

Surfing the Contingent Workforce Wave

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Economic and social forces are accelerating a trend to contingent labor that requires innovative employment and labor law compliance efforts from organizations that, until now, have focused principally on their roles as direct employers.

Contingent labor includes most of the ways that people work other than the direct, long-term employer-employee relationship. The most common ways are as temporary agency employees, independent contractors and members of professional employer organizations. Also included are directly

employed, but short-term, project workers. Most contingent labor still involves in-person service and interaction, but technology provides new modes of contingent labor that omit in-person contact, such as offshore outsourcing and web-based "crowdsourcing" (a phenomenon where small work tasks are offered, accepted, performed and compensated online too fast for the traditional employment processes to occur).

In April 2009, our prediction was that, at the end of the current recession, 50 percent of the workforce added in the recovery and 25 percent of the total ongoing workforce will be contingent employees. Since September 2009, 495,000 temporary jobs have been created, not including the growth of independent contractors and short-term project positions. The 2010 Aberdeen Group Contingent Labor Management Report surveyed 30,000 organizations, revealing that already one out of every five workers are contingent, with their numbers growing more than 20 percent per year. The "jobless recovery" has delayed the endpoint of the recession; however, if the growth rate continues, our prediction would be reached in early 2012 without including short-term project employees.

For many reasons, some conflicting, both workers and employers drive this trend. Workers, especially members of "Generation X" and those disillusioned by changes in the traditional employment model, value independence, freedom and the greater ease of securing contingent work. Employers, besieged by the ever-increasing burden of labor and employment laws, want flexibility, cost savings, human resources services and legal insulation; and these factors all become stronger during and on the way out of economic recessions.

Businesses go national and international much more quickly these days, but it is still burdensome to become an employer in multiple jurisdictions, so staffing and outsourcing firms make geographic expansion less compli-

cated, risky, time consuming and expensive. Increasingly, certain skills are in short supply, and becoming a "contractor" is often a way to maximize payment for such skills. Staffing Industry Analysts, in its annual forecast, predicts that by 2020 professional skills will constitute two-thirds of U.S. staffing spending.

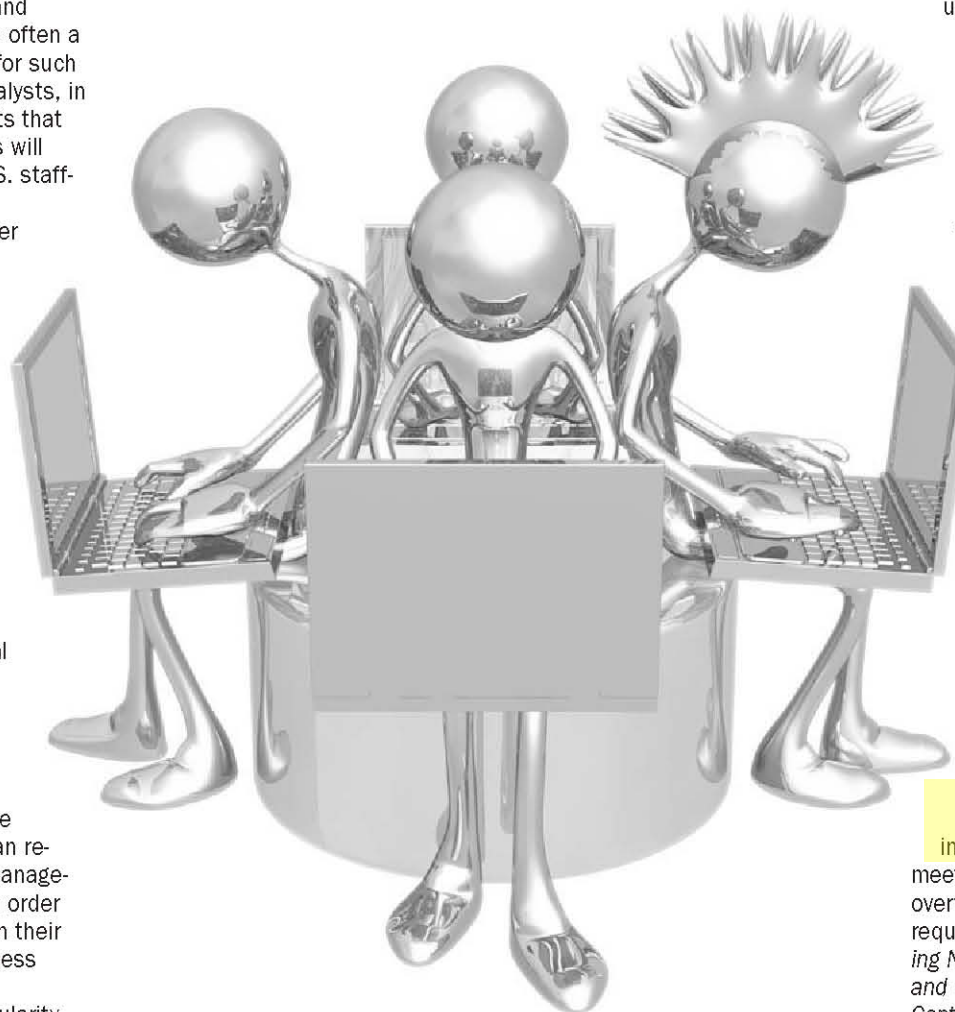
The professional employer organization model for outsourcing entire workforces has become widespread. Although it is facially similar to temporary agency employment because of its use of a third-party statutory employer, the emphasis is very different. Organizations that use professional employer organizations recruit their own workforces but use professional employer organizations as third party employers to provide superior benefits and to free themselves

as much as possible from human resources management — in order to focus on their core business functions.

The popularity of independent contractor status among workers is often driven by its cultural image of "free agency" and independence, by opportunities for project work that are not offered to regular employees, by legitimate tax reasons like deductions, and, in some cases, by the desire to

evade payroll and withholding taxes. This could be called a "return to the future," since independent economic roles for individuals were the norm before the industrial revolution.

Even the traditional direct employer-employee relationship has become increasingly contingent. Twenty-three percent of all workers over age 16 have been on their current job for less than 12 months. The U.S. Department of Labor estimates that today's learners will have 10 to 14 jobs by age 38. Now, people change jobs and occupations freely; employers dis-



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charge them for no-fault business reasons; unions have declined in the private sector; and benefits (such as defined contribution retirement plans) are fast vesting and relatively portable. When job changes happen, employees do not forfeit their social networks but bring them along in cyber communities like LinkedIn, Facebook, and Myspace. And these factors will surely continue through 2011 and beyond.

The federal health care reform law enacted in 2010 may well accelerate the contingent labor trend. It promises to partially or completely divorce access to health care coverage from the traditional employment relationship. Many workers now held hostage by job-linked health coverage will be free to consider contingent employment roles. Several features of the new law favor small employers or contractors and encourage franchising, while other features will tempt employers to use part-time instead of full-time

workers.

Mostly written decades ago, federal and state general employment laws fail to take contingent employment expressly into account, and it takes years for new working

arrangements to be tested in litigation. The law has not kept up with employment trends, so how can you? How should organizations achieve employment and labor law compliance for the new contingent workforce?

Three essentials have emerged: First, identify the contingent workforce in your organization. Second, designate a contingent workforce compliance manager who can coordinate resources and requirements from the human resources, legal and procurement departments. Last, consider a compliance audit potentially subject to the attorney-client privilege. Several new third-party companies have emerged, which focus on providing compliance assistance. These range from staffing organizations to specialized services such

as BOTH USA (Back Of The House), which helps independent contractors

meet legal requirements. For an overview of the legal issues and requirements, see *"The Emerging New Workforce: Employment and Labor Law Solutions for Contract Workers, Temporaries, and Flex-Workers,"* available at www.littler.com.

In the globally competitive 21st century, a legally compliant contingent workforce can not only enhance an organization's qualitative and financial results; it will be essential for business survival.



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