

## **Best Practices and Guidelines For Effectively Using A Contract Workforce**



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### Disclaimer

**Warning:** Information in this guide is provided for informational purposes only. This information does not constitute legal advice. State entities should not act on or rely upon any information contained in this guide without first seeking the advice of an attorney.

The general information in *Best Practices and Guidelines For Effectively Using A Contract Workforce* may or may not apply to the specific circumstances of individual state entities. Further, the information does not provide an exhaustive list of all legal and policy issues that state entities may need to consider when using and managing contract workers. State entities should conduct their own research in consultation with their legal counsel. Smaller entities without benefit of internal legal counsel should consider consulting with their legal representative at the Attorney General's Office or with outside counsel.

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## Introduction

The State Auditor's Office is providing state entities these guidelines to consider for effectively using and properly managing their contract workforce. Based on our research, this booklet describes some of the issues that entities should be aware of when considering using a contract workforce.

This booklet does not provide an exhaustive list of all legal and policy issues that state entities should consider when using and managing contract workers. State entities should conduct their own research in consultation with their legal counsel. Smaller entities without benefit of internal legal counsel should consider consulting with their legal representative at the Attorney General's Office or with outside counsel.

## Do You Need a Contract Workforce?

If you think that your state agency or institution may need a contract workforce, first examine these three issues:

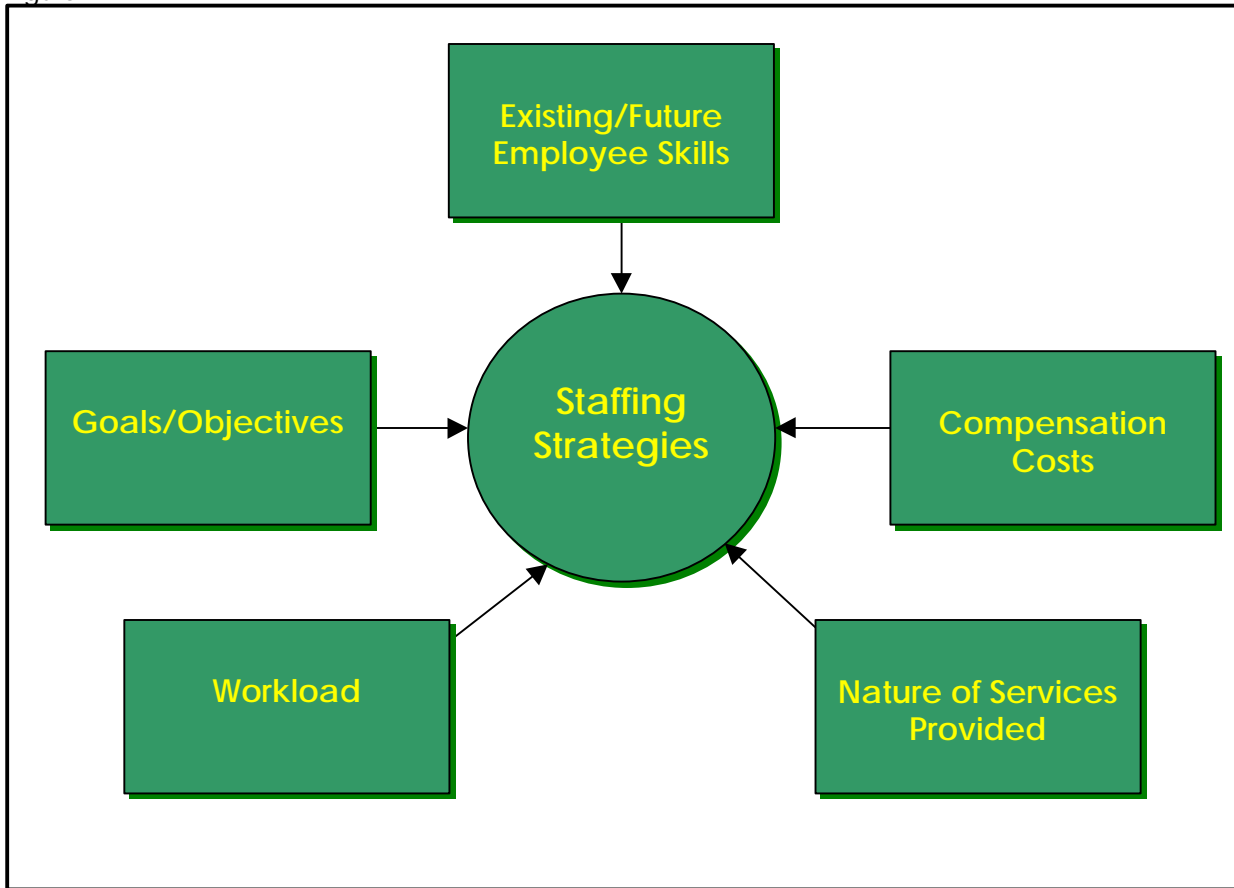
- Staffing strategies
- Cost-effectiveness
- Legal issues and their consequences

### Does a Contract Workforce Fit Your Staffing Strategies?

Research indicates that while strategic staffing helps to ensure that increases and decreases in staffing are planned and managed in the most efficient and effective manner, few organizations actually do it. Without staffing strategies, organizations often must react to fluctuations in the demand for more workers with little time to weigh the options and consider the alternatives. Being reactive rather than proactive often ends up costing more and producing less than management intended. Figure 1 shows some of the factors state entities should consider.

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Figure 1



In developing a strategy, human resources professionals should look to the overall goals and objectives in the strategic plan, both short and long term. Next, consider the skills workers currently have compared to the skills that will be needed in the future. Typically, regular workers are those who have the skills that will be critical to the entity over the long run. Sometimes lower skilled administrative workers are more easily brought in on a temporary basis.

Third, consider the cost of salary and benefits for each position along with productivity. Organizations often think temporary workers save them money because they are not paying for such things as social security and workers' compensation. However, state entities may be paying for similar hidden overhead costs as part of the amount paid to the contract company. It is also important to take into account differences in productivity of employees and contract workers. See the discussion on cost-benefit analysis that follows.

Finally, consider the type of work to be performed, the volume of the workload, the time required to complete a project, and the cyclical nature of the services provided. Determining when and how the workload will expand helps organizations plan for temporary staffing increases to accommodate these seasonal surges in work.<sup>1</sup> (See Staffing Strategies Checklist.)

<sup>1</sup> Caudron, Shari. "Contingent Workforce Spurs HR Planning," *Personnel Journal*, Vol. 73, No. 7 (July 1994): pgs. 52-60.

### Staffing Strategies Checklist

Have you reviewed the:

1. Overall goals and objectives in the strategic plan?
2. Existing skills of workers compared to those needed in the future?
3. Cost of compensation per position including salaries, benefits, and productivity?
4. Type of work to be performed?
5. Volume of the workload?
6. Time required to complete a project?
7. Cyclical nature of the services provided?

Source: Caudron, Shari. "Contingent Workforce Spurs HR Planning," *Personnel Journal*, Vol. 73, No. 7 (July 1994): pgs. 52 - 62.

### Would the Use of Contract Workers Be Cost-Effective?

Contract workers are not always a cost-effective solution to providing workforce flexibility. Research on the subject indicates that while lower cost is often cited as a reason to use contract workers, organizations seldom do any kind of cost-benefit analysis to determine whether contract workers are more or less expensive than regular employees. It is important to conduct a cost-benefit analysis for individual types of contract workers to determine whether their use is cost-effective. Research also indicates that there is no way to calculate an average cost benefit for contract workers due to differences in the type of work performed, length of assignments, and nature of services provided by different organizations.

Cost-effectiveness depends not only on wages and benefits, but also on productivity. Organizations using large numbers of contract workers without knowing the return they provide risk weakening their ability to withstand unpredictable business cycles, according to Shari Caudron, contributing editor to *Personnel Journal*. Myrna Hellerman, senior consultant with Chicago-based Sibson & Co., suggests evaluating the "true productivity" of contract workers. True productivity is defined as the output produced per hour by contract workers divided by the input. The input is the cost of employment per hours worked.<sup>2</sup>

While we realize this type of formula may not be easily applied to certain types of jobs or workers, state entities should consider productivity when determining the cost-effectiveness of contractors versus employees. State entities may need to develop models specific to their types of workers to estimate productivity. If state entities are unable to measure productivity, Stanley Nollen, authority on contract workforce issues, recommends calculating three scenarios that assume the productivity of contract workers is:

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<sup>2</sup> Caudron, Shari. "Calculating the Cost of Contingent Workers," *Personnel Journal*, Vol. 73, No. 11 (November 1994): pgs. 48a-48c.

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- Ten percent greater than the productivity of state employees
- The same as the productivity of state employees
- Ten percent less than the productivity of state employees<sup>3</sup>

Other advantages and disadvantages to using contract workers should also be considered, including training and retraining costs, loyalty to and investment in the organization, and the need for flexibility. (See Cost-Effectiveness Checklist.)

<b>Cost-Effectiveness Checklist</b>	
Have you:	
1. Compared the contract company's charge or the amount paid to contract workers with the salaries and benefits paid to employees doing the same type of work?	<input type="checkbox"/>
2. Compared productivity between the contract workers and state employees?	<input type="checkbox"/>
3. Calculated the unit labor cost per worker? The unit labor cost per worker is the cost of employment adjusted for productivity. For example, if the salary and benefit cost of contract workers is 11 percent less than state employees, and productivity is 4 percent less, then the unit labor cost of contract workers is still 7 percent less than state employees.	<input type="checkbox"/>
4. Factored the cost of training contract workers, such as salaries and lost output? These costs occur because the contract workers are paid while attending training, and they are not continuing to produce output while in training.	<input type="checkbox"/>
5. Analyzed the return on the training investment after the training is over? This analysis can be done by comparing the value of output produced by the contract worker to the money paid for that person's salary and benefits. After training, the output that workers produce should exceed the cost of their salaries and benefits. This gap is how organizations regain training costs.	<input type="checkbox"/>
6. Considered how long the contract worker stays on the job as it relates to training costs?	<input type="checkbox"/>

Source: Caudron, Shari. "Calculating the Cost of Contingency Workers," *Personnel Journal*, Vol. 73, No. 11 (November 1994): pgs. 48a-48c.

The tables in Appendix 1 provide additional guidance on how to determine and compare unit labor cost for contract and core workers, how to determine training cost for contract workers, and how to determine the cost-effectiveness of contract labor.

### **Have You Examined the Legal Issues Involved With a Contract Workforce?**

State entities must be familiar with the legal considerations and consequences involved with using and managing contract workers. Some managers incorrectly assume that a contract workforce always reduces the legal obligations that exist in the typical employer-employee relationship.

In fact, legal liability could increase when using and managing contract workers. When a court of law or the Internal Revenue Service determines that a worker classified as a contractor actually has an employer-employee relationship rather than a contract relationship, the state entity could be liable for additional

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<sup>3</sup> Ibid, p. 48b.



benefits, taxes, and other employee protections and regulations. (See text box titled "If Your Independent Contractor Is Determined to Be an Employee . . .")

Some managers do not realize that when a contracting company is involved, legal obligations may become more complicated rather than less complicated. In this situation, the state entity and contracting company become "joint employers" where each may have actual or potential legal duties of an employer. In developing staffing strategies for using contract workers, state entities should reconcile differences between perceptions about contract work relationships and the realities of those relationships in the eyes of the law.<sup>4</sup>

State entities need to plan carefully and examine the following issues with respect to their use of contract workers:

- Anti-discrimination
- Compensation, benefits, and taxes
- Workplace safety

See Appendix 2 for more details.

#### **If Your Independent Contractor Is Determined to Be An Employee . . .**

- The Internal Revenue Service (IRS) may require you to pay Social Security contributions and unemployment compensation taxes that should have been paid (including penalties and interest) and penalties for failure to withhold income taxes.
- The Department of Labor may require you to pay back overtime (if applicable) and possible fines up to \$10,000.<sup>a</sup>
- You could be liable for employee benefits. In the *Vizcaino v. Microsoft*<sup>b</sup> case, the employer was ordered to allow certain temporary workers to participate in the company's savings plan and employee stock purchase plan. This occurred when a court determined that an employer-employee relationship existed.

#### **Even If a Contract Worker Is Correctly Classified . . .**

- You could be liable under the federal anti-discrimination laws (such as Title VII, ADA, ADEA).

<sup>a</sup> Braff, Jeffrey L. "Legal Pitfalls of Classifying Workers," *HR Focus*, Vol. 74, No. 12 (December 1997): pgs. S9-S10.

<sup>b</sup> *Vizcaino v. Microsoft*, 1996 U.S. App. Lexis 26021

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<sup>4</sup> Nollen, Stanley, and Helen Axel. *Managing Contingent Workers: How to Reap the Benefits and Reduce the Risks*. New York, New York: AMACOM, a division of American Management Association (1996) p. 184.

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**What Are the Best Practices for  
Using a Contract Workforce?**

If you have decided that using contract workers is the appropriate course, keep the following best practices in mind. Use of contract workers requires state entities to understand and manage the complexities of these relationships. Management of these workers is further complicated by the fact that best management practices are not always consistent with advice from legal counsel. For example, directly providing performance feedback and training while building strong relationships with workers is a good management practice. However, legal advisors are likely to urge a much more cautious and distant relationship with contract workers. From a legal perspective, the best action for an organization is to plan carefully to avoid exposure to unnecessary liability.

**Best Practices Checklist**

1. Provide managers with guidelines for using contract workers. Time limits on assignments should be included to prevent "permanent" temporaries.
2. Make distinctions between types of work to be performed by state employees and contract workers. Provide considerations for use in making these distinctions. Avoid using contract workers in critical areas where in-house expertise should be retained or where confidentiality is important.
3. Be specific when describing skills and training needed for the position.
4. Ensure that you are not the only client of independent contractors or contracting companies. Ask them to provide evidence of their independent business operation.
5. Avoid the appearance of an employer-employee relationship by not using the services of one contractor full-time for long periods and by not providing job titles, dedicated office space, or dedicated support staff.
6. Provide separate ID cards for contract workers so they can be identified separately from state employees.
7. Interact with contract workers so that they do not view the State as their employer. For example, contract workers might feel the State is their employer if a supervisor manages and evaluates them the same as state employees.
8. Require any temporary or contracting company to make all employment decisions.
9. Use a separate policy manual and require reporting of personnel problems to the contracting company.

Sources: Nollen, Stanley, and Helen Axel. *Managing Contingent Workers: How to Reap the Benefits and Reduce the Risks*. New York, New York: AMACOM, a division of American Management Association (1996) p. 205.

Corroon, Willis. "Contingent Workers," [www.wilcor.com](http://www.wilcor.com). January 1996.

## Do You Have Policies and Procedures Specifically for Contract Workers?

Some state entities provide guidance on acquiring contract workers; however, few have comprehensive policies and procedures to guide entity personnel in managing contract workers. Without policies and procedures, management cannot ensure that contract workers are managed as intended throughout their organization. Policies and procedures are integral to the planning process discussed above and are essential tools for managerial direction and control.

Policies and procedures for management of contract workers should include guidance on how to monitor and evaluate contract workers' performance to ensure that they consistently provide quality services (by measuring performance against well-documented expectations) and that public funds are spent effectively and efficiently.

### Policies and Procedures Checklist

- |    |   |                          |
|----|---|--------------------------|
| 1. | How will you decide whether to use a contract worker or a state employee?<br>A method for analyzing costs and benefits (including productivity) should be included. | <input type="checkbox"/> |
| 2. | How will you ensure the best contract workers are fairly and objectively selected?  | <input type="checkbox"/> |
| 3. | How will you manage the contract workforce?<br>Policies including legal considerations and risks should be included.  | <input type="checkbox"/> |
| 4. | How will you evaluate and monitor performance of contract workers and contract companies?   | <input type="checkbox"/> |

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Appendix 1:  
**Calculating the  
Cost-Effectiveness of  
Contract Workers**

When determining the cost-effectiveness of contract workers, consider using the following worksheets and methodologies from Stanley Nollen and Helen Axel’s book titled *Managing Contingent Workers*.<sup>5</sup> While we realize that this type of formula may not be easily applied to certain types of jobs or workers, state entities should consider productivity when determining the cost-effectiveness of contractors versus state employees.

State entities may need to develop other models specific to their types of workers to estimate productivity. If state entities are unable to measure productivity, Stanley Nollen, authority on contract workforce issues, recommends calculating three scenarios that assume the productivity of contract workers is:

- Ten percent greater than the productivity of state employees
- The same as the productivity of state employees
- Ten percent less than the productivity of state employees<sup>6</sup>

### Compensation

Compensation is the sum of the **hourly** rate for wages, benefits, and fees received by contracting companies as indicated in this formula:

$\underline{W}ages + \underline{B}enefits + \underline{C}ontracting\ Company\ \underline{F}ees = \underline{C}ompensation$
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<u>Examples:</u>	
Formula:	$W + B + F = Compensation$
Contract Worker:	$\$15 + \$0 + \$5 = \$20$
State Employee:	$\$12 + \$3 + \$0 = \$15$

<sup>5</sup> Nollen, Stanley, and Helen Axel. *Managing Contingent Workers: How to Reap the Benefits and Reduce the Risks*. New York, New York: AMACOM, a division of American Management Association (1996).

<sup>6</sup> Caudron, Shari. “Calculating the Cost of Contingent Workers,” *Personnel Journal*, Vol. 73, No. 11 (November 1994): p. 48b.

The benefits may be zero if a contracting company furnished contract workers or if the State did not provide benefits.

### Unit Labor Cost

To calculate the unit labor cost, use the amount of compensation (per hour) and the output rate (quantity of units produced per hour) in the following formula:

$$\text{Unit Labor Cost} = \frac{\text{Compensation rate per hour}}{\text{Quantity of output produced per hour}}$$

Following is an example calculation of unit labor cost. Assume that compensation per hour is \$20 for contract workers and \$15 for state employees as calculated in the compensation example above. Also assume the contract worker has an output rate of 5 units per hour and the state employee has an output rate of 3 units per hour.

<u>Contract Worker:</u>	<u>State Employee:</u>
$\frac{20}{5} = \$4/\text{unit}$	$\frac{15}{3} = \$5/\text{unit}$

The example above demonstrates the importance of productivity. While the compensation per hour in our example is lower for the state employee, the higher quantity of output produced by the contract worker resulted in a lower unit labor cost. However, if we assumed the state employee produced 4 or more units per hour, the unit labor cost of the state employee would be lower.

### Compensation, Unit Labor Cost, and Pay/Performance Ratio Worksheets

Tables 1, 2, and 3 are examples of worksheets that can be used to compare compensation, unit labor cost, and the pay/performance ratio for a contract worker and state employee.

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Table 1

<b>Compensation Worksheet</b>		
<b>(W + B + F = Compensation)</b>		
	<b>Contract Worker</b>	<b>State Employee</b>
Wages \$/hr	\$	\$
Benefits \$/hr	\$	\$
Contracting Company Fees \$/hr	\$	
Compensation \$/hr.	\$	\$

Table 2

<b>Unit Labor Cost Worksheet</b>			
<b>Compensation ÷ Output Rate = Unit Labor Cost</b>			
	<b>Compensation (Hourly Rate)</b>	<b>Output Rate (Units Per Hour)</b>	<b>Unit Labor Cost</b>
Contract Worker	\$		\$
State Employee	\$		\$

Table 3

<b>Pay/Performance Ratio Worksheet</b>			
<b>Compensation ÷ Performance Appraisal = Pay Performance Ratio</b>			
	<b>Compensation (Hourly Rate)</b>	<b>Performance Appraisal</b>	<b>Pay/Performance Ratio</b>
Contract Worker	\$		
State Employee	\$		

The benefits may be zero if contract workers are supplied by a contracting company or if no benefits are paid. If no output/input measure is available for productivity because of the nature of the work, use performance appraisal data instead (see Table 3). If no performance appraisal data is available, adopt alternative “what if” assumptions about productivity differences. The end result obtained will be either unit labor cost difference or pay/performance ratio difference between contract workers and state employees.

## Training

Tables 4, 5, and 6 consider the impact of training costs when deciding whether to use a contract worker.

Table 4

Training Cost Worksheet	
Formal Classroom Training	
Direct cost of trainer	\$
Direct cost of facilities	\$
Opportunity cost (trainee's compensation)	\$
<b>Subtotal Formal Training</b>	\$
On-the-Job Training	
Direct cost of scrappage (Defective output or wasted Materials)	\$
Opportunity cost (Value of supervisor's lost output; Value of trainee's compensation less output)	\$
<b>Subtotal On-the-Job Training</b>	\$
<b>Total Training Cost (Formal + On-the-job)</b>	\$

The company expects to get value of output from workers equal to the amount it pays workers. To determine the value of output, equate the output rate to the compensation rate for an entry-level state employee or trained contract worker. Training costs begin to be recovered when the value of output produced by the trainee exceeds the wages paid to the trainee.

Table 5

Training Cost Recovery Rate			
Value of <u>O</u> uput - <u>C</u> ompensation = Cost Recovery Rate (O - C = R)			
	Value of <u>O</u> uput	<u>C</u> ompensation	Cost Recovery <u>R</u> ate
Contract Worker	\$	\$	\$
State Employee	\$	\$	\$

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Table 6

<b>Variables for Decision Methodology</b>	
Unit Labor Cost or Pay/Performance Ratio	\$
Training Cost Unrecovered, \$/trainee (Total Training Cost from Table 4 or Recovery Cost Rate x Time on Job After Training)	\$
Training Cost Recovered	\$
Time on job after training (hours)	
Contract Labor Cost Savings After Training, \$/Worker (Unit Labor Cost Difference x Hours Worked)	\$
Total Cost Difference for Contract Workers \$/Worker (Training Cost Unrecovered - Contract Labor Cost Savings After Training)	\$

### Decision Methodology

1. If unit labor costs or pay/performance ratio is higher for contract workers, they are not cost-effective. If it is lower, see if the training cost is unrecovered.
2. If training costs are recovered, contract workers are cost-effective. If some training costs are unrecovered, determine total cost difference for contract workers (see last row of Table 6).
3. If contract labor cost savings after training exceeds unrecovered training cost, contract workers are cost-effective.
4. If labor cost savings after training is less than unrecovered training cost, contract workers are not cost-effective.



Appendix 2:  
**Understanding the Legal Issues  
Related to Contract Workers**

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**Related Laws and Regulations**

- Title VII
- Age Discrimination in Employment Act
- Americans With Disabilities Act
- Internal Revenue Service 20 Factors Test (Rev. Rul. 87-41, 1987-1 C.B. 296)
- Family and Medical Leave Act

**Anti-Discrimination**

Title VII, Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) are important anti-discrimination regulations, which state entities must consider in planning for and managing their contract workforce. (See Anti-Discrimination Checklist.)

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Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. State entities may be liable under Title VII even when the entity does not have an employer-employee relationship with the contractor.

The ADEA prohibits discrimination on the basis of age for those who are at least 40 years of age.

The ADA prohibits discrimination on the basis of disability and requires that a reasonable accommodation be made upon request.

Further, the Family and Medical Leave Act (FMLA) prohibits discrimination or retaliation against staff taking leave that is allowable under FMLA.

<b>Anti-Discrimination Checklist</b>	
1. Does your entity afford workers from temporary or contracting companies the same protections against discriminatory treatment that apply to permanent staff?	<input type="checkbox"/>
2. Has your entity considered having its Equal Employment Opportunity (EEO) policy expressly apply to contract workers?	<input type="checkbox"/>
3. Does your entity emphasize to all staff that the EEO policy applies to contract workers as well as to permanent staff.	<input type="checkbox"/>
4. Does your entity promptly investigate and take appropriate remedial action in response to any complaint of discriminatory behavior toward a contract worker?	<input type="checkbox"/>
5. Is your entity refraining from making any request or demand of a contracting company that could be construed as a request to engage in discriminatory conduct?	<input type="checkbox"/>

Source: Mish, Risa M. "Perils of Temporary Employees Liability Lurks Under Several Federal Statutes," *New York Law Journal*, June 1, 1998.

## Taxes

Employers must withhold income, Social Security, Medicare, and unemployment taxes on behalf of their employees. Whether an employer is bound by federal tax rules depends on whether an individual is an employee or an independent contractor. A contract stating that a worker is a contractor does not ensure that the worker will be considered a contractor by a court of law or by the Internal Revenue Service (IRS).

The IRS applies a facts-and-circumstances test that distinguishes employees from independent contractors based on the relationship that exists and the control an employer has. Misclassifying workers can result in federal (and state) tax liabilities and penalties for the employer, as well as unanticipated legal liabilities. An employer may request an IRS determination of a worker's status by filing Form SS-8. Form SS-8 contains the list of questions used by the IRS to determine whether a worker is an employee or contractor.<sup>7</sup>

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<sup>7</sup>IRS Form SS-8, *Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. (Revised June 1997).

### Factors the IRS Considers to Determine a Worker's Status

The IRS has identified the following factors derived from the common law to indicate whether sufficient control exists to establish an employer-employee relationship.<sup>a</sup> These factors serve only as guidelines. The degree of importance of each factor depends on the type of work performed and the context of particular situations. In general, workers who are considered employees can be expected to:

1. Comply with instructions about when, where, and how work is done.
2. Receive on-the-job training or formal instruction.
3. Perform services that are integrated into operations.
4. Render services personally.
5. Rely on the employer to hire, supervise, and pay assistants.
6. Maintain a continuing relationship with the organization where services are performed.
7. Comply with set hours of work.
8. Devote full time to the employer's organization.
9. Work on the employer's premises or in locations sanctioned or required by the employer.
10. Perform services in a set order or sequence.
11. Submit oral or written reports.
12. Receive payment by salary or time, not by job or commission.
13. Receive reimbursement for business and/or traveling expenses.
14. Look to the employer to furnish tools, materials, and equipment.
15. Lack significant investment in the business.
16. Realize no profit or loss from work performed.
17. Work for one organization at a time.
18. Not make services available to the general public.
19. Be subject to discharge at will by the employer.
20. Have the right to terminate the employment relationship at any time.

<sup>a</sup>See IRS Publication 15-A, *Employer's Supplemental Tax Guide*. (Revised January 1999).

Source: Nollen Stanley, and Helen Axel. *Managing Contingency Workers: How to Reap the Benefits and Reduce the Risks*. New York, New York: AMACOM, a division of American Management Association, 1996.

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### Benefits

State entities should consider the potential liability for employee benefits when hiring contract workers. If a court determines that an employer-employee relationship exists (rather than a contractual one), an entity could be liable for various types of state benefits. Courts have considered the control factors identified by the IRS and previous IRS rulings when determining whether an employer-employee relationship exists for the purpose of benefits. Where the employer has significant control over the work performed, an employer-employee relationship will likely exist.

Language used in benefit plans describing who is entitled to benefits also contributes to a court's decision about whether a worker should receive employee benefits. Legal representatives should ensure that language used in benefit plans protects state entities to the maximum extent possible.

Some benefits allocate certain responsibilities to the staffing company and other responsibilities to the client employer. The Family and Medical Leave Act (FMLA) is one of those benefits. FMLA requires the:

- Provision of unpaid leave for up to 12 weeks annually for family or medical reasons
- Maintenance of benefits during leave
- Reinstatement to same or equivalent positions at expiration of leave

Primary employers (contracting companies) are responsible for providing notices to employees, administering the rights and benefits, and restoring employees to the jobs they left. The secondary employer (state entity) must accept the returning contract worker and is prohibited from discriminating or retaliating against a worker who takes FMLA.<sup>8</sup>

### Workplace Safety

Employers should provide a safe work environment for their contract workers as well as their employees. The state entity that provides the workplace and controls the working environment of its contract workers could be liable if a safe workplace is not provided. This potential liability could be shared with the contracting company, but the entity providing the workplace is likely to be found primarily liable where it has supervisory control over work on the premises.<sup>9</sup>

The Supreme Court of Texas discussed the liability of a premises owner to an independent contractor's employees in a recent opinion.<sup>10</sup> The court said "A premises owner may be directly liable to an independent contractor's employees under two general theories of premises liability: (1) negligence arising from an activity on the premises; and (2) negligence arising from a premises defect. Under either theory, proof of the premises owner's right to control is an explicit requirement."

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<sup>8</sup> Nollen, Stanley, and Helen Axel. *Managing Contingent Workers: How to Reap the Benefits and Reduce the Risks*. New York, New York: AMACOM, a division of American Management Association (1996).

<sup>9</sup> Burnes, Beverly Hall and John H. Willems. "Employment Law," *The National Law Journal*, (October 13, 1997): p. B-08.

<sup>10</sup> See *Coastal Marine Services of Texas vs. Martha Lawrence...*, No. 98-0287, p. 2, February 1999. Also See *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W. 2d 523, 527-28 (Tex. 1997) and *Redinger v. Living, Inc.*, 689 S.W. 2d 415, 417 (Tex. 1985).

The Texas Workers' Compensation Commission (TWCC) oversees the safety and health of work environments for state employees and contract workers who work on site at state entities. State entities should ensure compliance with TWCC requirements. They should also make sure contract workers are insured for workers compensation either by the contracting company or the state entity. Additionally, while Occupational Safety and Health Administration (OSHA) requirements do not specifically apply to them, state entities should use OSHA guidelines where applicable to ensure they are providing a safe workplace to both their employees and contract workers.

### What Items Should Be Considered When Developing Contracts?

When entering into contracts for services, state entities should consider several issues. Without consideration of these issues, entities may not be able to hold contractors accountable for services provided, and the relationship with the contractor may not be clearly defined. Additionally, state entities have a higher risk of legal liability when these issues are not considered. Considering all important legal issues lessens the risk but does not always prevent legal liability from occurring. The Contracts Checklist contains some of the items that should be considered by entity management and discussed with legal counsel when developing contracts where contract workers will be used.

<b>Contracts Checklist</b>	
1. Is the contract worker licensed and bonded? (If necessary)	<input type="checkbox"/>
2. Do the contracting company and your state entity both comply with federal and state tax requirements and regulations relating to employee benefits, anti-discrimination and authorization to work?	<input type="checkbox"/>
3. Do your contracts with staffing or contracting companies specify who has the authority and responsibility to hire, fire, transfer, train, evaluate, discipline, pay, and assign work?	<input type="checkbox"/>
4. Do your contracts indicate responsibility for wrongful discharge lawsuits, unemployment insurance, workers' compensation, employment taxes, and reimbursement due to losses in these areas?	<input type="checkbox"/>
5. Do your agreements with contractors explicitly describe the relationship as such, and deny traditional employment? (Status as an independent contractor under federal law will depend on the facts and circumstances, not just the language in the agreement.)	<input type="checkbox"/>
6. Do your contracts for services identify specific projects to be completed and ensure payments coincide with delivery dates during the project period?	<input type="checkbox"/>
7. Do your contracts include a description of how contractor performance will be monitored and assessed?	<input type="checkbox"/>
8. Do you require written documentation of the scope and character of services to be provided, including reference and background checks?	<input type="checkbox"/>
9. Do you consult with legal counsel on every contract to ensure that legal issues have been adequately considered?	<input type="checkbox"/>

Appendix 3:

References and Places  
State Entities  
Can Go for Assistance

For assistance, state entities should always consult with legal counsel. For background research and additional information, state entities should see the following sources.

### Books



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Thompson, John A. "The Contingent Workforce: The Solution to the Paradoxes of the New Economy," *Strategy and Leadership*, Vol. 25, No. 6 (November/December 1997): pgs. 44-45.

Thrasher, John. "Build Flexibility into the Work Force with Independent Contractors," *Recruitment Today*, Vol. 3, No. 2 (Spring 1990): pgs. 36-39.

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## Court Cases



*Clark v. Dupont*, 1997 U.S. App. Lexis 321

*Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W. 2d 523, 527-28 (Tex. 1997)

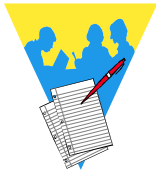
*Coastal Marine Services of Texas vs. Martha Lawrence . . .*, No. 98-0287, p. 2, February 1999.

*Hill v. Eastman Kodak Co.*, No. 94-CV-6353T (W.D.N.Y.); *Penix v. Eastman Kodak Co.*, No. 94-CV-6352T (W.D.N.Y.).

*Redinger v. Living, Inc.*, 689 S.W. 2d 415, 417 (Tex. 1985).

*Vizcaino v. Microsoft*, 1996 U.S. App. Lexis 26021

## Related Laws



- Title VII
- Age Discrimination in Employment Act
- Americans With Disabilities Act
- Internal Revenue Service 20 Factors Test (Rev. Rul. 87-41, 1987-1 C.B. 296)
- Family and Medical Leave Act



## Internet Sites



*Workforce* magazine:

[http:// www.workforceonline.com](http://www.workforceonline.com)

Department of Labor:

[http:// www.dol.gov](http://www.dol.gov)

Internal Revenue Service:

[http:// www.irs.ustreas.gov](http://www.irs.ustreas.gov)

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