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EMPLOYING CONTINGENT WORKERS

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INTRODUCTION

Many employers are making increased use of temporary or contract workers to meet their staffing needs and to control their costs. Many employers are outsourcing portions of their business, either core production/services or ancillary aspects, such as internal maintenance. Recent cases, such as the *Microsoft* litigation, have highlighted some of the legal issues that can arise from the use of these "contingent workers." Other recent events, such as the Teamsters strike against UPS, have created a public perception that growing use of other than traditional full time employees is creating a two-tiered workforce. The following outline discusses some of the legal issues that arise when employing contingent workers.

Issue 1 -- Is A Contingent Worker Your Employee?

An increasing percentage of the workforce consists of workers who supply services for a company but who do not have a traditional employer/employee relationship with that company. The means by which such workers come to provide services for a company are varied. The labels used to designate these workers are numerous. Common examples include "temps" retained through temporary service agencies, seasonal workers, independent contractors, leased employees, and casual employees. Collectively, such types of workers are commonly referred to as the "contingent workforce."

Many of the laws regulating the workplace, including tax, benefits, civil rights and workers compensation laws, were designed to address the traditional employer/employee relationship. The growth of the contingent workforce and, perhaps, the increased public scrutiny of the contingent workforce, has raised issues concerning the rights, obligations and duties of contingent workers and those companies that utilize contingent workers under such statutes. More recent statutory enactments, such as the Family and Medical Leave Act, the Worker Adjustment and Retraining Notification Act and the American With Disabilities Act, give some recognition to the unique problems posed by the contingent workforce.

Ultimately, however, application of the various workplace laws and regulations in most cases becomes a question of whether the reality of the relationship between a particular contingent worker and the entity for whom she provides services is more akin to the traditional employer/employee relationship.

The following section briefly describes the tests that have been applied in different contexts to make this determination. In the following discussion, the term "Worker" will be used to refer to any type of contingent worker, whether leased, temporary or independent contractor. The term "Work Site Employer" will be used to refer to the entity which receives services from a worker. The term "Staffing Employer" will refer to any entity which provides workers to Work Site Employers, such as traditional temporary services agencies, leasing companies, on-site employee management firms, or contractors to whom certain portions of a Work Site Employer's business or operations have been outsourced.

I.

Internal Revenue Service "20 Factor" Test

A. **Focus**. Whether the Work Site Employer has the right to control and direct the Worker, not only as to the desired end, but also as to the manner and means by which the desired result is accomplished. Note, the critical inquiry is not whether the Work Site Employer has actually exercised such control, but whether it retains the right to do so.

B. **Application**. The Internal Revenue Service applies a variation on the common law "right to control" test to determine whether an individual is an employee of independent contractor for tax withholding purposes. This test is applied by the IRS to determine whether the Work Site Employer has withholding obligations under FICA, FUTA and income tax provisions or whether the worker has self-employment tax obligations. Rev. Rul. 87-41, 1987-1 C.B. 296.

C. **Factors.** In Revenue Ruling 87-41, 1987-1 C.B. 296, the IRS explained the twenty factors it considers in determining whether a Worker is an independent contractor or an employee. While no one factor is determinative, the issue of whether the Work Site Employer has the right to control the means and manner by which a Worker performs the agreed upon task is the most critical. The following description of the IRS's 20 Factor test is reproduced from Revenue Ruling 87-41:

1. *Instructions*. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work ordinarily is an employee. This control factor is present if the person or persons for whom the services are performed have the *right* to require compliance with instructions. *See, for example,* Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. *Training*. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. *See* Rev. Rul. 70-630, 1970-2 C.B 229.

3. *Integration*. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. *See United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. *Services Rendered Personally*. If the services must by rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. *See* Rev. Rul. 55-95, 1955-2 C.B. 410.

5. *Hiring, Supervising, and Paying Assistants*. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of

a result, this factor indicates an independent contractor status. *Compare* Rev. Rul. 63-115, 1963-1 C.B. 178, *with* Rev. Rul. 55-593, 1955-2 C.B. 61.

6. *Continuing Relationship*. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. *See United States v. Silk*, [331 U.S. 704 (1947), 1947-2 C.B. 167].

7. *Set Hours of Work*. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. *See* Rev. Rul. 73-591, 1973-2 C.B. 337.

8. *Full Time Required*. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. *See* Rev. Rul. 56-694, 1954-2 C.B. 694.

9. *Doing Work on Employer's Premises*. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicted when the person or persons for whom the services are preformed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. *See* Rev. Rul. 56-694.

10. *Order or Sequence Set*. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. *See* Rev. Rul. 56-694.

11. *Oral or Written Reports*. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. *See* Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a

job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. *See* Rev. Rul. 74-389, 1974-2 C.B. 330.

13. *Payment of Business and/or Traveling Expenses*. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. *See* Rev. Rul. 55-144, 1995-1 C.B. 483.

14. *Furnishing of Tools and Materials.* The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. *See* Rev. Rul. 71-524, 1971-2 C.B. 346.

15. *Significant Investment*. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. *See* Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. *Realization of Profit or Loss*. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is [generally] an employee. *See* Rev. Rul. 80-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. *Working for More Than One Firm at a Time*. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. *See* Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. *Making Service Available to General Public*. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. *See* Rev. Rul. 56-660.

19. *Right to Discharge*. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot

be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. *Right to Terminate*. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. *See* Rev. Rul. 70-309.

** "*Tie Breaker*." Although the label the parties use to describe their relationship generally is given little or no weight, in a close case the IRS will look to the contract between the parties, or other evidence of intent, to ascertain the parties' mutual understanding of their relationship. *See* IRS Training Manual on Worker Classification, *"Employee or Independent Contractor?"*, pp. 77-79 (Aug. 2, 1996) (citing *Illinois Tri-Seal Prods., Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965)).

D. <u>Statutory Employees and Non-Employees.</u> Certain types of Workers may be statutorily defined as "Employees" or "Non-Employees" for certain tax purposes. Note, however, that these statutory classifications are determinative <u>only</u> for purposes of applying the Internal Revenue Code.

1. *Statutory Employees*: Four categories of workers who are independent contractors under common law are deemed to be employees under the Code. The categories are:

- Certain delivery truck drivers, if the driver is the employer's agent or is paid on commission.
    - This designation only applies to truck drivers who meet certain statutory criteria <u>and</u> distribute (i) meat or meat products, (ii) vegetables or vegetable products, (iii) fruit or fruit products, (iv) beverages other than milk, or (v) laundry or dry-cleaning services.
- Full-time life insurance sales agents who sell life insurance or annuity contracts, or both, primarily for one life insurance company.
- Certain individuals who work at home on materials or goods supplied by the employer.
- Certain full-time traveling salespeople.

Special rules for withholding income, Social Security, Medicare, and unemployment taxes apply to statutory employees.

2. *Statutory Non-Employees*: Three categories of workers are automatically treated as self-employed workers under the Code. The categories are:

- Direct sellers of consumer products or newspapers or shopping news.
- Licensed real estate agents.

- Certain companion sitters.

There is no withholding requirement for income, Social Security, Medicare, or unemployment taxes for statutory nonemployees.

II. Common Law "Right To Control" Test

A. Focus. The primary focus of the right to control test is to determine whether the Work Site Employer and Worker have a conventional master-servant relationship by assessing the Work Site Employer's right to control the Worker, based on multiple factors. *Speen v. Crown Clothing Co.*, 102 F.3d 625, § 630 (1st Cir. 1996).

B. Application. The common law right to control test should be used by courts to determine whether a Worker is an employee under any federal statute where Congress has used the term "employee" without providing a meaningful definition or otherwise has not indicated an intent to depart from the common law test. *Nationwide Ins. v. Darden*, 503 U.S. 318, 322-23 (1992). Thus, the right to control test should be used to determine an individual's relationship to an employer under ADEA, Title VII, ADA, ERISA, FMLA, IRCA, the National Labor Relations Act. *See e.g.*, *Speen v. Crown Clothing Corp.*, 102 F.3d at 631 (applying right to control test under ADEA and ERISA); *NLRB v. A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964) (NLRA); *Birchem v. Knights of Columbus*, 116 F.3d 310 (8th Cir. 1997) (ADA); *Strange v. Nationwide Mut. Ins. Co.*, 1997 U.S. Dist. LEXIS 13034 (E.D. Pa. Aug. 21, 1997) (ADEA). This test also should be used under Mass.Gen.L. ch. 151B. *Comey v. Hill*, 387 Mass. 11 (1982); *Marx v. South Shore Publishing Co.*, 2 MDLR 1115, 1119 (1980).

C. Factors. In *Nationwide Mut. Ins. v. Darden*, the Supreme Court identified the factors that are relevant to whether a Worker is an employee or independent contractor of a Work Site Employer under the common law right to control test. It is important to recognize that each factor must be evaluated in light of the overall circumstances of the relationship; a factor that might suggest the existence of an employment relationship in one set of circumstances might be neutral in another (*see* the example in Section D below).

1. *Control over performance.* Whether the Work Site Employer has the right to control the manner and means by which the intended product is accomplished or service is rendered. The greater the degree of control, the more likely that the Worker will be found to be an employee.

2. S*kill.* The degree of skill required to perform the work. A greater degree of skill weighs toward a finding of independent contractor status.

3. *Provision of instruments and tools.* Whether the Worker or the Work Site Employer provides the equipment and tools required to perform assignments. If a Worker is responsible for providing tools and equipment, even if leased from the Work Site Employer, this factor would weigh in favor of finding independent contractor status.

4. *Location of the work to be performed.* Whether the Worker is required to perform the assignment at the Work Site Employer's location or other site designated by the Work Site Employer. If the Work Site Employer designates where the work will be performed, this factor may weigh in favor of finding employee status.

5. *Duration.* The expected or actual duration of the relationship between the parties. Generally, the shorter or more finite the duration, the more this factor weighs in favor of independent contractor status.

6. *Assignments.* Whether the Work Site Employer has the right to assign additional projects to the Worker. If the Work Site Employer is able to assign additional tasks to the Worker, the relationship tends to appear more like that of employer/employee.

7. *Time of performance.* The extent to which the Worker has discretion over when and how long to work. A Worker's ability to set his/her own hours of work is more indicative of independent contractor status.

8. *Method of payment.* Whether the Worker is paid periodically, by commission, or on a fee or project basis. Receipt of regular, periodic wages on an hourly, weekly or monthly basis is more indicative of employee status. Payments provided on a fee, project or straight commission basis tend to indicate an independent contractor status.

9. *Worker's role in hiring and paying assistants.* Whether the Worker or Work Site Employer has the right to hire and duty to pay individuals retained to assist the Worker in performing an assigned task. If a Worker has the right unilaterally to hire assistants and to delegate work to those assistants, this factor weighs in favor of independent contractor status.

10. *Integration with hiring party's business.* Whether the work performed is part of the Work Site Employer's regular business. The more closely the contracted tasks are integrated into the Work Site Employer's normal business, the more this factor weighs in favor of finding employee status.

11. *Business.* Whether the Worker is in business. A Worker who is in the business of providing the contracted tasks to the public at large is more likely to be found to be an independent contractor.

12. *Provision of employee benefits to the Worker*. Whether the Work Site Employer provides employee benefits to the Worker. Receipt of employee benefits suggests that a Worker is an employee.

13. *Tax treatment of the worker*. Whether the Work Site Employer reports the Worker's income on a Form 1099 or W-2 and whether the Work Site Employer undertakes tax withholding from the Worker's fees.

D. <u>Example.</u> A sales representative's 20-year relationship with a clothing company was terminated because the company was dissatisfied with the sales representative's declining sales. The sales representative sued the employer for age discrimination under ADEA and ch. 151B and for denial of benefits under ERISA. The district court and the First Circuit concluded that the sales representative was an independent contractor, not an employee, under the common law right to control test. The following factors indicated that the sales representative had independent contractor status: (i) he determined when and for how long he worked on a given day, (ii) he determined how and in what order he covered his sales territory; (iii) he was not required to report to the company's place of business on a daily basis and, in fact, reported there infrequently; (iv) he was not required to carry anything, do anything or say anything in order to

sell the company's product; (v) he was permitted to and, in fact, on occasion did sell other company's product; (vi) he was paid on commission; (vii) the company reported his income on Form 1099s rather than W-2s; (viii) he was excluded from the company's pension plan; (ix) when the company rejected his demand that he should be treated as an employee, he continued to perform services for the company; and (x) he had formed a corporation. Thus, notwithstanding that he had sold the company's product for 20 years, the sales representative was found not to be an employee. Also instructive are the factors that the court deemed to be equally compatible with a finding of independent contractor or employee status in the circumstances of this case. Specifically, the sales representative's use of company-provided business cards and samples, the requirement that he must make daily telephonic reports regarding orders and sales visits and use company-approved forms to enter orders, and the requirement that he attend two sales meetings a year to learn about the company's new clothing lines did not favor either status. *Speen*, 102 F.3d at 632-634.

III. "Economic Realities" Test

A. Focus. The "economic realities" test assesses whether the Worker is economically dependent on the Work Site Employer: "[E]mployees are those who as a matter of economic reality are dependent on the business to which they render services." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). This test is typically more expansive than the common law right to control test or the IRS 20 Factor test, *see Speen*, 102 F.3d at 630, since a court is more concerned with whether the Work Site Employer exerts significant control over the Worker's ability to earn his/her livelihood than with whether the Worker is a common law employee. *See, e.g., Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 421-425 (7th Cir. 1986).

B. Application. In the past, this test was broadly applied by many circuits as the appropriate test to determine employee status under a variety of employment statutes. Since the Supreme Court's decision in *Darden* (*see* n. 3 above), this test should have more limited application. Since *Darden*, the First Circuit has endorsed its continued use as an analytic tool only in the context of determining employee status for wage and hour purposes under the FLSA. *Id.* at 631-632. However, since the Equal Pay Act incorporates the FLSA definition of employee, presumably this test also would be employed to determine employee status under EPA claims.

C. Factors. Although a variety of formulations of the "economic realities" test have been described, in practice five factors are analyzed to determine whether workers should be deemed to be economically dependent on the entity for which they perform services:

1. *Control.* The greater the degree of control exerted by the Work Site Employer over the Worker, the more likely that an employment relationship will be found.

2. *Profit or loss.* The greater a Worker's genuine opportunity to realize a profit or loss from rendering services, the more likely the Worker will be deemed an independent contractor.

3. *Investment.* Whether the Worker has made a significant investment in the business, or in the equipment and materials required to render agreed upon services.

4. *Permanence.* Whether and the extent to which the working relationship is permanent.

5. *Skill.* The degree of skill required to perform the work.

Doty v. Ellis, 733 F.2d 720, 723 (10th Cir. 1984).

IV. "Hybrid" Test

A. Focus. The "hybrid" test combines elements of the right to control and economic realities tests. In application, a court will consider the economic realities of the business relationship between the Worker and Work Site Employer, but retain an emphasis on the Work Site Employer's right of control. *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992).

B. Application. Some courts have applied this test to determine employee status under a variety of employment statutes. *See, e.g.*, *Reynolds v. CSX Transp.*, 115 F.3d 860 (11th Cir. 1997) (Title VII); *Diggs v. Harris Hospital - Methodist, Inc.*, 847 F.2d 270 (5th Cir.) (Title VII), *cert. denied*, 448 U.S. 956 (1988); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983). However, the First Circuit apparently has never endorsed its use and has indicated that it will not do so. *Speen*, 102 F.3d at 630.

C. Factors. Courts will primarily consider the factors applied under the right to control test and, as an additional factor, will consider whether the nature of the relationship demonstrates economic dependence.

V. Joint Employment Status

A. Focus. The joint employment (or "co-employment") doctrine is applied to admittedly separate companies and focuses on whether employees of one company should also be deemed the employees of the other. A joint employer relationship will be found where an otherwise independent Work Site Employer possesses sufficient control over the Workers supplied by a Staffing Employer. *See Holyoke Visiting Nurses Ass'n. v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993); *Astrowsky v. First Portland Mortgage Corp.*, 887 F. Supp. 332, 336 (D. Me. 1995) (companies "'are what they appear to be' -- independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer - employee relationship'") (citations omitted). In most circumstances, day-to-day, meaningful supervision of the Worker is the key to a determination of joint employer status. *See, e.g., Continental Winding Corp. v. NLRB*, 305 N.L.R.B. 122, 123 n.4 (1991) (joint employer status found where supervision over temporary employees was "essentially identical" to that exercised over regular employees and that such supervision was more than "routine" and was not "insignificant").

B. Application. Questions about joint employment status typically arise in situations where Workers provide services for or at the location of the Work Site Employer, but are actually or nominally employed by the Staffing Employer. These arrangements can take a number of forms and serve many purposes. Common examples of arrangements where this issue arises include (i) the use of temporary help retained by a Work Site Employer through a temporary agency; (ii) the use of long term, specialized services provided by a highly skilled

worker leased by a Work Site Employer through a technical or professional services firm; or (iii) the outsourcing of services or production to independent firms, where the service or production are performed on the Work Site Employer's premises or constitute service or production traditionally performed by the Work Site Employer's own employees.

Determining whether the Work Site Employer is a joint employer of the Staffing Employer's Workers is relevant to determining the Work Site Employer's and the Workers' rights and obligations to one another under virtually all statutes that impact the employment relationship. For example, joint employer status can be critical in determining whether a Work Site Employer: (i) faces liability under various tax, anti-discrimination, wage and hour or other employment-related statutes, or (ii) is shielded from certain types of liability under various states' worker's compensation laws.

C. **Factors.** A Work Site Employer may be found to be a joint employer of Workers provided by a Staffing Employer based on an assessment of the degree to which it possesses, or shares with the Staffing Employer, effective control over the following factors:

1. *Day-to-day supervision.*
2. *Hiring.*
3. *Firing.*
4. *Work assignments.*
5. *Discipline.*
6. *Pay and payroll practices.*
7. *Insurance and benefits*.
8. *Records.*

S*ee, e.g, NLRB. v. Solid Waste Services, Inc., 38 F.3d 93 (2nd Cir. 1994); Rivas v. Federacion De Asociaciones Pecuaria, 929 F.2d 814, 820 - 21 (1st Cir. 1991); EEOC. v. Regency Windsor Management Co., 862 F. Supp. 189, 191 (W.D. Mi. 1994).*

D. Examples.

1. Joint employment found:

- In a Title VII sexual harassment case, a car manufacturer hired, trained and otherwise had significant control over marketing representatives (Workers) who it then assigned to the payroll of a marketing company. The marketing company in turn assigned those Workers to automobile dealerships affiliated with the manufacturer. The manufacturer and marketing firm were found to

be joint employers and were each essentially Staffing Employers for the car dealership, which was the ultimate Work Site Employer. The Worker's claim was permitted to proceed against the Work Site Employer because there was an issue of fact to be determined at trial whether the Work Site Employer to which the Worker was assigned exerted sufficient control over the Worker to also be joint employer. *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500 (E.D. Va. 1992).

- Where a temporary agency (Staffing Employer) hired and determined a Worker's pay and the Work Site Employer supervised and otherwise controlled terms of employment, the Work Site Employer and Staffing Employer were found to be joint employers. *Continental Winding Corp. v. NLRB*, 305 N.L.R.B. 122, 123 n.4 (1991).

2. Joint employer status not found:

- A manufacturer (Work Site Employer) is not joint employer of its reseller's (Staffing Employer's) sales representative (Worker) who claimed sexual harassment; although both entities worked closely to achieve the common goal of selling the Work Site Employer's goods and employees moved between the two entities, the Worker was not an employee of the Work Site Employer because it had no authority "to hire, fire, . . . issue work assignments, or issue any kind of rules of employment" to the Staffing Employer's employees. *Field v. Corporate Office Systems, Inc.*, 1995 U.S. Dist. LEXIS 9354, at *11 (N.D. Ill. July 6, 1995).

- In an ADEA case, a milling company (Work Site Employer) is not a joint employer of an employee (Worker) of a shipping company (Staffing Employer) that provided on-site services to the Work Site Employer since there was no control by the Work Site Employer over terms of employment. *Rivas v. Federacion De Asociaciones Pecuaria*, 929 F.2d at 820-821.

- In a Title VII case, the Staffing Employer is found not to be a joint employer where its only contact with the Worker it supplied is to issue and process pay checks and the Worker had been leased for a long period of time to a Work Site Employer which controlled the actual terms of employment. *Astrowsky v. First Portland Mortgage Corp.*, 887 F. Supp. at 336.

2 --What Are Your Obligations To A Contingent Worker?

A Work Site Employer's liability, obligations, rights and duties with respect to a Worker generally vary depending upon whether the relationship between the Work Site Employer and the Worker is one of employment, joint employment or principal/independent contractor. The following discussion briefly highlights these issues with respect to various statutes.

I. Employment Tax Obligations

A. Properly Classified Independent Contractors. Work Site Employers are not required to withhold or pay any taxes with respect to independent contractors, although they are required to issue information statements (Form 1099-MISC) with respect to payments made to independent contractors and report the payments to the IRS.

B. Misclassified Independent Contractors. If a Work Site Employer misclassifies a Worker as an independent contractor, files a Form 1099-MISC with respect to that individual, and accordingly fails to withhold and pay income, FICA, and FUTA taxes with respect to that Worker, the Work Site Employer will be liable for the taxes, penalty and interest described in the following chart, unless the Work Site Employer is eligible for relief under section 530 of the Revenue Act of 1978 (described further in Section I.C, below):

Taxes	Rate
*Liability for failure to withhold federal income tax (Code section 3509)	1.5% of wages.
*Liability for failure to withhold employee's share of Social Security and Medicare taxes (Code section 3509)	20% of employee's share of Social Security and Medicare taxes for the applicable year. For 1991 and thereafter, there is a 6.2% tax based on OASDI wages and a 1.45% tax based on hospital insurance wages.
Employer's share of Social Security and Medicare taxes (Code section 3111)	100% of employer's share of Social Security and Medicare taxes for the applicable year. The employer must pay the full amount of taxes which it would have otherwise paid on behalf of the employee.
Federal unemployment taxes (Code section 3301)	6.2% of the first $7,000 of wages. This rate may be reduced, through offsetting credits which vary by employer, to 0.8%.

Penalty	Rate
Penalty for failure to deposit income, Social Security, or Medicare tax on time (Code section 6656)	2% - 10% of the applicable underpayment, depending upon the extent of the delay in depositing the taxes. (A delay of more than 15 days after the due date will result in a 10% penalty.) A reasonable cause exception exists.
Interest	**Rate**
Interest on underpayment of income, Social Security, or Medicare tax, which begins accumulating on the last date allowed for payment of the tax, continuing until the date paid (Code section 6621(a)(2))	The rate is the federal short-term rate plus three percentage points, compounded daily, and is adjusted quarterly.
Interest on penalties and additions to any tax, which begins accumulating 10 days after an IRS notice or demand is received, continuing until the date paid (Code section 6601(e)(2))	The rate is the federal short-term rate plus three percentage points, compounded daily, and is adjusted quarterly.

* These liabilities double, to 3% and 40%, respectively, if the Work Site Employer failed to file a Form 1099-MISC, provided that the failure was not in intentional disregard of the requirement to withhold taxes (in which case more severe penalties would apply).

C. Section 530 Of The Revenue Act Of 1978. Section 530 of the Revenue Act of 1978 ("Section 530") relieves Work Site Employers of retroactive and prospective liability for employment taxes with respect to misclassified employees.

1. Requirements for relief under Section 530:

- Reporting Consistency: All federal tax forms (including Forms 1099) must have been filed in a manner consistent with the business' treatment of the Worker as an independent contractor.

- Substantive Consistency: All similarly situated Workers must have been treated as independent contractors as well.

- Reasonable Basis: The Work Site Employer must have had a reasonable basis for treating the Worker as an independent contractor, such as:

  - Judicial precedent;

  - A published ruling by the IRS issued to the taxpayer;

- Long-standing (but not more than 10 years) recognized practice of a significant (i.e., at least 25%) segment of the industry to treat such Workers as independent contractors; or
- Any other reasonable basis (*i.e.*, prior IRS audit which specifically addressed employment tax issues).

2. Classification Settlement Program ("CSP"):

- The IRS has instituted the CSP to resolve worker classification cases without going through more burdensome administrative channels. If the employer wishes to utilize the CSP, an IRS auditor will examine all relevant facts and circumstances in light of the requirements of Section 530, and proceed accordingly. The employer is not required to use the CSP, and may instead pursue an administrative review of any assessment and attempt to receive judicial relief from the imposition of employment taxes.

- The CSP is being implemented on a two-year trial basis, beginning March 5, 1996.

- Each taxable year under examination is reviewed separately. If the IRS auditor determines that all three conditions of Section 530 are satisfied, the business will qualify for relief under Section 530 for the examination year, and no further liability will be imposed.

- Similarly, if the IRS auditor determines that the business meets the Section 530 reporting consistency requirement but either clearly does not meet the Section 530 substantive consistency requirement or clearly cannot meet the Section 530 reasonable basis test, the IRS will offer a settlement of a full employment tax assessment for the one taxable year under examination, computed in accordance with the above table.
- Finally, if the IRS auditor determines that the business meets the reporting consistency requirement and has a colorable argument that it meets the substantive consistency requirement and the reasonable basis test, the IRS will offer a settlement of 25% of the employment tax liability otherwise due.

D. **Joint Employment.** As a general rule, a temporary help company is viewed as the sole employer for employment tax withholding and reporting purposes. *See, e.g., General Motors Corp. v. United States*, 91-1 U.S. Tax Cas. (CCH) ¶ 50, 032 (E.D. Mich 1990); *In re Critical Care Support Services, Inc.*, 138 Bankr. 378 (Bankr. E.D.N.Y. 1992).

1. In order for this rule to apply, the temporary help company (*i.e.*, Staffing Employer) must have control of payment of the worker's wages. In that case, it is irrelevant that the Work Site Employer controls the employee's activities at the work site.

2. A Work Site Employer generally is not jointly or alternatively liable for payment of employment taxes even if the Staffing Employer fails to withhold, regardless of whether the Work Site Employer otherwise is deemed to be a joint employer.

3. The proposed Staffing Firm Workers Benefits Act of 1997 (HR 1891) was introduced on June 12, 1997, to clarify the employer status of Staffing Employers for employment tax purposes and to give firms greater flexibility in establishing benefit plans. The bill was jointly developed by the National Association of Temporary and Staffing Services ("NATSS") and the National Association of Professional Employer Organizations ("NAPEO").

II. ERISA/Employee Benefits Issues

A. The use of contingent Workers and "Leased Employees" (as that term is defined under the IRC, *see* Section II.E, below) as well as (or in lieu of) regular employees, raises numerous issues with respect to the benefit plans offered by the employer. The areas of concern are:

4. Tax-qualified retirement plans (*e.g.*, 401(k) plans and defined benefit pension plans);

5. Certain welfare benefit plans (*e.g.*, self-insured medical plans, cafeteria plans and dependent care assistance plans); and

6. Stock-based compensation or bonus plans (*e.g.*, employee stock purchase plans).

B. Employee benefit plans and compensation practices can be tailored to cover only those employees and/or independent contractors whom the employer wants to cover, within certain limits imposed by the participation rules of ERISA or the Code with respect to the types of plans described in II. A.1-3, above. In general, these rules scrutinize the eligibility and level of benefits provided to an employer's "highly compensated" employees as compared to "non-highly compensated" employees.

C. If a Worker is improperly excluded from participation in an employee benefit plan and contests the exclusion, a court may require the Work Site Employer to provide that Worker the right to participate in the plan. Depending on the types of plans at issue, this may result in:

1. Retroactive and current participation in profit-sharing plans (including lost appreciation);

2. Retroactive and current participation in employee stock purchase plans;

3. Retroactive and current participation in welfare benefit plans, such as medical plans (with resultant COBRA coverage); or

4. Payment of back wages, if vacation pay or sick leave was at issue.

D. **Example -- *Microsoft* Litigation.** In *Vizcaino v. Microsoft Corp.*, 1997 U.S.App. LEXIS 18869 (9th Cir. July 24, 1997) (*en banc*), Microsoft had classified certain Workers (called "freelancers") as independent contractors. The freelancers had signed agreements stating they were independent contractors and acknowledging they were ineligible for benefits under Microsoft's benefit plans. Subsequently, the IRS concluded that the freelancers were in fact common law employees, and not independent contractors, for income tax withholding and employment tax purposes. Microsoft did not challenge this IRS conclusion.

The freelancers subsequently sued Microsoft, arguing that they had been impermissibly excluded from Microsoft's employee stock purchase and 401(k) plans, which were available to employees (but not independent contractors). The Ninth Circuit Court of Appeals, sitting *en banc*, ruled in July of 1997 that because the freelancers were in fact employees (based on, *e.g.*, the level of control Microsoft had over the freelancers), they could not be excluded from Microsoft's plans based upon the "independent contractor" agreements they had signed. The court concluded, therefore, that the exclusion of the freelancers from the employee stock purchase plan violated the terms of that plan. With respect to the 401(k) plan, there will be further proceedings to determine whether the language of Microsoft's plan excluded the freelancers, even though they were employees.

1. *Impact of Microsoft*: The reclassification of a Worker as an employee, rather than an independent contractor, can affect not only employment tax and withholding issues, but also the worker's eligibility to participate in the employer's benefit plans.

- Employers should review the language of their benefit plans to determine whether it is consistent with their intended plan design. For example, the plan's definition of "eligible employee" should be specific enough to encompass only those classes of workers whom the employer intends to benefit under the plan. Workers who are not considered by the employer to be benefits-eligible should be specifically excluded from plan coverage, to the extent permitted by law.

E. Impact of "Leased Employees" on Employee Benefit Plans. The term "leased employee" has a specific meaning under the Internal Revenue Code for benefits purposes.

1. The Code defines a "leased employee" as a person who:

- Performs services under an agreement between the Work Site Employer and Staffing Employer;

- Performs services under the primary direction or control of the Work Site Employer; and

- Performs services for the Work Site Employer on a full-time basis (*i.e.*, 1500 hours) for at least a 12-month period.

2. The Staffing Employer is considered the leased employee's employer for certain purposes. The Staffing Employer has the right to control and direct the worker's services for the Work Site Employer, including the right to discharge or reassign the worker. The Staffing Employer hires the workers, controls the payment of their wages, and provides them with unemployment insurance and other benefits.

3. A leased employee is not considered an employee of the Work Site Employer, but the Work Site Employer may provide certain pension benefits to its leased employees.

4. Certain benefit plans offered by Work Site Employers (*e.g.*, tax qualified retirement plans, life insurance plans, cafeteria plans, dependent care assistance plans, and educational assistance programs) must include leased employees in its coverage and participation testing, provided the leased employee has performed services for the Work Site Employer on a substantially full-time basis for a period of at least one year and such services are performed under the primary direction or control of the Work Site Employer, unless, with respect to tax-qualified retirement plans only,

- Leased employees constitute less than 20 percent of the Work Site Employer's non-highly compensated workforce (within the meaning of Code Section 414(n)(5)), and

- The leased employee is covered by a money purchase pension plan maintained by the Staffing Employer which provides for a nonintegrated employer contribution rate of at least ten percent of compensation, immediate participation, and full and immediate vesting.

5. Leased employees are treated as the Work Site Employer's employees for participation, vesting, nondiscrimination and other qualification requirements, although the benefits which the leased employees receive from the Staffing Employer which are attributable to service with the Work Site Employer are treated as provided by the Work Site Employer.

III. Worker's Compensation

A. Most states, including Massachusetts, provide worker's compensation benefits as the exclusive remedy to employees injured in the workplace and, in return, the employee is barred from suing his or her employer for damages related to such injuries. Subject to certain exceptions, a Work Site Employer generally is not protected by the worker's compensation bar and, consequently, may be liable to a Worker injured on its premises or in its service under a variety of common law tort theories.

1. Since the Staffing Employer is generally the employer, it generally will be protected by the exclusive remedy shield.

B. Massachusetts, like many states, extends the exclusive remedy bar to Work Site Employers of Staffing Employers, but only in limited circumstances. *See Mass.Gen.L. ch. 152, §§ 14A, 15, 18 and 211 CMR 111.04* (extending worker's compensation bar to leased and "special employers" under certain circumstances); *Williams v. Westover Finishing Co.*, 24 Mass. App. Ct. 58 (1987) (related companies both immune from liability under worker's compensation bar where they are joint employers of the plaintiff). *See generally, Larsen; Workers' Compensation*, §48.00 (1997).

1. *"Leased employees"*: A Massachusetts Superior Court recently held that the protection of the worker's compensation bar extends to a "client" of an "employee leasing company" so long as the requirements of Mass.Gen.L. ch. 152, §14A and 11 CMR 111.04 are followed. *Boyer v. Chatham Village Foods*, C.A. 96-0441, slip op. (Mass. Sup. Ct. June 2, 1997). Although no appellate-level court has yet ruled on the

specific issues raised in *Boyer*, that decision suggests that the protection of the worker's compensation bar can be extended to Work Site Employers in certain circumstances.

- Under that decision, for the bar to apply, the client must pay the entire cost of the worker's compensation premium for insurance coverage maintained by the employee leasing company for the leased employees, and the Massachusetts Employee Leasing Endorsement attached to the employee leasing company's insurance policy must show that the employee is leased to the client and identify the client as an insured.

- Under §14A, a "client" is clearly a type of Work Site Employer, *i.e.*, an entity that "utilizes workers provided by an employee leasing company pursuant to a contract." *Mass.Gen.L. ch. 152, § 14A(1)(a).* However, an "employee leasing company" is narrowly defined as an entity whose "business consists largely of leasing employees to one or more clients under contractual arrangements that retain for such employee leasing company a substantial portion of personnel management functions, such as payroll, direction and control of workers and the right to hire and fire [the leased] workers . . . provided, however, that the leasing arrangement is long term and not an arrangement to provide the client temporary help services during seasonal or unusual conditions." *Id. at §14A(1)(c).* Thus Section 14A, by its terms, would not appear to apply to short term leasing arrangements such as the usual temporary agency arrangement.

2. *"Special employers"*: The Massachusetts Worker's Compensation Act permits "special employers" to agree with a "general employer" that the "special employer" or its insurer shall be liable for the worker's compensation coverage for loaned employees. *Mass.Gen.L. ch. 152, §18.* Through this provision, Massachusetts has essentially codified the common law "loaned" or "borrowed" employee rule under which the Work Site Employer is considered to be a "special employer" and the Staffing Employer the "general employer" of the employee.

- Massachusetts courts apply a two-pronged test to determine whether a Work Site Employer is entitled to the benefit of the worker's compensation bar under this doctrine: (i) a direct employment relationship must exist between the Work Site Employer and the Worker and (ii) the Work Site Employer must be an "insured person" liable for the payment of compensation. *Lang v. Edward J. Lamothe Co.*, 20 Mass.App.Ct. 231, 232 (1985).

    - If the Work Site Employer retains sufficient right to control the Worker so that it would be deemed at least a joint employer of the Worker, the "direct employment" prong would appear to be satisfied. *See Boyer, supra.*

    - The "insured person" prong may be satisfied if the Work Site Employer is identified as an insured on the Staffing Employer's Massachusetts Employee Leasing Endorsement, *id.*, or if the Work

Site Employer's insurance policy expressly insures Workers. *Mass.Gen.L. ch. 152, § 18.* However, the "insured person" prong will *not* be satisfied if the Work Site Employer merely reimburses the Staffing Employer periodically a specified amount attributable to the cost of providing worker's compensation benefits to the Workers, but the Staffing Employer is the only named insured. *Numberg v. GTE Transport, Inc.*, 34 Mass. App. Ct. 904 (1993).

3. *Related Entity Joint Employers*: Related corporations may both be immune from tort liability under the worker's compensation bar where the operations of the two companies are closely integrated and employees work under the direction and control, and for the benefit of, both companies to such a degree that the companies are deemed to be joint employers. *Williams v. Westover Finishing Co.*, 24 Mass. App. Ct. 58 (1987).

- Absent that relationship, a parent corporation may not be protected by the worker's compensation bar when an employee of one of its subsidiaries is injured. However, that employee of the subsidiary may have a cause of action against the parent, notwithstanding the separate corporate existence, if the parent has become involved in or taken some degree of responsibility for health and/or safety conditions at the subsidiary's place of business or for the subsidiary's employees. (*See, e.g., Allen v. Borden, C.A. No. 92-10005-WD, slip op. (D. Mass., Sept. 16, 1993); Batchelder v. Borden, C.A. No. 89-22011, slip op. (Mass. Super. Ct., Oct. 4, 1994).*

IV. Unemployment Insurance

A. Courts apply the broad "economic realities" test to determine if a Worker is an employee or independent contractor.

B. Generally, the Staffing Employer is responsible for making unemployment compensation contributions for temporary workers as part of its obligation to comply with employment tax obligations.

C. However, the Supreme Judicial Court has opined that the Department of Employment and Training ("DET") could, in a given case, find that a Work Site Employer is responsible for making unemployment insurance contributions on behalf of Workers if the Work Site Employer exercised control and direction and the purposes of the unemployment compensation laws would be better served by holding that entity responsible. *Work-A-Day v. Commissioner of Dept. of Empl. & Training*, 412 Mass. 578 (1992).

D. Services performed by independent contractors are deemed to be "employment" subject to the unemployment compensation laws unless the Worker: (a) is free from control and direction in connection with the performance of services; (b) performs services (i) that are outside the usual course of business for the Work Site Employer or (ii) away from the Work Site Employer's place(s) of business; *and* (c) is customarily engaged in an independently established trade, occupation, profession or business. *Mass.Gen.L. ch. 151A, § 2.* If strictly applied, this provision would result in many true independent contractors being deemed in the employment of Work Site Employers for purposes of unemployment compensation laws.

V. Wage and Hour Issues

A. Courts apply the broad "economic realities" test to determine if a Worker is an employee or independent contractor.

B. Under the Fair Labor Standards Act, a single individual may be an employee of two or more employers at the same time, depending upon the economic realities of the situation. *See 29 C.F.R. § 791.2.*

1. In practical terms, the Staffing Employer ordinarily is responsible for complying with minimum wage, overtime, child labor, equal pay and record keeping requirements with respect to its employees.

2. Work Site Employers may be responsible as joint employers for the minimum wage and overtime due to temporary Workers assigned to that Work Site Employer for that work week. If a non-exempt temporary Worker works more than 40 hours for one Work Site Employer in the same work week, the Staffing Employer and Work Site Employer would be jointly liable for violations of the minimum wage and overtime rights of that employee. *See Department of Labor Opinion Letter No. 874* (October 1, 1968).

- A Work Site Employer, therefore, should not simply assume that its Staffing Employer (*e.g.*, temp agency) is paying overtime in compliance with the FLSA, but should seek assurances that the Staffing Employer is fulfilling its responsibilities under the FLSA.

VI. Family and Medical Leave Act

A. Coverage. The Family Medical Leave Act ("FMLA") applies to employers with 50 or more employees per day for 20 or more weeks in the current or preceding calendar year within a 75 mile radius of the work site.

B. Impact Of Contingent Employment Under The FMLA.

1. Work Site Employers may have to count Workers in determining whether they meet the 50 employee threshold. Generally, such Workers must be counted if "the entire relationship ... viewed in its totality" is one of joint employment. A temporary staffing or employee leasing company and its Work Site Employers will normally be considered co-employers. *29 C.F.R. § 825.111(a)(3).*

2. The regulations distinguish between "primary" employers and "secondary" employers. Normally the Staffing Employer is the primary employer. *See 29 C.F.R. § 825.106(e).* However, if a Work Site Employer exercises virtually exclusive control over a Worker, it may be deemed to be the "primary."

3. The "primary employer" bears responsibility for many FMLA obligations, including:

- providing required notices;

- approving leave;
- maintaining health benefits during leave; and
- restoring the employee to the same or equivalent position upon returning from leave.
- If, while a Worker is on leave, the Work Site Employer stops obtaining Workers from the Staffing Employer for legitimate business reasons or no longer has a need for the services provided by that worker, the Staffing Employer must place the Worker in an equivalent vacant position with another Work Site Employer or, if no equivalent vacancy is available, provide the Worker with priority consideration for assignments for which he or she is qualified.
- However, the secondary employer also has obligations:
    - It may not interfere with the exercise of FMLA rights by a worker or retaliate against the worker;
    - Normally must allow the leased or temporary worker to return to work at the conclusion of the leave, even if that means bumping another temporary worker.

VII. Civil Rights

True independent contractors generally are not protected by Federal or state fair employment practices or anti-discrimination statutes, such as Title VII. *E.g., Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986) (Title VII); *Birchem v. Knights of Columbus*, 116 F.3d 310 (8th Cir. 1997) (ADA); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 631 (1st Cir. 1996) (ADEA); *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987) (Equal Pay Act). However, misclassification of employees as independent contractors or the presence of joint employment relationships can complicate matters.

A. Title VII

1. A Work Site Employer may be held liable under Title VII if it unlawfully discriminates against a Worker it has classified as an independent contractor or a Staffing Employer's Workers if the reality of relationship indicates that the Work Site Employer is a joint employer or sole employer. *See, Williams v. Caruso*, 966 F. Supp. 287 (D. De. 1997) (finding a temporary employee provided by an agency not to be employed by the agency, but only by the work site employers); *Amarnare v. Merrill Lynch*, 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

2. Liability may be imposed on a Work Site Employer in the absence of a joint employment relationship where the Work Site Employer's discrimination can be shown to interfere with a Worker's employment opportunities with another employer.

Pardazi v. Cullman Med. Ctr., 883 F.2d 1155 (11th Cir. 1988); *Gomez v. Alexian Bros. of San Jose*, 698 F.2d 1019 (9th Cir. 1983).

3. In some cases, courts have held that an individual need not be a common law employee or joint employee of a Work Site Employer for Title VII liability to be available. *Mitchell v. Tenney*, 650 F. Supp. 703 (N.D.Il. 1986). These cases, however, tend to have been rendered under the old and largely repudiated "economic realities" test, where the court's main focus was on whether the aggrieved party was economically dependent on the Work Site Employer, regardless of the label one placed on the relationship.

B. Equal Pay Act (Federal and Massachusetts).

1. Joint employment status under the federal Equal Pay Act will be determined through application of the broad "economic realities" test. 29 C.F.R. § 1620.8. However, employment status under Title VII is determined under the narrower, common law right to control test. *See, Speen*, 102 F.3d at 631-632.

- As a result, in a discrimination case alleging gender discrimination under Title VII and violations of the Equal Pay Act, an individual could be found to be an unprotected independent contractor under Title VII, but an employee for purposes of the Equal Pay Act.

2. In determining whether an employer has discriminated against a Worker, the EEOC only considers job content, not job classifications, titles or other labels used by an employer. 29 C.F.R. § 1620.13. Thus, in a joint employment relationship, a Worker arguably could be compared to the Work Site Employer's actual employees for EPA purposes.

3. The fact that Workers are provided to the Work Site Employer by a Staffing Employer and that he Staffing Employers sets their salaries could be used by the Work Site Employer to establish that wage a differential is "based on any other factor other than sex." *See* 29 U.S.C. § 206(d). However, no cases have been reported that address this issue.

4. The Massachusetts Equal Pay Act prohibits discrimination "in the payment of wages as between the sexes" and makes it unlawful to "pay any person in [the employer's] employ salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations." Mass.Gen.L. ch. 149, § 105A. The only affirmative defense under MEPA is that wage differentials are based on seniority. *Id.*

C. Americans with Disabilities Act.

1. A Work Site Employer may face liability under the ADA if it is found to be a joint employer of a Worker. *See, e.g., Doe v. Shapiro*, 852 F. Supp. 1246, 1252 (E.D. Pa. 1994).

2. The Work Site Employer *and* Staffing Employer may be liable if the Staffing Employer complies with a discriminatory request from a Work Site Employer. *42 U.S.C. § 12112(b)(2).*

3. The EEOC has taken the position that both the Work Site Employer and Staffing Employer have a duty to accommodate a disabled Worker provided by the Staffing Employer. The extent to which a accommodation must provided will vary depending on the length of the assignment and the cost involved. *EEOC Compliance Manual*, Vol. 2, §65, Appendix G; *See generally, Poff v. Prudential Ins. Co.*, 882 F. Supp. 1534 (E.D. Pa. 1995).

D. Age Discrimination in Employment Act.

1. As with other anti-discrimination statutes, whether a Worker is classified as an employee will generally be determinative of whether the Work Site Employer faces potential liability.

2. Misclassifying employees as independent contractors or failing to recognize a joint employment relationship with leased workers could taint the disclosure required under the Older Workers Benefit Protection Act when a release is sought in connection with a reduction in force or voluntary termination program. *See 29 U.S.C. § 626((f)(1)(H).* That, in turn, could invalidate the releases.

E. Massachusetts Fair Employment Practice and Civil Rights Statutes

1. Chapter 151B does not apply to independent contractors. *Comey v. Hill*, 387 Mass. 11 (1982).

- Recently, the United States District Court for the District of Massachusetts held that Mass.Gen.L. ch. 214, §1C -- which generally prohibits sexual harassment -- does not cover independent contractors either. *Vicarelli v. Business International, Inc.*, C.A. No. 95-12401-RCL, slip op. (D.Mass. August 22, 1997).

2. However, the "aid or abet" provision of ch. 151B could be implicated if actions by a Work Site Employer caused a Staffing Employer to discriminate against a worker. *See Mass.Gen.L. ch. 151B, §5* (making it unlawful for "any person" to "aid, abet, incite, compel or coerce the doing of any of the acts" forbidden by ch. 151B). Likewise, the anti-retaliation provisions of ch. 151B are broad enough to reach a Work Site Employer regardless of whether it exercises any meaningful control over the worker. *See Mass.Gen.L. ch. 151B, §§ 4, 4A.*

3. The Massachusetts Equal Rights Act prohibits discrimination against independent contractors in entering into contracts and, possibly, the termination of contracts. *See Mass.Gen.L. ch. 93, §§ 102-103.*

F. Employer Information Reports (EEO-1 Forms)

1. Employers with 100 or more employees must provide annual statistical identification of an employer's workforce on the basis of gender and minority status.

2. The Official Instructions for the EEO-1 Form exclude "temporary employees" from the definition of employer for the purposes of that Form. Leased employees (as defined in the Instructions) must, however, be counted and included in the Report by the leasing company.

VIII. National Labor Relations Act.

A. Independent Contractors.

1. Under the NLRA, the term"employees" expressly excludes "independent contractors." 29 U.S.C. § 152(3). Since the NLRA only extends protection to "employees," independent contractors generally do not have rights thereunder.

2. Two pending cases, *Roadway Package System, Inc.*, 31-RC-7267, 31-RC-7277 ("RPS"), and *Dial-A-Mattress Op. Corp.*, 29-RC-8442, should provide new guidance as to how the National Labor Relations Board will evaluate whether an individual is an independent contractor or employee. The RPS case should be especially instructive since RPS uses an independent contractor agreement that the IRS has conceded complies with its 20 Factor test.

B. Joint Employment.

1. If the Work Site Employer is substantially involved in determining the terms and conditions of Workers provided by the Staffing Employer, the Work Site Employer may have joint employer obligations with respect to those Workers. *See, e.g., NLRB v. Browning-Ferris Ind.*, 691 F.2d 1117 (3d Cir. 1982); *North Am. Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir. 1980), *cert. denied*, 449 U.S. 899 (1980).

2. An additional factor to consider in determining whether there is co-employment in the area of labor relations is whether there is a sufficient "community of interest" between the Staffing Employer's Workers and the Work Site Employer's employees.

C. Collective Bargaining Units.

1. The NLRB has held that where there is a sufficient nexus between the Staffing Employer's employees and the Work Site Employer, the Staffing Employer's employees may be included in the Work Site Employer's collective bargaining unit. *See Manpower, Inc. of Shelby County*, 164 N.L.R.B. 287 (1967); *Add-a-Man*, N.L.R.B. Case No. 7-RC-9639 (1970); *Continental Winding Company and Kelly Services*, 305 N.L.R.B. 122 (1991). At least one federal court has also followed this rule. *See NLRB v. Western Temporary Services*, 821 F.2D 1258 (7th Cir. 1987).

2. Temporary Workers cannot be organized into a joint unit with employees of the Work Site Employer to which they are assigned without the consent of both the Staffing Employer and the Work Site Employer. *See Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973). In December 1996, the NLRB heard oral argument in three cases in which the *Greenhoot* decision was called into question by unions. *Jeffboat Division, American Commercial and Marine Services*, NLRB 9-UC-406; *M.B. Sturgis Inc.*, NLRB, 14-RC-11572, and *Value Recycle Inc.*, NLRB, 33-RC-4042. The NLRB has not yet released its decision in any of those cases.

D. Interference With Organizational Rights.

1. Interference with the Staffing Employer's employees' right to participate in union organizational activities or join the union may constitute an unfair labor practice against both the Staffing Employer and Work Site Employer.

2. The Work Site Employer may defend against such an unfair labor practice charge by establishing that it did not have an employment relationship with the employee. The NLRB addressed this issue in *Malbaff Landscape*, 172 N.L.R.B. 122 (1968). There, the NLRB held that the Work Site Employer did not violate § 8(a)(3), which outlaws employer discrimination against employees, by terminating the services of a temporary help company whose employees participated in a union organizing effort. However, the Work Site Employer in *Malbaff Landscape* contracted for the employee's services pursuant to a managed care arrangement, therefore, there was no employment relationship between the Work Site Employer and the employees.

IX. Work Site Safety

A. The Federal Occupational Safety and Health Act require employers to maintain a safe workplace.

B. The party with direct control over the workplace and the actions of the employees is normally the entity cited for violations -- and that is usually the Work Site Employer. *See Secretary of Labor v. Manpower, Inc.*, 1997 WL 6891 (OSHRC), 1977-78 O.S.H. Dec.

C. The Staffing Employer will normally not be cited for OSHA violations unless necessary to cure the violation or if the company knew or should have known about the violation.

D. Work Site Employers normally must maintain records regarding illnesses and accidents involving temporary Workers so long as the temporary Workers are subject to the Work Site Employer's supervision. *See* Fed. Reg. 4058 (1996).

E. While OSHA has directed that Work Site Employers notify contingent Workers of hazardous substances in the workplace (*see* OSHA's "Hazard Reporting Communication Standard"), some regional offices are imposing notification, training and provision of safety equipment obligations on Staffing Employers with respect to temporary Workers before the assignment begins.

X. Worker Adjustment and Retraining Notification Act ("WARN")

The WARN Act creates a dichotomy between "employees" and "affected employees." The former are counted for purposes of determining WARN coverage and the existence of WARN events, the latter are the type of workers to whom WARN notice must be given. Since the two terms are not defined in precisely the same way, some individuals may who count for purposes of determining whether notice must be given may not be entitled to notice. On the other hand, some individuals who may not count for purposes of determining whether notice must be given (*e.g.*,"part-time" employees) can be entitled to receive WARN notice. Under this regulatory scheme, the use of contingent Workers complicates further the issues regarding coverage and notice obligations.

A. WARN Act Coverage.

1. WARN provides that, with certain exceptions, employers of 100 or more "employees" (excluding "part-time" employees) must give at least 60 days of advanced

notice of a plant closing or mass layoff to "affected employees" or their representatives. 29 U.S.C. §§ 2101, 2102; 20 C.F.R. §§ 639.3, 639.5.

2. WARN only requires that notice be provided to "affected employees." 29 U.S.C. § 2102; 20 C.F.R. §§ 639.1(e), 639.6. "Part-time" employees are included within "affected employees." However, consultants or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not deemed by the Department of Labor ("DOL") to be "affected employees" of the Work Site Employer. 20 C.F.R. § 639.1(e). Thus, the DOL has concluded that many types of contingent workers need not be given WARN notice.

- Although WARN does not expressly define the term "employee" -- the types of workers who must be counted for purposes of determining WARN coverage and whether a threshold event has occurred -- the DOL stated in commentary it issued along with the final WARN regulations that "consultants or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed" are not "employees." No cases have been reported which address the binding nature of this commentary.

- Although the apparent exclusion of consultants and contract employees from the definition of "employee" would exclude many Workers from WARN coverage, one must still be careful to classify other categories of contingent Workers correctly. Specifically, employers sometimes mistakenly classify common law employees as "self-employed" contractors (*i.e.*, independent contractors). Misclassifying employees as independent contractors could result in a failure by a Work Site Employer to recognize it is covered by WARN in the first instance.

3. "Part-time employees" are not counted in determining whether an employer employs 100 or more employees for purposes of determining WARN coverage. 29 U.S.C. § 2101(a)(1). A "part-time employee" is defined as an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which WARN notice is required. 29 U.S.C. § 2101(a)(8). This definition excludes many contingent workers from being counted for purposes of determining whether an employer is covered by WARN.

B. <u>WARN Notice Trigger Events.</u> A covered employer must give WARN notice only in the event of a plant closing or mass layoff.

1. A "plant closing" is defined as the permanent or temporary shutdown of one or more facilities or operating units within a single site of employment that results in an employment loss for 50 or more employees (excluding part-time employees). 29 U.S.C. § 2101(a)(2).

2. A "mass layoff" means a reduction in force caused other than by a plant closing which results in an employment loss at a single site of employment by (i) 50 or more employees (excluding part-time employees) that constitute at least 33% of the

employees at that work site or (2) at least 500 employees (excluding any part-time employees). 29 U.S.C. § 2101(3).

- The closing of a temporary facility or a closing or layoff resulting from the completion of a particular project or undertaking of limited duration does not constitute a WARN event so long as the employees understood from the onset of their employment that the employment would be of limited duration. 20 C.F.R. § 639.5(c).

- Misclassifying common law employees as independent contractors could result in a failure by a Work Site Employer to recognize that it has conducted a "plant closing" or "mass layoff" that triggers WARN notice obligations.

XI. Immigration Reform and Control Act of 1986 ("IRCA")

A. IRCA makes it unlawful for an employer to hire any person not authorized to work in the U.S.

B. Employers must complete an I-9 form representing that the employer has verified the employee's right to work in the U.S. by reviewing certain documents specified in the regulations.

C. Unless contingent Workers are on a Work Site Employer's direct payroll, the Staffing Employer is obligated to comply with IRCA.