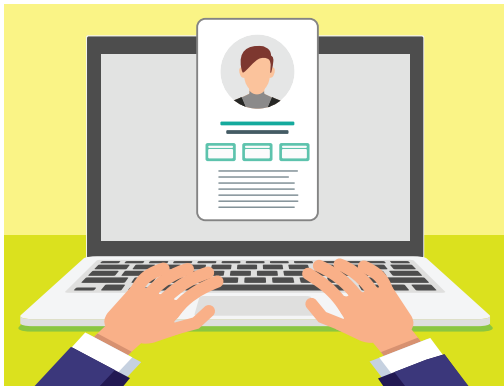
LEGAL SCENARIOS AND COMPLIANCE STRATEGIES





SPECIAL REPRINT

as seen in *Staffing Success*, a collection of legal case studies specific to the staffing and recruiting industry.

Clearing the Smoke on **Medical Marijuana**

By Diane J. Geller, Esq., and Joseph McNelis, Esq.

In this scenario, a staffing firm manager is faced with the decision of **whether or not to fire one of her best recruiters** after the recruiter's **drug test comes back positive,** violating company policy. Does the state law **protect the use of medical marijuana** at work?

Sarah Summers, a senior recruiting manager at Highland Staffing Inc. in Pittsburgh, PA, was recently notified by the firm's outside drug-testing company that one of her top-performing recruiters, Bud Beasley, tested positive for tetrahydrocannabinol (THC) during a random drug-test that was administered.

When Summers confronts Beasley about the test results, Beasley admits that he had used marijuana for medical purposes (and even presents a valid medical marijuana card). When told by Summers that he faces termination of his job because of the company's strict written policy banning the use of illegal substances, Beasley argues that, because the use of medical marijuana is legal in Pennsylvania—and he was not impaired while on the job and his work quality was not an issue—it would be discriminatory for the company to fire him.

Summers carefully considers what action she should take. Should she stick to the company's policy and fire her best recruiter? Will that potentially bring a lawsuit against the company? After finding inconclusive advice, she remembers that her company is a member of the American Staffing Association, and searches *americanstaffing.net.* She quickly finds guidance on state marijuana laws and reads that taking adverse action against an employee based solely on the individual's status as a medical marijuana card holder would likely be considered discrimination in her state. She also finds an updated issue paper that ASA has released, entitled "Clearing the Smoke: Medical Marijuana and the Workplace." Here is some of what she learns:

Just a few short years ago, a positive workplace drug screen result that demonstrated marijuana use was sufficient to refuse an offer of employment, or end employment. Today, employers face a confusing patchwork of federal and state laws regarding marijuana, and the consequences of a positive test are not always clear.

While federal law continues to treat all marijuana as a Schedule I substance and illegal under the Controlled Substances Act, states have increasingly legalized marijuana for both medical and recreational use.

Focus on the Facts

Despite an everchanging legal landscape, there are a few constants that remain in place. First, staffing companies can still prohibit employees from possessing, using, selling, distributing, or manufacturing marijuana at work.

Second, no state law obligates employers to allow marijuana use or impairment while on the work site. Even in states where medical and recreational marijuana is legal, staffing companies may maintain zero-tolerance workplace policies and take appropriate action when an employee is demonstrating impairment while on duty.

Third, staffing companies can adopt and enforce a drug-free policy for safety-sensitive positions. There is no state law that requires staffing companies to put the general public or employees at risk by allowing an employee who is under the influence of marijuana to operate dangerous equipment, make medical decisions, or supervise children.

Fourth, employers can legally terminate the employment of any employee who violates a prop-

Staffing firms that drug test must have a written policy.

erly drafted policy, including if he or she engages in the use, sale, possession, or transfer of marijuana in the workplace.

The decision whether to implement a drug-testing policy can be less clear in states where the use of medical marijuana has been approved by the legislature, but the state workers' compensation laws list it as a prohibited drug. The challenge is whether the staffing company can still implement and take advantage of premium discounts by drug testing for marijuana without violating the state's medical marijuana laws. And some employers have no choice but to drug test—such as companies that are subject to the drug-testing regulations set forth by the U.S. Department of Transportation.

Essential: A Detailed Written Drug Policy

Staffing firms that drug test must have a written policy. In designing a policy, staffing companies must first understand the current federal, state, and local laws. Next, they must make the decision of which employees to test and what type of drug testing to conduct. For instance, a staffing company could test all candidates before placement, or only those that are required to be tested for a certain client or a specific type of job. Of course, companies cannot set up a plan that is patently discriminatory, such as testing all candidates of a specific race or other protected class, or a plan that could have a disparate impact on any protected class.

Is Accommodation Required?

While no state law mandates that an employer permit use of medical marijuana in the workplace, employers in states where state law requires an accommodation for use of medical marijuana may have to take other steps to try to address use. This may include adopting very clear and detailed job descriptions, as well as following guidelines similar to those under the Americans With Disabilities Act (ADA) by engaging in an interactive process to determine if allowing some type of medical marijuana use would be considered a reasonable accommodation (if the employee tests positive and presents the required medical marijuana card).

A challenge for staffing companies is that a positive marijuana test does not necessarily inform the employer of when the employee last used marijuana, how much marijuana was used, or whether the employee is currently impaired due to marijuana use. Therefore, positive test results may stem from an employee's off-duty use of marijuana and its residual effects. This issue is particularly prevalent in states where recreational marijuana is legalized.

Best Practices: Planning Reduces Liability

In light of this difficult legal landscape, when faced with the issue of drug-testing compliance in the workplace, it is important for employers to make an affirmative plan of action that includes the following:

1. Adopting drug-testing and/or drug-free workplace policies.
2. Taking affirmative steps to communicate your drug-free workplace policy to your employees.
3. Reviewing job descriptions and including in those descriptions all job duties and responsibilities.
4. Not asking about the possession of medical marijuana cards in the hiring process, even in states where medical marijuana is permitted.
5. Training managers to recognize impairment.

The full issue paper can be found at *americanstaffing.net/marijuanalaws.*

Given this information, Summers will consult with her company counsel to determine if it would be wise to terminate Beasley in light of Pennsylvania's medical marijuana law that offers protections to workers like Beasley, and whether the company's strict drug-free workplace policy should be revised given the changed legal landscape. ■

Diane J. Geller is a partner and Joseph McNelis is an associate in the law firm Fox Rothschild LLP. Send your feedback on this article to success@americanstaffing.net. Follow ASA on Twitter @StaffingTweets.

Employer of Record Insurance—**Know the Risks**

By Ed Lenz, Esq.

In new guidance, ASA counsel examines **employer of record arrangements** and discusses the **potential pitfalls staffing firms could fall into** if the insurance policies and premiums **do not cover the risks involved,** or if the arrangement runs afoul of state rules that may apply.

Staffing firms maintain many types of insurance to cover the risks related to the work performed by their employees, such as workers' compensation, professional and general liability insurance, and employment practices liability insurance. Managing workers' compensation costs has been an especially difficult challenge for staffing firms, and ASA and its partners have been at the forefront in helping staffing firms reduce those costs by promoting workplace safety best practices and developing programs to help companies assess and monitor safety risks.

A growing number of staffing firms are obtaining their liability and workers' compensation insurance through a third-party provider, generally referred to as an "employer of record" (EOR). Using an EOR may be a sound approach, but if the coverage or premiums do not adequately reflect the risks involved, or the arrangement runs afoul of state law, the EOR—and, potentially, the staffing firm—may be at risk. Health insurance risks are not necessarily work-related and are subject to different rules that are not addressed in this article.

The term "employer of record" has its roots in the U.S. tax code provisions and court decisions that treat certain third-party payers as employers for the payment of wages and withholding federal employment taxes—as distinguished from the common law employer for whom the employees' services are performed. (Third-party payers include employers under section 3401(d) of the Internal Revenue Code, professional employer organizations, and payroll service providers.) EOR status does not, however, necessarily authorize the EOR to offer workers' compensation or other insurance to the employees of other employers. For example, state guidance and court rulings call into question whether an EOR can lawfully provide workers' compensation insurance covering the temporary and contract employees of a staffing firm. The rules governing professional employer organizations (PEOs) illustrate the problem.

PEOs have spent decades establishing their employer bona fides for workers' compensation and other purposes. Federal law expressly recognizes PEOs that meet certain criteria as employers for employment tax withholding. Most states recognize PEOs as co-employers and authorize them to provide workers' compensation insurance covering the employees of PEO clients—provided certain rules are met to ensure that premiums properly reflect risks. PEOs can offer either "master policies" based on client-specific payroll and loss data, or "multiple coordinated policies" in which each client is issued its own separate policy. Both types of policies address regulators' concerns with identifying and tracking the risks.

PEO coverage of staffing firm employees particularly concerned insurance regulators. They viewed as "problematic" having to identify and track the risks associated with employees working at remote third-party work sites. As a consequence, the National Association of Insurance Commissioners published "Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements" prohibiting PEOs from contracting with staffing firms to provide workers' compensation insurance covering their temporary and contract employees. Thus, if a state adopts the NAIC guidance, or similar provisions, a PEO would be barred from providing such insurance to staffing firms. Likewise, firms operating as EORs (which

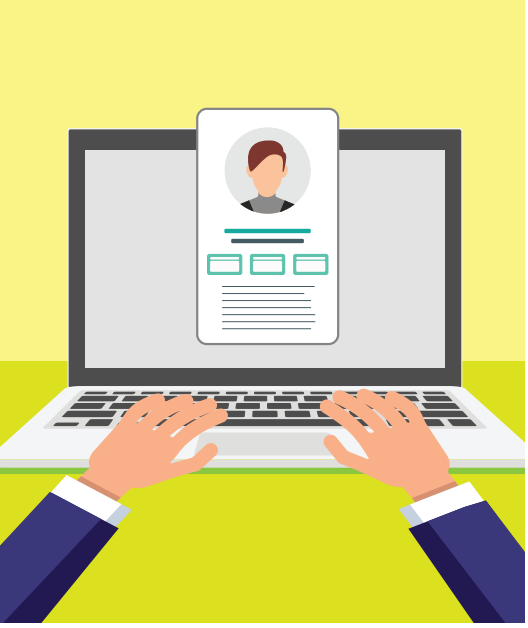
some courts have held to be indistinguishable from PEOs) also could be barred—and if the state has a PEO licensing law, the EOR could be subject to penalty for operating an unlicensed PEO.

Staffing firms covered by PEO or EOR insurance also may be at risk, depending on state law. Firms risk loss of coverage and even could face criminal charges. In 2011, the California State Insurance Fund charged a large staffing firm with fraud in connection with its use of a PEO to provide workers' compensation coverage. Staffing firms' liability coverage also may be in jeopardy—if the underwriter has not approved coverage for the firms' temporary and contract workers or if the policy does not cover the risks.

Using an EOR may be a sound approach, but if the coverage or premiums do not adequately reflect the risks involved, or the arrangement runs afoul of state law, the EOR—and, potentially, the staffing firm—may be at risk.

ASA urges staffing firms considering the use of third-party providers for workers' compensation or liability insurance to confirm with the provider—and with the staffing firms' insurance and legal advisers—that the insurance policies adequately cover the risks and otherwise comply with applicable state insurance laws and policies. ■

Ed Lenz is senior counsel for ASA. Send your feedback on this article to success@americanstaffing.net. Follow ASA on Twitter @StaffingTweets.



Is Virtual I-9 **Here to Stay?**

By Helen L. Konrad, Esq.

In this scenario, a staffing firm has been taking advantage of **virtual verification of Form I-9 documents**—but how long will it be permitted to **continue doing so post-Covid-19?**

Industry veteran Heather Hagerty owns Hagerty Staffing, based in Baltimore, MD. She keeps her business operations in full compliance with all local and federal laws, and values her hardworking associates (Hagerty Staffing hires on average 3,000 temporary employees each year).

Hagerty and her internal staff began working remotely from their homes when the Maryland governor implemented a strict stay-at-home order in March. After years of performing countless inspections of I-9 documents in person, as required by law, she was grateful that the government allowed virtual verification during the Covid-19 pandemic—a small relief during a very uncertain time. But now that things are starting to return to normal, Hagerty wonders how long she will be legally allowed to continue performing virtual I-9 inspections of documents. What if her company has a policy in place prohibiting nonessential visitors in the office?

Luckily, one of Hagerty's directors attended the recent virtual ASA Staffing Law Conference, which featured numerous sessions dedicated to issues surrounding the Covid-19 pandemic—including a session specific to Forms I-9. Here is what Hagerty learns.

Long before we ever heard of Covid-19, Form I-9 processing had been frustrating for employers because of the government's intransigence on requiring "physical presence" of the employee with the person responsible for inspecting original documents on behalf of the employer. But in the face of the pandemic, the government actually relented and permitted "virtual verification" during the national emergency (thus allowing the use of Skype, Zoom, GoToMeeting, or any other platform that we have all grown accustomed to over the last couple months)—but only as a placeholder until in-person inspection could occur. In addition, this option was only available if the employer had implemented Covid-19 precautions that prevented an in-person inspection of documents. With this exception period set to expire, it is helpful to remind employers about the timing of their obligations.

As of the printing of this magazine, virtual verification was set to expire on June 18. It is possible that it has since been extended again, but that announcement would not likely have come until right before the deadline (readers can visit *uscis.gov/i-9-central/whats-new* to learn the latest). Assuming that it is not extended, what does that mean for employers who have been relying on it? First and foremost, employers would have to make sure that all new hires after June 18 have an in-person inspection of documents—whether the employer continues to have employees working remotely or not. But an in-person inspection of documents does not mean that the employee will be required to come into an office. In-person inspection of documents on behalf of the employer can be performed by "any person." This point has been reaffirmed and highlighted in the instructions to the most recent version of Form I-9 that became mandatory on May 1. As some states or localities continue to have stay-at-home orders that extend past June 18, this provision will be critical to maintaining I-9 compliance. A household member qualifies as "any person" who can complete

Section 2 in-person inspection of documents on behalf of the employer. But just as in any remote hire context, the employer remains liable for I-9 compliance performed by an agent. Therefore, it is absolutely critical that a process be put in place to review all I-9s completed by an agent to ensure that they were completed accurately.

New hires are only half of the problem, however. All I-9s that were prepared pre-June 18 relying on virtual verification are still required to have an in-person physical inspection of documents "within three days of when normal operations resume." That deadline couldn't be harder to unravel, given that most employers will probably never return to what were previously "normal operations." At a minimum, employees will be brought back to work in the office in phases, or possibly not at all. So then what? The only way to analyze this is to document what ongoing Covid-19 precautions are in place that would prevent an in-person inspection of documents. But also recognize that you will never be able to skip the in-person inspection of documents, so you need to start planning now how you intend to comply. Relying on the remote agent option mentioned above may be the only interim solution you can provide if your office is not likely to have people in place for some time.

Proposals have been made to the government to continue the option to rely on virtual verification at least through the end of the year, and even to rely on it solely if the employer is enrolled in E-Verify. So far, the government's response has continued to be that the current law requires the in-person inspection of documents. Congress would need to eliminate that language for this to be a long-term solution to I-9 compliance and a big step toward recognizing that remote workplaces are here to stay.

Hagerty makes a note to follow up on the June 18 deadline, to see if it was extended. She also decides to consult her outside counsel to determine best practices on employing the remote agent option. ■

Helen L. Konrad, Esq., is a director in the immigration practice group of McCandlish Holton PC. Send questions about this article to hkonrad@lawmh.com. Engage with ASA on social media—go to *americanstaffing.net/social*.

Examining **Diversity and Inclusion** in the Workplace

By Nina K. Markey, Esq.

Here's an overview of best practices for **recruiting and retaining diverse employees,** as well as implementing diversity and inclusion **initiatives at your company.**

Diversity recognizes the inherent value of human differences. Although workplace diversity often focuses on the gender, race, and ethnicity of employees, it includes employees with varied religious and political beliefs, education, socioeconomic backgrounds, sexual orientation, cultures, and disabilities. From a business perspective, increased diversity and inclusion (D&I) lead to better decision-making, greater employee empowerment, increased positive company profile, and customer recognition and comfort. It is therefore no surprise that staffing companies and the clients they support are increasingly looking for ways to not only increase diversity in their workforces, but to also develop more effective strategies for inclusion. This article will provide insight into some of the keys to successful and lawful diversity and inclusion initiatives.

What *Can't* You Do to Recruit and Retain Diverse Employees?

As a general principle, absent a bona fide affirmative action program, you cannot make decisions to hire or promote someone because of a protected characteristic such as race or gender—even if you are doing so to promote diversity and not discrimination. And this is true whether you are the staffing company or the client; both entities are subject to liability under Title VII as joint employers for any illegal employment decisions. An undue focus on numbers, particularly to the point of establishing quotas, is also legally dangerous.

What *Can* You Do to Recruit and Retain Diverse Employees?

To be successful, an organization's diversity program must be supported from the top down. All D&I initiatives should be linked to an organization's core operations, and senior leadership must lead by example. Middle managers must also buy in and participate fully.

Recruiting Diverse Employees

Diversity cannot be achieved unless diverse candidates are actively sought. This means developing ways to find and recruit diverse candidates and, where they are already on board, to retain those persons so that they can help you continue to recruit new diverse employees.

Some ways that employers can diversify their candidate pool include recruiting at educational institutions where the demographic of interest is well represented; utilizing advertising media that are likely to reach the desired communities; identifying job boards and job fairs with high rates of participation by the desired demographic; and partnering with professional associations and other organizations that serve the desired communities. You should also think creatively and focus on the long term as well as the short term by utilizing internships and developing connections with diverse communities.

Many employers have also adopted versions of the Rooney Rule to increase diverse recruitment and hiring. The Rooney Rule is a National Football League policy that requires every team with a head coaching vacancy to interview at least one or more diverse candidates. One such adaptation is the Mansfield Rule, which seeks to boost the representation of diverse lawyers in law firm leadership by broadening the pool of candidates considered for these opportunities.

Retaining Diverse Employees

Retention should also be a focal point of any D&I plan, and requires support and the elimination of obstacles for diverse employees. Support includes mentoring, performance development, and effective feedback. Elimination of retention-related obstacles includes providing mentorship and other support systems, and actively working to recognize and manage bias in the workplace.

Training

Many managers and supervisors do not understand diversity, or find the topic polarizing. To understand the concept and realize its value, managers must be trained about diversity and inclusion and the values they promote.

Mentoring

Mentorship programs can improve diversity by providing career networking within the organization, and someone to help diverse employees identify and improve their skills necessary to advance in the company.

Affinity Groups

An effective affinity group connects its members with the larger employer community. Affinity groups are meant to focus on the needs of a particular group of employees, but they must be open to other employees outside of the group as well.

Declaring Your Support for Diversity

The company that successfully achieves diversity should do so openly. The public should be told of the company's values in a variety of ways, from mission statements to advertising to support of diversity-related organizations and events.

Staffing firms should utilize these principles in creating and strengthening existing diversity and inclusion initiatives that are increasingly vital to the success of their workplaces. ■

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Top 10 Litigation Risks Arising **Out of the Pandemic**

By Neil Alexander, Esq., and Claire Deason, Esq.

This year has brought many unexpected challenges to employers—**what could possibly happen next?** Here's an overview of potential litigation that **staffing firms should be aware of.**

On top of all the immediate challenges of the pandemic—coordinating safe return to work, managing requests for leave, implementing telework programs, determining wage reductions, and more—employers are beginning to look to the future to prepare for the litigation to come. Plaintiffs have already filed numerous lawsuits stemming from Covid-19 in federal and state courts since March 2020, and many are claims from employees under various federal, state, and local laws addressing workplace health and safety, nondiscrimination, and employment termination. This article discusses key areas of litigation that could potentially arise out of the pandemic that staffing firms need to be aware of.

Wage and Hour Law

Challenge 1: Off-the-Clock Work. Employers must pay nonexempt employees for all hours worked, including overtime pay required by both federal and state law, and (in many states) must ensure that employees take mandatory meal and rest breaks. Accurate timekeeping and break time compliance is more challenging when nonexempt employees are not in the physical workplace and may be working more variable schedules than before the pandemic began. Employers can expect to see increased litigation over claims of "off-the-clock work" by teleworking employees.

Challenge 2: Expense Reimbursement. Many employees have incurred costs associated with telework. Depending on the jurisdiction, an employer may be obligated to reimburse the employee for costs associated with teleworking. Staffing firms should closely review the applicable reimbursement statutes that apply to them to ensure compliance. New class action lawsuits are already being filed for the costs of prorated home internet and cell phone plans, and even for pro rata rent for home office space.

In addition, employers should consider these wage and hour risk areas:

- **Challenge 3:** Potential changes to compensable work time if employees are completing new duties before or after their working time
- **Challenge 4:** Changes to exempt status brought about by shifts in duties for exempt workers
- **Challenge 5:** Calculation of the regular rate of pay for overtime; when "hazard pay" bonuses are paid

Downsizing and Reductions in Force

Challenge 6: Selective Recalls From Furlough. As employers prepare to reopen businesses, or return employees from furlough, they should be mindful of Worker Adjustment and Retraining Notification Act obligations. This is especially true where federal funding to maintain jobs (such as under the Paycheck Protection Program) may be running out, meaning employers are facing the unwelcome prospect of having to let workers go, potentially triggering WARN notice requirements. Examine the WARN exceptions and obligations for staffing firms closely before you get that call from a client laying off 100 assigned workers.

Leave and Accommodation

Challenge 7: Vulnerable Demographics. Particu-

An employer that does not adequately adopt measures to prevent the spread of Covid-19 could face liability for failure to comply with occupational health and safety laws.

larly where employers and staffing clients are beginning to return their employees to the workforce, they should be mindful of potential pitfalls—even when they believe they are acting in an employee's best interests. The U.S. Equal Employment Opportunity Commission has cautioned against possible infection control strategies and conduct that may conflict with the Age Discrimination in Employment Act of 1967, Pregnancy Discrimination Act, Title VII of the Civil Rights Act of 1964, or state equal employment opportunity laws. EEOC has made it clear that employers may not prevent older workers or pregnant workers from returning to work if they wish to do so, even if the employer believes it is acting to protect these workers from risk.

Leaves of Absence

Challenge 8: Paid Leave Protections. The Families First Coronavirus Response Act, as well as numerous new state and local laws, ordinances, or regulations, provide or extend paid leave to employees during the pandemic. Agency interpretations of protected use for these leave programs have changed throughout the pandemic. Staffing firms should monitor developments in this area closely and make sure their leave programs are coordinated to meet varying federal, state, and local requirements.

Safety and Health

Challenge 9: Providing a Safe Workplace. Employers have a duty to ensure the safety and health of employees, but it's more difficult than ever to comply. Employers are balancing federal guidance and recommendations with evolving local guidance and orders. Moreover, different sectors of the economy may have drastically different requirements and guidelines to follow upon employees' physical return to work—particularly for public-facing businesses and firms in the health care sector. An employer that does not adequately adopt measures to prevent the spread of Covid-19 could face liability for failure to comply with occupational health and safety laws. The U.S. Department of Labor has long sought to hold staffing firms equally accountable with clients for alleged safety violations in a client workplace.

Challenge 10: Retaliation. Employees who have continued to work in essential businesses are increasingly filing complaints regarding personal protective equipment, social distancing, and other health and safety measures during the pandemic. At the same time, many employers are faced with the need to change or reduce hours, cut pay, or terminate employees due to the widespread decline in business activity. The combination of increased health and safety complaints with a simultaneous escalation of employment actions that many employers must take due to business necessity has led to an increase in retaliation claims being filed under state and federal law. ■

Neil Alexander, Esq., and Claire Deason, Esq., are shareholders at the law firm Littler Mendelson PC. Alexander is also co-chair of the firm's staffing, independent contractors, and contingent workers practice group. Send questions about this article to nalexander@littler.com and cdeason@littler.com. Engage with ASA on social media—go to *americanstaffing.net/social*.