

W E L C O M E**A message from
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Laws and regulations affecting staffing companies change frequently, so it's a good idea to schedule periodic reviews to make sure that your practices and procedures are in compliance with federal, state and local requirements.

This issue of *The TKD Staffing Advisor*, a special publication for our clients and colleagues in the staffing industry, explores two issues that you may want to include in your compliance reviews. In one article, we look into the need to review independent contractor agreements in light of federal and state crackdowns on the misclassification of employees as independent contractors. A second article focuses on the I-9 form used to verify an employee's eligibility for employment, taking you through the form step by step and also giving you tips on how to maintain your files to ensure compliance with federal immigration law. In addition to these articles, we offer updates on potential legislative changes affecting staffing companies in New York City and New Jersey.

We hope you find this *Staffing Advisor* informative and useful, and we welcome your comments and suggestions. If you have a topic that would like us to address in a future issue, please contact me or any of the authors featured in this issue.

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**INDEPENDENT CONTRACTOR
CRACKDOWN: BE PREPARED!**

By Richard L. Steer and Arthur Zagorsky

The Internal Revenue Service, the U.S. Department of Labor and many state governments are cracking down on how companies classify their workers. The Obama administration has announced a plan for the Departments of Labor and the Treasury to hire 100 additional workers to conduct special audits focused on worker classification. The administration has indicated that the government can collect \$7 billion over the next ten years from firms that misclassify their employees as independent contractors.

The IRS has launched a three-year program that will randomly examine 6,000 companies to identify permanent workers misclassified as freelancers in violation of the Tax Code. Most of the IRS action will target small businesses and the self-employed, according to the General Accountability Office. The IRS

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asserts that smaller businesses are more likely to evade taxes and furthermore, it is easier and quicker to audit smaller businesses.

The pool of independent workers is enormous. According to a 2005 study by the Bureau of Labor Statistics, the most recent year for which figures are available, approximately 10.3 million workers or 7.4% of the employed workforce were classified as independent contractors. The survey did not indicate how many of those workers were misclassified.

U.S. Department of Labor estimates indicate that up to 30% of companies allegedly misclassify at least some of their employees. Some estimates indicate that companies can hold down labor costs by as much as 30% if they use independent contractors, because they do not have to pay Social Security and Medicare taxes, provide vacation or sick leave, pay for workers' compensation and

unemployment insurance, or worry about minimum wage or overtime provisions.

While the law on employee classifications has not markedly changed over the years, the emphasis on how to apply well-known legal principles has changed significantly. The New York State Department of Labor has been interpreting the factors for determining independent contractor status extremely strictly. In a recent case, demonstrated proof that a contractor had other clients and was a member of the Freelancers Union was not sufficient to prevent a finding of employee status.

New York State agencies have utilized a wide variety of factors in determining employee status. Many of the same factors are also utilized by the Internal Revenue Service.

Historically, the IRS utilized a 20-factor test in considering the determination of a worker's independent contractor status. In

2006, however, the IRS streamlined the 20 factors and organized the factors into the three main categories used today:

Behavioral Control – Facts that show whether the business has a right to direct and control how the worker does the task for which the worker was hired include the type and degree of instructions, evaluation and training the business provides the worker.

Instructions – An employee is generally told:

- When, where and how to work
- What tools or equipment to use and who owns them
- What workers to hire to assist with the work and who pays them
- Where to purchase supplies and services
- What work must be performed by a specified individual
- What order or sequence to follow when performing the work

Training – An employee may be trained to perform services in a particular manner.

Financial Control – Facts that show whether the business has a right to control the economic aspects of the worker's job include:

- The extent to which the worker has unreimbursed business expenses
- The extent of the worker's investment in the equipment or facilities used in performing services
- The extent to which the worker makes his or her services available to the relevant market
- How the business pays the worker



- The extent to which the worker can realize a profit or incur a loss
- Whether the worker is paid on a tax form 1099

Type of Relationship – Facts that show the type of relationship include:

- Written contracts describing the relationship the parties intended to create
- The extent to which the worker is available to perform services for other, similar businesses
- Whether the business provides the worker with employee-type benefits, such as workers' compensation benefits, insurance, a pension plan, vacation pay or sick pay
- The permanency of the relationship
- The extent to which services performed by the worker are a key aspect of the regular business of the company

The factors listed above are not an exhaustive list and other factors surface based on particular cases and industries. Many of the same factors are used under the New York State law in classifying employees. The key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Employers who believe that simply having a written independent contractor agreement will protect them are in for a rude awakening. Many employers' agreements and documentation simply do not go far enough in light of the new reality. Therefore, businesses that consider hiring independent contractors should consult an attorney to ensure that they comply with federal, state and local worker classification requirements. A thorough review of independent contractor agreements, even those that the company has used for years, is crucial.

About Richard L. Steer, Partner

Richard is a Partner in TKD's Labor and Employment Practice Group and heads the firm's Employment Practices Liability Insurance (EPLI) practice. He is also an Adjunct Professor of Law at Pace University School of Law. Richard has defended and counseled a wide range of employers, including staffing companies, regarding independent contractor status in government hearings and audits. He can be reached at rsteer@tarterkrinsky.com.

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I-9 FORMS – THE WHO, WHAT, WHY AND WHERE

By Andrew S. Koerner



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As immigration continues to grab the headlines, staffing companies need to consider how immigration reform often directly affects hiring processes and procedures. The I-9 form, used to verify an employee's eligibility for employment, and the procedures surrounding it were an outgrowth of the Immigration Reform and Control Act of 1986. Over the years, the I-9 has been incorporated into the welcome and hiring packages of new employees throughout the country. As enforcement of immigration regulations increases, in tandem with fines and in some cases criminal prosecutions for those who do not comply, it is important to review your firm's I-9 procedures.

The I-9 form and its requirements were created because Congress wanted to ensure that "foreign appearing" U.S. citizens and legal aliens were not turned away from jobs because of the possibility of additional paperwork or the fear that these individuals were not authorized for employment. One way Congress found to combat these possible issues was to impose the same proof of employment authorization for everyone: foreign nationals, permanent residents and U.S. citizens. It is illegal to require different levels of proof for different categories of job applicants, such as requiring that a permanent resident produce a permanent resident card in addition to the I-9-required documents from List B (documents that establish identity) and List C (documents that establish employment authorization).

For instance, any category of employee may provide a valid state driver's license (List B) and Social Security card (List C) to meet the requirements listed on the I-9 form.

In 2010, the Justice Department filed a lawsuit against John Jay College alleging that the school imposed "unnecessary and discriminatory hurdles to employment for work authorized non-U.S. citizens" by requiring additional or different employment eligibility verification documents from non-citizens, as compared with U.S. citizens, when hiring or re-verifying the non-citizens. John Jay allegedly fired an employee when she provided her unrestricted Social Security card and unexpired driver's license to verify her authorization for employment but did not provide a copy of her permanent residence card. Since she met the requirements according to the I-9 form, she should not have been required to provide a permanent resident card. Therefore, John Jay's standard practice or operating procedure allegedly resulted in a violation of the Immigration and Nationality Act.

This is a good time for you to review your own I-9 procedures to ensure that you are in line with U.S. regulations. A first step would be to make sure that you are using the most recent and updated I-9 form. In 2009, a new I-9 form was issued. The current, valid form shows a revision date of either August 7, 2009 or February 2, 2009; you can find the date in the lower right-hand corner of the form. You may download the most up-to-date form at www.uscis.gov.

The form is comprised of two sections: Section 1 is for the employee to swear that



he is authorized to work in the United States, and Section 2 is for you as the employer to swear that you have examined the original documents presented by the employee, that you believe the documents to be originals, and that the documents belong to the individual who presented them. You should make sure that names, ages and photos all match and make sense.

You may consult the "Handbook for Employers" at www.uscis.gov to ensure that you are completing the forms correctly. Please keep in mind that it is extremely important to fill out the forms correctly. If the forms are not completed exactly as they should be, your company may be fined or charged with criminal offenses by Immigration Customs Enforcement.

Here are some helpful tips regarding Section 1. You should ensure that the potential employee:

- Completes Section 1 without assistance. He must sign and date the form, and choose the documents to present.
- Includes his valid Social Security number on the form.
 - ♦ If the employee is waiting for his number to be issued, he should note that on the form, and then you should follow up with him.
 - ♦ If the employee has received a receipt from Social Security as proof of requesting the number, you should staple a copy of the receipt to the form.
- Checks one of the four boxes denoting citizenship status in the United States.

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- Includes a street address, as opposed to a post office box number. Regulations require the employee to provide his home location, not where he receives mail. In addition, the employee must sign and date the form in the correct boxes.
- Review and certify only original documents. Do not base your decision on copies; you must view the original documents and sign the employer's certification and print or type your full name. Keep in mind you are making a sworn statement that you have examined these documents.
- Enter the business name and address in the employer's certification block.
- Date the form on the day it is completed.
- Contact your legal counsel for confirmation in the event you are unsure whether any of the documents the employee provides is appropriate.

With regard to Section 2, you should:

- Assign completion of the form to the individual who normally does the hiring in your office, or is usually in charge of I-9 forms.
- Record only the specific information required on the form. The I-9 form requires only one document from List A (documents that establish both identity and employment authorization) or one document from List B and one from List C. Even if the employee provides more than one document from List A, record only one.
- Make sure you note the expiration date and write it on the form. You may not accept expired documents as proof of

identity or eligibility.

Once the form is completed, you should make sure that it is retained in a file specifically designated for I-9 forms. Keep all of your forms for your current employees in alphabetical order and attach copies of the documents used to verify identity and work eligibility. If you are using the E-Verify program, you should attach those receipts as

well. Keep forms for terminated employees in a separate file. You must keep files for terminated employees for three years after the employee's date of hire, or for one year after the termination date, whichever is later.

In addition, you should keep a separate file for the I-9 forms that will require some kind of action in the future — for instance, when an employee's visa or employment authorization card will expire, or when you are waiting for a Social Security number to be issued for a specific employee.

Finally, make sure you have a system in place, and that you review your files periodically to be sure everything is up to date.

About Andrew S. Koerner, Counsel

Andrew is Counsel in TKD's Business Immigration Practice Group. He counsels clients in all areas of immigration law and represents numerous national and international companies in their efforts to recruit and retain top multinational staff. Andrew can be reached at akoerner@tarterkrinsky.com.

NEW JERSEY LEGISLATIVE UPDATE

LEGISLATION WILL MANDATE E-VERIFY FOR I-9 COMPLIANCE

By Linda Singer Roth

Following a national trend, identical bills are currently under consideration by the New Jersey Senate and Assembly that would require New Jersey employers to use E-Verify. E-Verify is a web-based Employment Verification System run by the United States Citizenship and Immigration Services that allows employers to electronically confirm the employment eligibility of newly hired employees. Employers using the system can compare information provided by new hires on their I-9 forms to records maintained in the Social Security Administration and Department of Homeland Security databases.

Bills S1842 and A2600 prohibit the employment of unauthorized workers and require all New Jersey employers to use E-Verify. The bills provide for random audits as well as complaint-based investigations and require the termination of unauthorized workers. In addition, serious sanctions may be imposed on businesses employing unauthorized aliens. Possible sanctions include fines ranging from \$100 to \$1,000 per violation and/or the loss of business licenses either temporarily or, in severe cases, permanently.

Both bills are currently proceeding through the committee process. The effective dates for employers to comply with the legislation are not currently known, but the bills provide that smaller employers will have more time to comply than employers with 100 employees or more.

PAID SICK TIME ACT: MORIBUND... FOR NOW

By Alan M. Tarter

While the New York City Council's proposed Paid Sick Time Act did not come up for a vote in 2010 due to opposition from Mayor Michael R. Bloomberg and City Council Speaker Christine C. Quinn, it is possible that legislators will amend the legislation and send the amended version for another hearing in 2011. It is essential that the staffing community remain vigilant.

The City Council identified a need for paid sick time as a way to make it possible for employees to take care of themselves and their families when ill, and to address the accompanying issue of public health.

The proposed legislation would require all employers with 20 or more employees to provide all employees up to nine days of paid sick time per year. Businesses with 20 or fewer employees would be required to provide all employees up to five days per year. The "legislative intent" of the Paid Sick Time Act reads, in pertinent part,

"(N)early every worker in New York City will... need temporary time off from work to take care of his or her own health needs or the health needs of members of their families.... Paid sick time will have a positive effect on the public health of New York City by allowing sick workers the occasional option of staying at home to care of themselves when ill, thus... reducing the likelihood of spreading illness to other members of the work force...."

Some business and staffing trade groups have tried to identify some common ground with the proponents of the legislation and have proposed alternatives to address the City Council's concerns. There remains, however, great concern that businesses would have to bear the entire cost. Small businesses have voiced their objection to the bill saying that the burden of compliance would cause undue hardship, especially in these economic times. They might have to reduce their staffs, or even close their doors.

Be sure to pay attention to developments in the City Council in the coming months so that you are prepared to take action in connection with the proposed legislation if and when needed.



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