THE LITTLER REPORT

THE EMERGING NEW WORKFORCE:

2009 Employment and Labor Law Solutions for Contract Workers, Temporaries, and Flex-Workers

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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I. INTRODUCTION

The current economic recession, characterized by former Federal Reserve Chairman Alan Greenspan as the "longest and deepest" since the "Great Depression" of the 1930s,[1] has immersed employers in a battle to reduce labor costs. In the instant era of downsizing, the principal focus has become immediate survival planning. Layoffs, overhead cost cuts, cost audits, and other efforts to simply remain afloat are the reality for management across the nation. But, unquestionably, another day is coming. Many economists now predict that the recession, which began in 2007, will end or be in its final stages in the second half of 2009.[2]

With expectations (and hopes) that the recession will be over in 2010, what should employers do to take immediate advantage of the coming upturn as it impacts the labor force? One option is to remain rigidly focused on containing costs while waiting for the recovery. This approach is all too common not necessarily as a conscious choice, but as a condition of paralysis when encountering deep disappointment. The price paid for failing to plan for the coming changes will be the loss of competitive advantage. Employers that prepare now for the new emerging workforce of 2010 will be far better positioned to embrace the new workforce and meet legal compliance requirements.

The purpose of this Report is to provide employers with the tools to prepare *now* for the employment and labor law challenges they will likely face when the post-recession workforce emerges. Littler predicts that "contingent workers" will constitute, on average, a full 50% of the new source of workers to whom employers will turn as the recession ends.[3] The result of this trend will be that contingent workers will make up approximately 25% of the total workforce, and this percentage will continue to increase.

The trend towards using skilled workers on a temporary, project-by-project, basis is not new, but will become increasingly visible as employers seek to efficiently increase and manage their labor pools following the recession. As far back as the mid-1990s, the MIT Sloan School of Management posited shifting networks of contingent workers as one possible scenario for the workforce of 2015.[4] Based on industry research and trends, the scenario envisioned by MIT as possible in 2015 is now likely to become a reality in 2010 — five years early — as a result of rapid changes caused by the recession. The deep economic contraction has been far greater that anything forecast in the 1990s, resulting in the likely loss of more than six million jobs. Accordingly, an opportunity has opened to refill these positions with a higher percentage of contingent workers.

A. An MIT Model for 21st Century Organizations: "Shifting Networks of Small Firms"

To provide employers a realistic vision of what to expect in the post-recession workforce, Littler has consulted with Professor Robert J. Laubacher from MIT, who co-chaired a groundbreaking study at the MIT Sloan School of Management aimed at envisioning scenarios for future organizational structures. In 1994, MIT began a multi-year research and education initiative titled *Inventing the Organizations of the 21st Century*.[5] A key focus was developing coherent scenarios of possible structures of future organizations. The scenarios were intended not as predictions, but rather as visions of potential alternative ways of organizing work and structuring business enterprises in the next century. The scenario process employed a range of techniques, including research, brainstorming, story telling, and sketching narrative accounts delineating the boundaries of what could conceivably occur. MIT framed potential scenarios focusing on what the world would be like in the year 2015, future ways of organizing work and businesses worldwide, and the effects of future organizational forms on economic and non-economic aspects of life for individuals and society. From 1994 to 1997, the possible scenarios were reviewed by and discussed with hundreds of business executives, academics, and consultants.

MIT predicted that five variables would likely be the most important driving forces for businesses of the future: (1) technology; (2) human aspirations (*i.e.*, what will people in the future want?); (3) global economic, political, and physical environment; (4) complexity (*i.e.*, will the world continue to become more complex?); and (5) demographics (in particular, the shift of population and wealth away from North America and Western Europe).

Considering these elements, the MIT study focused on the *size* of individual companies of the future. Technological advances, allowing instant communication through the Internet and e-mail, globalization, increased education and expertise, and generational differences were addressed as having the potential to result in companies having smaller regular workforces, but increasingly relying on enormous networks of contingent workers.

The smaller companies envisioned by MIT would have large, temporary networks of thousands of contingent workers. These skilled workers would come together to form temporary organizations or "virtual companies" that would exist only until the project bringing the network together was completed.

MIT posited that many large corporations of the 20th century were simply a transitional form of business emerging from the industrial revolution. Before the industrial revolution, most Americans were self-employed as, for example, farmers, shopkeepers, or artisans, and belonged to a series of institutions, including professional associations and local communities that provided means for finding jobs, sharing learning and skills, and meeting with peers. After the Industrial Revolution occurred in the 19th century, American workers became more closely tied to the employing organization, which they depended upon for everything from benefits to professional development to socializing.

The MIT study envisioned that, during the next organizational phase, the model used in the entertainment and construction industries could become the norm rather than the exception. For example, Hollywood film production companies have long used a business model that brings together talented employees from various sectors, from actors to caterers to complete a specific project. Once one film is completed, the temporary workforce is already transitioning to the next movie or other production.

The first element of the scenario envisioned by MIT is "fluid networks for organizing tasks." If this scenario were reality, nearly every task would be performed by autonomous teams of between one and ten contingent workers. Companies would submit requests for proposals or otherwise advertise project needs, receive responses from staffing firms and hire workers principally on an *ad hoc* basis. Work for individuals would be project-based, with freelancers able to bid for new assignments based on their circumstances and preferences. Flexible schedules and telecommuting would become the rule rather than the exception.

The second element is the emergence of more stable communities to which people would belong as they move from project to project. The "free agent" model would change the dynamics of society in that, unlike during the Industrial Revolution, the workplace would no longer be a principal source of social interaction or professional networking. Nor would workers rely upon employers for professional development, health insurance, or retirement savings plans. MIT hypothesized that independent organizations would evolve for social networking, learning, reputation-building, and income smoothing. Such organizations might include professional societies, unions, alumni associations, churches, political parties, service clubs, fraternal orders, neighborhoods, and families/clans.

The MIT study recognized the concern that life for independent workers could be difficult, with a continual need to find work and a lack of social interactions. The desirability of this scenario ultimately depended upon the emergence of new organizations to take on the "life maintenance" role that has been played by employers since the Industrial Revolution. In an article dated October 1997, Professors Laubacher and Malone further addressed the need for additional social networking capabilities for "free agent" workers.[6] Daily socializing around the coffee machine or chance encounters in the hallway provide employees not only with social interactions and bonds, but also with opportunities to share knowledge. These workplace encounters must be replaced by "either actual or virtual" meeting places "where workers with similar experiences might gather on a regular basis to trade stories and share advice." In 1997, MIT noted a then "recent phenomenon" in which young professionals began keeping in close contact via e-mail with networks of friends from college and the workplace. These seedling virtual networks allowed professionals to quickly share information about technological advances or available jobs, resulting in a "virtual network" serving "as a combination continuing education course and placement center."

Another element addressed by the MIT study was increased availability of information through the Internet, which could change the face of marketing and organizational structures. MIT hypothesized that, in the future, companies could market their products either: (1) as Nike has done, as a quality certification brand name for goods created entirely by outsourcing; (2) through brokers acting as intermediaries between buyers and sellers; or (3) entirely through electronic means, such as online networks or collaborative filtering.[7] The final result of these trends would be a world in which information is so readily available, (*e.g.*, through the Internet, and consumers' access to it so seamless that there could be no need for brands or intermediaries to link sellers and buyers). Word about new products would be passed almost instantaneously to thousands of individuals via e-mail and bulletin board postings.

B. The Littler Prediction: Contingent Workers Will Comprise 50% of the U.S. Workforce Added After the Recession

With a focus not towards whether the business model envisioned by MIT would be economically viable or prudent for any particular business, but rather towards addressing existing employment trends, Littler predicts that the MIT "scenario" of smaller companies with networks of contingent workers will become a *reality* for many employers. Not every business will look this way. But the MIT model will become an option that companies increasingly use to obtain highly skilled, temporary labor for projects ranging from computer programming to attorney contract work to human resources, marketing and accounting. As a result of downsizing during the recession, many employers will find themselves without sufficient labor immediately available to meet post-recession opportunities. Other employers may wish to take a conservative approach to recovering from the recession by obtaining costly expertise on a contract basis rather than hiring full-time employees. Still other employers will institute or increase efforts towards a comprehensive contingent workforce management program, adding contingent workers to meet long-term goals.

Littler predicts that, assuming the recession is ending or has ended, 50% of the workforce added in 2010 will be made up of one form or another of contingent workers. As a result, approximately 25% to as high as 35% of the workforce will be made up of temporary workers, contractors, or other project-based labor. The numbers of professionals working in temporary or alternative work arrangements will continue to rise. Flexible work schedules and telecommuting will increase as companies turn towards practical solutions to efficiently complete tasks while retaining talented individuals.

This prediction is strongly supported by the numbers that staffing industry experts have already witnessed. The best and most comprehensive research and analysis firm covering the contingent workforce is Staffing Industry Analysts, Inc. (SIA), located in Los Altos, California.[8] Ron Mester, Managing Director, reports that SIA's research data is consistent with and supportive of the Littler prediction.[9] A survey taken during the current recession showed that 73% of large companies[10] anticipate increasing their current contingent workforce by a median of 25% between late 2008 and late 2010. One-third of large companies predicted contingent workforce growth of *50% or more*. According to Mester, this research "is consistent with Littler's estimate that 50% of jobs 're-filled' after this recession will be contingent."[11]

Moreover, a review of data regarding the 2001 recession provided by SIA shows that employer spending on contingent labor more than recovers following a recession. For example, in 2000, spending on temporary labor totaled approximately $81.5 billion. That number decreased during the recession, ultimately dipping to as low as $73.3 billion between 2001 and 2003. By 2006, that figure had not only recovered, but had *increased* to almost $95 billion. Spending on temporary labor and the number of temporary job holders has declined during the instant recession, as has spending across the board, as business demands decreased in many sectors. Use of contingent labor provides companies with a shock absorber for economic downturns, demonstrated by statistics showing that a higher percentage of contingent jobs than "regular" jobs are eliminated during recessions. According to the Contingent Workforce Strategies Magazine reports that "[t]emporary employment is a key indicator of the economy. Employers typically cut temps first before they begin cutting traditional workers. At the same time, the contingent component is more likely to grow first as the economy hits bottom and starts improving."[12] According to SIA, however, overall spending on temporary labor has more than doubled overall since 1995. Littler's prediction that employers will add increased numbers of contingent workers after the instant recession ends is consistent with historical data, as well as current trends.

Part of this trend is the increased use of contingent labor for professional skills. According to the Bureau of Labor Statistics, as compared to previous years, in 2005, independent contractors were more likely than those with traditional employment arrangements to be in management, business, and financial operations occupations.[13] SIA reports that spending on contingent labor has increasingly been for professional skills, rather than office/clerical or industrial workers. Currently, more than one-half of all money spent on temporary labor is for professional job skills. This demonstrates that employers are already turning to the contingent workforce to obtain highly skilled workers needed for particular projects at a fraction of the cost of hiring those professionals for full-time, regular employment.

Contributing towards the increase in the contingent workforce is the removal of certain prior barriers. First, American workers have historically depended on employers for economic stability with regard to benefits ranging from the most significant cost factor of health insurance to guided retirement savings programs. With a focus on competing globally, U.S. employers remain in dire need of ways to reduce health insurance costs. Many competitors are based in countries where health insurance is provided *by the government*, not employers. The escalating cost of health care has led U.S. companies to turn to contract workers or send work offshore to decrease labor costs in order to remain or become competitive on a global scale. However, many U.S. workers are simply not in a position to become "free agents" because of their reliance on employers for health insurance. There is currently a shift in the United States that may remove this barrier at least in part. Most significantly, President Obama has pledged both to decrease health care costs and to provide at least limited universal health care. In addition, with unemployment rising, many insurance companies have increased their promotion of affordable health insurance for individuals. Further, the rise in the number of dual-working families has also increased freelancing in situations where one spouse or partner has family benefits available from a full-time employer.

Second, the social isolation that the MIT study posited as the most significant barrier to a future workforce of "free agents" is avoided by the emergence of new technologies for instant communication and virtual social networking. From e-mail and instant messages to cell phones and text messages to Skype and other affordable video conferencing, a range of options now exists for workers working from home to instantly interact with contacts. Social networking is now conducted just as frequently, if not more frequently, through Internet and email as face-to-face interactions. A 2005 survey showed that workers in large companies now use e-mail more frequently than telephone calls to communicate on the job.[14] Significantly, the "virtual networks" envisioned by MIT scholars in 1997 have now arrived. MySpace, Facebook, and Twitter allow users to post "status updates" telling professional and social contacts what they are doing on a day-to-day basis. For example, Twitter advertises its virtual network as "a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: What are you doing?"[15] LinkedIn advertises itself as a forum for professionals "to exchange information, ideas and opportunities."[16] 360 degree e-feedback for the workplace is now promised by Rypple, Inc.[17] These virtual networks allow users to maintain vast networks of social and professional contacts despite geographical distance.

The "virtual networks" that have emerged online are no longer just for teenagers. President Obama changed the face of political campaigning when he used online social networks to reach voters in unprecedented numbers, creating a model for future campaigns in what some have dubbed "the Facebook Campaign."[18] A survey conducted by the Pew Internet & American Life Project in late 2008 showed that the number of *adult* users of online social network sites has *more than quadrupled* since 2005 (from 8% to 35% of all adults).[19] Because adults make up a larger portion of the U.S. population than teens, the 35% figure means that a much larger total number of users of online social network sites are adults. It is true that younger adults are more likely than their older counterparts to use online social networks, probably because the younger generation grew up using the Internet and remains more technically savvy as a whole. An incredible 75% of adults aged 18 to 24 use online social networks. In comparison, that figure remains high at 57% for adults aged 25 to 34; and decreases to 30% for the 35 to 44 year old group, 19% for 45 to 54 years, 10% for 55 to 64 years, and just 7% for adults 65 years and older. Of those adults already using social networking sites, 37% log-in *daily*, as compared to 48% of teen users. These figures demonstrate that the use of online sites is likely to overtake other means of social networking as the workforce ages. However, use of the professional networking site, LinkedIn, is already popular with professionals of all ages. The median age of LinkedIn users is 40 years old, and users of that site are more likely to have college degrees than users of other networking sites. Online sites have arisen for everything from job placement (*e.g.*, Yahoo! Hotjobs and Monster.com) to alumni sites (*e.g.*, as Classmates.com and university sites) to community bulletin boards (*e.g.*, Craigslist.org) to peer review sites (*e.g.*, Yelp.com) to dating sites (*e.g.*, Match.com and eHarmony.com). The phenomenon of increased use of online social and professional networking sites, allowing workers to maintain a "virtual network" of hundreds if not thousands of contacts, and the rise of other technological means of instant communication have already decreased the reliance on the workplace for social interactions and increased the amount of information instantly available to workers and consumers.

Third, as the country emerges from a devastating recession and increased numbers of "Generation Y" members (those born between 1977 and 2002) enter the workforce, there will be a marked decrease in the "stigma" formerly associated with being a "consultant." According to the Bureau of Labor Statistics, in 2005, contingent workers were twice as likely to be under the age of 25.[20] As the ever-industrious "Baby Boomers" retire, we are also beginning to see workers from that generation turning to part-time consulting work in increasing numbers. A September 2005 report by the Canadian Management Centre opined, based on a survey by Ceridian Employer Services that younger people are more comfortable with "alternative" work arrangements than their older colleagues, including flexible scheduling, telecommuting, job sharing, and contingent jobs.[21] A staffing director at Nike opines that the transient Generation Y "will take on the label of independent contractor with great enthusiasm."[22]

Not only are younger technologically savvy workers more inclined to accept alternative jobs, but there is also a marked decline in the stigma attached to such work arrangements in public opinion generally. In 2005, the Bureau of Labor Statistics reported that more than one-half of temporary workers would have preferred a permanent job (but an incredible 82% of independent contractors preferred their work arrangement to a traditional job).[23] The negative perception of temporary work assignments is changing according to SIA, which reports that temporary employees now tend to rate their staffing agencies and temporary work assignments higher than their last regular, full-time employment position. Moreover, as the recession ends and intense emotions over layoffs wane, organizational cultures will become even more supportive of using contingent labor. SIA research shows that a shift is already in the works, with substantially more survey respondents indicating their organization discouraged use of contingent workers in 2004 than in 2008. No longer will the title "consultant," "contractor," or "temp" automatically be viewed as less desirable. Rather, those titles will undergo a real paradigm shift as employers embrace contingent workers of all skill levels and types as valuable assets to the post-recession workforce and an essential part of tomorrow's workplace.[24]

C. The 21st Century Workplace

The workplace of tomorrow will feature small, core management teams for key corporate functions such as management and strategic direction. The rest of the workplace will be radically different than what we have seen and experienced since the 1960s and the rise of big corporations that do most everything in-house. The emphasis and management direction will be to outsource all that can be accessed reliably and cost effectively on the outside. Like Nike athletic shoes (which are only designed and marketed in-house), business models will be based on and supported by a huge network of national and international suppliers for everything from human capital to logistics to manufacturing. Indeed, with workers moving in and out of a company's doors on a just-in-time, project-by-project basis, it will be difficult to determine how many people are working for or supporting a company at any given time. Yet, this model will give corporations the flexibility to be nimble and selective when staffing and supporting business functions and be strategic and precise in long-term project planning. The ability to staff up or down quickly will be of paramount importance in this new model, which in turn, creates new hurdles and headaches in dealing with rather archaic employment and labor laws designed for decades ago. Companies need to plan for the new future — now.

In the radically different workplace will be perfect for the amazingly different workforce. The skilled workers who will join companies as contract labor will have the ability to work at their dream job each and every day. There will be no such thing as staying at a job you hate — each worker's skill set will be their greatest asset and those assets will be for sale — pitted against like talent, bid up based on depth and experience and sold to the highest bidder for discrete projects. Companies will line up to secure the coveted skills needed to complete their projects on a timely basis. Indeed, this workforce will be much like the one the U.S. Department of Labor says already exists — in which the average person has held 10.8 jobs by age 42.[25] The Bureau of Labor Statistics also reports that in January 2008 about 23% of workers over age 16 had tenure with their current employer of only 12 months or less. These statistics demonstrate that a substantial segment of American workers have been functioning almost as contract workers, frequently changing jobs and staying on some jobs for only a short period. In the past, workers holding "regular" jobs for short periods is, in essence, an insufficient form of contingent workers. These individuals have relied on their own resources to find employment, and employers have invested considerable amounts in these employees for recruitment and training. The contingent workforce of the future will result in increased efficiency as employers and workers alike turn to staffing agencies and online resources to find projects that will make the best use of available skill sets.

D. The Contingent Workforce in Action Today at U.S. Companies

Many companies are either ahead of the game or in the process of preparing to embrace the new workforce. For example, Cox Communications Inc., one of the largest cable providers in the United States, has created an initiative to improve the visibility and value of its contingent workforce. Cyndi Scallion, Cox's Corporate Employment Director, started with the company nine years ago as a contingent worker, providing recruitment and other human resources-related services. After five years, she became a "regular" employee, and is now in charge of Cox Communications' contingent workforce management program.

The growth in contingent workers experienced by Cox is consistent with the Littler prediction. Scallion tells Littler that approximately 28% of Cox Communications' labor will be provided by contingent workers by the end of 2009. The company has just under 25,000 regular employees and an additional contingent workforce of approximately 7,000. The largest increase in the contingent workforce at Cox has been in professional skill areas, which comprise more than half of the outside labor used by the company. Scallion anticipates that the number of contingent workers at Cox will increase after the recession ends, sharing the philosophy that the "ebbs and flows of business should be filled by contingent workers."

When Cox began its vendor management initiative, Scallion recalls, "we realized that Cox lacked visibility into the contingent workforce. We needed to accurately identify what the workforce consisted of." In the past, individual managers at each location were using outside labor without accurately reporting what their labor budget was being spent on. Now, Cox has instituted a sophisticated central management process, which has greatly improved visibility.

Knowing the make-up of its contingent workforce has allowed Cox to "achieve greater strategic planning for the future workforce," according to Scallion. Cox has undergone a process of analyzing the typical length of service for many regular employment positions that have traditionally existed at the Company. "If the data shows that a position only has an average of 18 months or less of service, knowing that figure allows us to make decisions about whether it would be more efficient to outsource that work." Implementing a contingent workforce management program has shown that it is more efficient for Cox to hire contractors to perform certain roles. For example, much of Cox's work, such as equipment upgrading and network building, is project-based. Using contingent workers allows Cox to employ the most skilled professionals for these projects when it is uncertain whether those skill sets will be needed in the long-term.

Cox Communications has clearly embraced the MIT model, viewing contingent workers as a valuable asset to the company. It is not alone. Recent reports indicate that Microsoft now has as many as 88,000 contingent workers, in addition to its 96,000 regular employees worldwide.[26] Eric Gregg, a managing partner at the Inavero Institute, was reported to have said that Microsoft's use of contingent workers is indicative of a broader trend, as "[i]t is no longer the case that companies view temporary and contract strategy as their 'contingent' workforce, but rather their flexible workforce," particularly in the technology sector where highly paid skills are often needed on a project-by-project basis. A spokesman for Microsoft confirmed that the large numbers are "within the ballpark," adding that the number of contingent workers "varies widely depending upon what's going on at any given time."[27]

Contingent Workforce Magazine reports that many companies, including Cisco and 3M, have implemented programs to increase the visibility and effectiveness of their contingent workforces.[28] Unquestionably, the "contingent workforce" is no longer a possible scenario for the future; that workforce has arrived and will become visible in increased numbers as the country emerges from the recession. The key question to be addressed now is, what should companies do today to be ready to usher the *Workforce of 2010* into the *Workplace of 2010*?

II. KEY EMPLOYMENT AND LABOR LAW ISSUES AND PRACTICAL STEPS

A. Overall Employment Law Compliance

1. Introduction

The movement toward a more decentralized workforce will take place within the forecasted increase in workplace regulation.

The use of contingent workers and independent organizations to provide labor and talent creates new challenges for employment compliance. Addressing these challenges now will position businesses to seize the opportunities that will emerge in the evolving workplace of 2010 and beyond.

2. Key Areas

Human Resources Functions

An organization's success is tied directly to the workforce it can harness. The traditional employer-employee workforce approach is too rigid to adapt to the new workplace. Organizations will move toward a flexible contingent workforce and will outsource many functions now handled in-house. In response to this rapidly changing landscape, the current Human Resources position will transform to talent acquisition for specific projects.

At the core of this strategic role will be effective recruiting. Faced with a shrinking talent pool, changing demographics and a more transient workforce, Human Resources will need to find creative ways to recruit and manage an organization's talent pool. Strategic alliances and networks must be built and managed so that an organization can quickly adapt to volatile market forces and the organization's labor needs. This move toward contingent labor will allow for greater flexibility and management of workforce needs.

The intertwining of networks and a contractor-based workforce will create myriad legal issues for organizations. At the forefront is the potential creation of multiple joint employer relationships. Relational issues will arise regarding who is or is not an employee of an organization and thus, who "controls" or has obligations to the employee. Human Resources will need be mindful of this issue when establishing its alliances and networks and must insist that its outsource partners have procedures and policies in place to ensure legal compliance with fair employment laws. Such compliance will involve multiple state jurisdictions and globalization and will require Human Resources to look beyond this country's borders as it considers and evaluates legal compliance.

Discrimination

Firms are faced with a patchwork of laws regulating the potential discrimination impact of their employment decisions including Title VII of the Civil Rights Act (Title VII), the American with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Civil Rights Acts of 1866, 1871, and 1991. State and local laws further complicate the regulatory picture for companies. In sum, these laws require that firms ensure all aspects of the employment relationship are without discrimination.

The desire to shield itself from liability for violation of these laws may motivate a company's decision to migrate to a decentralized, contract-based workforce. A decentralized workforce will offer some protection from discrimination liability to the extent that hiring, firing, salary determinations, discipline, and discharge are made by the subcontractor or staffing agency. Indeed, current EEOC guidance acknowledges that a staffing company is responsible for compliance with the ADA where the employee is completely under the control of a staffing company.

However, this protection will be far from complete. In addition to prohibiting companies from discriminating against their own employees, Title VII, the ADEA, and the ADA also prohibit businesses from discriminatorily interfering with an individual's employment opportunities with another company. The ADA specifically prohibits interference with rights protected under the statute. While Title VII and the ADEA do not include comparable provisions, they prohibit discrimination against "individuals." Therefore, even in a fully decentralized workforce, a company may still face liability for discrimination against a contingent worker if it has the ability to thwart the creation or continuance of a direct employment relationship or where it has the ability to affect the terms, conditions, or privileges of employment of that worker.

The emerging workforce could significantly impact and complicate discrimination avoidance to the extent that decentralization undermines an institution's ability to impose consistent standards for decision-making, supervision, discipline, and training across the entire organization.

The situation is further complicated by the fact that a centralized antidiscrimination policy may increase the likelihood that a company will be found to be a joint employer of the staffing agency. Accordingly, an organization transitioning to a decentralized workforce should take care to require that the independent organizations with which it works have compliant discrimination policies and reporting procedures.

Family and Medical Leave Act

In light of a workforce that may be evolving to one of extensive networks and individual contractors, companies may find their obligations to provide medical leave to workers subject to change. The Family and Medical Leave Act of 1993, as amended (FMLA), currently provides eligible employees of covered employers with up to 12 weeks of unpaid, job-protected medical leave during a 12-month period. *Eligible employees* include those who work at a worksite with 50 employees or who work for an employer with 50 or more employees within 75 surface miles of their worksite; have worked for the covered employer for at least 12 months; and have worked a minimum of 1,250 hours during the previous 12-month period. *Covered employers* include those with 50 or more employees, public agencies, and certain federal employers. The first step in determining whether a business is a covered employer and whether a worker will be eligible for FMLA benefits is for the employer to calculate its total number of employees.

Firms whose workforces are migrating from traditional workforces to one that is largely comprised of contract workers may find itself presented with some unique FMLA issues that currently confront joint employers,[29] including accurately calculating its total number of employees for FMLA purposes and determining to which employees it owes FMLA benefits. For joint employers, each organization, the primary employer and the secondary employer, must count its own permanent employees together with the employees it jointly employs to determine if it meets the 50 employee threshold. Thus, for firms shifting to a more contractor-based or small-firm based workforce, it is pertinent to identify and count both permanent employees and joint employees to ensure accurate and full compliance with the FMLA. This is true for small firms linked by networks as well.

Moreover, obligations under the FMLA may diminish if a company transitions from the role of a primary employer to that of a secondary employer under this new workforce. The primary employer of a joint employment relationship is generally the entity that exercises the most control over the employee(s), such by having authority to hire and fire, make job assignments or placements, make payroll, and provide benefits.[30] The FMLA assigns greater obligations to primary employers than to secondary employers. Where the primary employer is responsible for affording required notices to the employee, providing leave, maintaining benefits, and restoring the employee to employment after leave, the secondary employer is responsible only for accepting employees returning from FMLA leave and refraining from discriminating, retaliating, or otherwise interfering with an employee's FMLA rights. Thus, any company that transitions its workforce, or anticipates such a transition, to contingent labor, should consider its relationship to each worker and whether it owes primary or secondary employer obligations to those individuals.

One final consideration is due to any organization that finds itself transitioning from the traditional workforce to one that contracts for services traditionally provided by a professional employer organization (PEO).[31] A PEO is generally not considered a joint employer with its clients for purposes of the FMLA. However, to the extent the PEO maintains the right to hire, fire, assign, direct and control the employees or benefits from the work that the employees perform, the relationship between the PEO and its client is one of joint employment, which raises primary and secondary employer issues under the FMLA.

Corporate Ethics & Whistleblowing Protections

The new Federal Sentencing Guidelines, amended November 1, 2008, include penalties for violating the Foreign Corrupt Practices Act (FCPA). The FCPA affects issuers of securities, domestic companies headquartered, organized, incorporated, or with a principal place of business in the United States, U.S. nationals, and, in certain circumstances, foreign individuals and entities, including subsidiaries and joint venture partners.[32] Expanded Sarbanes-Oxley requirements, recent federal guidelines and other amendments establish ethics and compliance guidelines for all organizations, not just publicly traded companies, and require periodic training on workplace ethics and compliance. Suddenly, ineffective compliance practices, inadequate training or ill-drafted codes of conduct can spiral not just into civil liability exposure, but can expose executives and managers to criminal prosecution.

Ushering an era of expanded whistleblower protection, the American Recovery and Reinvestment Act of 2009 (ARRA), contains sweeping new protections for public and private employees who blow the whistle on gross mismanagement or waste of covered funds, creation of public health or safety risks, or violation of laws or regulations relating to the grant of the funds. These measures apply to companies that receive contracts, subcontracts, grants or other payments funded in whole or in part by the federal stimulus package. In addition to creating significant new protection for employees, other provisions of the statute are likely to increase litigation. For example, section 1553 of the ARRA does not establish a statute of limitations, does not impose a statutory cap on damages, and prohibits waiver and arbitration of these claims.

The advent of a new workforce may create a double layer of compliance obligations. The first layer is the independent organization that makes the workers available to the company of tomorrow, operated primarily by a small group of core managers. When entering into contractual arrangements for contingent labor, the organization must take steps to ensure that the independent organizations that provided the workers have established procedures in place to address ethics obligations and whistleblowing protections. Further, the core organization should take steps to ensure that it has an effective corporate ethics and compliance program for its core group of managers and for any workers who provide services to advance its organizational goals. It is conceivable, and to be expected, that legislation will expand to cover the new reality of organizational structures and that the small company model will be held responsible for ethics compliance and protection for workers, whether true "employees" or not, who blow the whistle on the organization's practices that run afoul of these laws.

Successful organizations take proactive measures to prevent unethical and illegal conduct. Implementation of an effective ethics and compliance program includes policy requirements, reporting procedures, antiretaliation provisions, and training that provides managers, executives, and workers with skills for identifying required practices their companies must follow in resolving ethical dilemmas. Establishing such an ethics and compliance program can greatly reduce potential fines, liability, and litigation an organization may face. It is important to begin now to create and foster an organizational commitment to an ethical culture and an understanding of each individual's responsibilities for following applicable laws and regulations. Taking a proactive approach to ethics and whistleblower claims includes:

- Implementing a policy that includes prohibitions against discrimination and retaliation for reporting what employees reasonably believe to be wrongdoing of any kind — not just discrimination and harassment — and providing two avenues for reporting, one of which is outside of the employee's chain of command.
- Ensuring that complaints and claims are promptly investigated by someone within or outside of the company who is knowledgeable about the subject matter of the complaint (*e.g.* finance, health, safety).
- Educating managers and employees on compliance with laws, rules or regulations relating to the use of government funds, in addition to providing comprehensive training on awareness and prevention of whistleblower retaliation.

Taking these steps now will help organizations be poised to meet the challenges of the new workforce.

Recordkeeping

Initially, one might think that moving toward a more mobile, independent-contractor-based workforce may reduce the recordkeeping demands placed on companies. Organizations — soon free of the traditional "employer" role — may call upon the talent and skill sets they need without the administrative concerns of managing a large group of permanent employees. Unfortunately, the chances that federal administrative agencies will allow organizations to benefit from workers without lending them adequate protections are quite low — and assuming those agencies continue to require compliance with major employment legislation, someone, somewhere will have to document that compliance.

In contemplating how recordkeeping demands may change, consider one of the most basic components of human resources documentation — the all-powerful job description. Job descriptions cure a number of ills by:

- Helping organizations defend their hiring and testing practices under Title VII, the ADEA, and ADA;
- Establishing why someone is not entitled to overtime compensation under the Fair Labor Standards Act (FLSA);
- Substantiating pay practices to protect against discriminatory pay claims;
- Assisting in the dialogue regarding reasonable accommodations under the ADA;
- Providing underlying documentation in making difficult reduction-in-force decisions without taking into consideration impermissible factors such as age;

- Helping determine the impact of work-related injuries and liability under state workers' compensation laws;
- Assisting in making legally-defensible promotion and transfer decisions.

Initially, the freedom from maintaining such excessive documentation on job functions will certainly provide relief for businesses. But from a practical standpoint, when forced to substantiate these types of decisions, the inability to directly observe and record how an employee spends his/her day may make everyday business decisions more difficult to justify than ever before.

Another hallmark of regular employees that may face dramatic changes is the use of and reliance upon the standard employment application. As an example, federal contractors subject to the Office of Federal Contract Compliance Programs (OFCCP) requirements currently face myriad issues related to tracking every individual who qualifies as an "applicant." Those organizations must solicit information about race, gender, veteran status, and disability from all applicants, and maintain it for the preparation of affirmative action plans and responses to governmental audits. Traditional employers with centralized HR functions and sophisticated electronic applicant tracking systems struggle with current recordkeeping obligations as well as the difficulty of obtaining consistency across an entire organization.

The new workforce of mobile workers is expected to move about freely from organization to organization, and likely will not go through the rigorous pre-employment process (including completion of applications and self-identification forms) now expected of applicants for traditional employment. Companies will benefit from a standardized electronic tracking system whereby worker data is stored more centrally and is more accessible to the businesses for which these individuals perform work. On a positive note, however, such a change should ultimately provide greater consistency in the data that separate and distinct organizations have been unable to accomplish on their own thus far.

In addition, the new workforce will begin to rely almost exclusively on provider organizations for wages, rather than for the more traditional, paternal-type care provided by today's companies. While narrowing the scope of liability for other types of claims is appealing, businesses should expect to see increased enforcement of other types of legal obligations for which they are still responsible, such as those under federal and state wage and hour laws. Although maintaining the proper documentation to survive a Department of Labor (DOL) audit is no easy task in today's environment, the implications of payroll records, hours worked, timesheets, deductions, etc., that are associated with a completely transitory workforce will present entirely new challenges. Employees with the greatest talent will expect to move from firm to firm, subject to individual agreements that compensate them for their services and skills. In essence, the standardization that institutions have come to rely on in certain job categories or pay grades will be diminished by the need to compete on a case-by-case basis in the open market for these contracted employees.

The good news amid such changes is that in situations where recordkeeping has occupied expansive resources for many years, the burdens may become lighter:

- The need to extensively document terminations may be reduced by a lack of any expectation on the part of workers that they will have long-term employment;
- To the extent that workers rely on companies only for wages, the issues of fringe benefits, such as health insurance, retirement benefits and unemployment insurance may shift dramatically to the provider organizations and/or the individual workers; and
- The obligations to provide medical and personal leaves of absence can be shifted from the employing organization to the employee who schedules his/her own workload based on availability.

Ultimately, regardless of which entities end up bearing the responsibility as "employers" for these new workers, the federal recordkeeping obligations — and their state counterparts — will inevitably fall to someone. The new workforce model suggests that while companies may be relieved of duties they long to be rid of, the challenges of meeting the obligations they still have will be different and evolve over time.

Workplace Safety

The Federal Occupational Safety and Health Act (Fed-OSHA) defines *employee* as an employee of an employer who is employed in a business that affects commerce. The Act requires every employer to furnish a safe place of employment and to comply with all applicable occupational safety and health standards. An *employer* as defined in the Act is any person or entity that has employees and that is engaged in a business affecting commerce. Fed-OSHA has interpreted the term *employee* to include supervisors, partners, corporate officers, former employees, applicants for employment and, at least for the purposes of the antidiscrimination rules, employees of other employers. Fed-OSHA maintains that the existence of an employment relationship is based upon economic realities rather than legal definitions.

A body of case law exists to identify the proper employer for Fed-OSHA purposes in the context of a loaned employee. This context may prove analogous to the contingent worker situation. In the loaned employee cases, loaning organizations seek to disclaim liability under Fed-OSHA by shifting responsibility to the borrowing companies through different contractual arrangements. The Occupational Safety and Health Review Commission (OSHRC) has stated that even where a borrowing company has agreed to accept responsibility, "an employer remains accountable for the health and safety of its employees, wherever they work, and cannot divest itself of its obligations under the Act by contracting its responsibility to another employer." It is therefore unlikely that a contingent labor arrangement can free a company from ultimate Fed-OSHA responsibility for leased employees, if the company qualifies as the employer of affected workers for purposes of the OSHA statute.

3. Practical Steps to Take Today

In preparation for this decentralized workforce, companies should consider the following guidelines, mindful that the independent contractor option will be limited because of government's thirst for revenue from payroll taxes:

- Companies that have experience with independent contractors, joint employment relationships or other contract-based arrangements should review the lessons already learned from those existing relationships, including an evaluation of the sources of prior claims and litigation exposure, administrative burdens, and policy and procedure challenges. This type of preemptive evaluation positions companies to determine which vulnerabilities can be corrected before a larger scale version of that model becomes a day-to-day reality.
- As we move towards a more decentralized workforce, the obligations and duties for each entity in the relationship will vary for employment law compliance purposes. The obligations will hinge on whether the company's provider is an umbrella organization, a guild or network of skilled workers, a staffing organization providing services, or a PEO, as well as the types and duration of services contracted for and provided. Accordingly, if and when a company receives a complaint regarding discrimination, retaliation, harassment, safety, or interference with federally protected rights, it should always conduct its own investigation into the allegations. The specific type of business relationship it has with the provider organization will determine which responsibilities and duties rest with which entity.
- For any contract for services or joint employment relationship or agreement, the company must exercise vigilance in including antidiscrimination and indemnification clauses in all contracts to ensure that it is properly shielded from unnecessary liability.

B. Global Mobility

1. Help from Abroad

Geographic boundaries that once surrounded the workforce are quickly disappearing. A variety of factors and technological advancements have contributed to the establishment and development of a global labor market. Further, workers are no longer limiting themselves to one location. Rather, they are continually marketing their skills to organizations based anywhere in the world. In this global labor market, companies, likewise are increasingly reallocating workers to the projects and locations that provide the most cost effective and efficient use of their expertise.

With an eye toward the global labor market, U.S. companies with overseas facilities are finding a welcome reprieve from the current national economic woes. These multinational corporations are well positioned to maintain a viable global workforce during these tough national economic times in anticipation of an economic upswing in the foreseeable future. In addition, these corporations are finding creative alternatives to maintaining a substantial U.S. workforce including the development and use of the L-1 Intracompany Transferee visa program. This visa category allows an organization to bring an unlimited number of foreign workers into the United States from overseas entities that share common ownership and control. Eligible workers must have worked for the company outside of the United States for at least one year. A multinational corporation facing a downturn in the U.S. might, for example, assign a new hire to spend 12 months working in a country with looser immigration rules before bringing him or her to the United States.

The intracompany transferee program provides tremendous flexibility to the corporation in that it allows the U.S. entity to transfer the L-1 individual into the United States on a short or long-term project basis, leave the individual on the foreign entity payroll and benefits, and utilize the specialized services on an intermittent basis for the duration of the L-1 period. This provides a company with tremendous options in moving these individuals throughout the U.S. on a variety of projects where their expertise and services are needed. This also allows the U.S. organization to efficiently and effectively scale headcount up or down as business needs change.

Some companies have gone a step further by seeking alternatives to basing technlogy workers in the United States at all. They have found numerous advantages to creating teams of professionals based outside the United States who can easily be sent to countries where they are needed—for example, to support local rollouts of high-tech products. In a trend that has gained momentum in the past 18 months, companies have been creating sophisticated "global mobility" programs aimed at creating truly international career paths for professionals. Having learned that hastily planned transfers often leave employees and their families feeling out of place culturally, these companies now carefully screen employees before any transfers, monitor their satisfaction and performance during foreign assignments, and debrief them afterward about what did and did not go well. In this global mobility trend, it is imperative that organizations manage their people well. In the project-based model, an individual's information, knowledge, skills, and relationships are an organization's biggest asset and main source of competitive advantage. With people-related costs approaching more than two-thirds of organizational spending, the project-based model provides attractive alternatives if managed and implemented correctly.

Further, in the advent of the global mobility program, the importance of people to the bottom line is significant. As such, companies seeking this alternative must review the demographic, economic, technological, and socio-political make-up of their workforce on each project to ensure that the project is managed, overseen, implemented and directed in the most efficient manner. With a workforce that is more diverse, mobile, informed, and in demand, the management of people as well as the mobility program itself are vital to a corporation's growth, profit, and existence. Experience demonstrates that proper program implementation is paying off. Employees seem more satisfied with the experience, and the company benefits from workers' broader language and people skills and their greater knowledge of the company's operations. This workforce is flexible, mobile, and experienced. The key to making it work is establishing a thorough global mobility program that allows for the uninhibited movement from one country to another through prequalification or other immigration strategies that streamline the process for intracompany transferees throughout the world.

For the many large companies that have not yet developed global mobility programs, here are two reason to do so:

- **They help recruitment and retention.** Companies report that employees have come to see international mobility as a new way to distinguish themselves and as a positive career move.
- **Their start-up costs are not as high as one might think.** Many executives assume that a mobility program requires the firm's full incorporation in foreign countries. Not so. A low-cost branch office may be all that is needed, and companies have discovered it is often more cost-effective to send a team of trained professionals into a new country for a short-term project than to train local employees. There is a strategic benefit too: a faster, more flexible structure. When they are organized around projects, as opposed to locations, companies can enter new segments more quickly, reduce time to market, and enhance process standardization.

Having a trained, educated, project-based workforce can be a more cost effective approach than hiring of a full-time, permanent employee in the global environment. A prime example of the benefit of using contract labor is flexibility by supplying already skilled workers and producing at maximum performance without a training curve. Contract labor is a great fit for projects that require a large workforce with specialized skills. These workers can be supplied on short notice for a day or a few months and have already been prescreened to determine the level of their expertise in a specific field. Independent contractors, who are proficient in the expertise needed or the technology being used, can begin producing results immediately, there by eliminating the need for costly training and saving time.

2. Practical Steps to Take Today

- Explore foreign markets to determine viable locations for opening cost effective foreign operations.
- Identify key personnel to provide initial staffing for foreign operations.
- Begin overseas hiring with an eye toward developing expertise and skills that can be transferable across projects.
- Work with legal counsel to identify cross-border work authorization requirements to quickly facilitate the transfer of contract or project-based workers .

C. Worker Privacy & Technology

The ever-expanding ability to collect and manage increasingly large volumes of information about prospective and current employees raises opportunities and creates risks for businesses. Companies are now gaining an unprecedented capacity to screen applicants, track employee productivity, create online corporate communities and streamline data resources. At the same time, more prevalent and complex international, federal and state regulation of privacy and information security raise compliance costs and expose businesses to litigation risks associated with failed confidentiality measures and alleged discrimination. Companies can and should embrace these technology-driven benefits within the framework of forward-looking policies that fully account for the evolving framework of privacy and data protection law.

1. Major Challenges in the Areas of Privacy and Data Protection:

Vetting Prospects and Investigating Current Employees

As identity theft and theft of business information accelerate and legislators and regulators impose ever more onerous requirements to safeguard customer and employee data, companies are under increasing pressure to vet prospective and current employees. Indeed, most major players in the financial services, health care, and telecommunications industries will not hire someone, or even permit a vendor's employee to provide services, without subjecting that person to some form of background check. The decrease in long-term employees whose trustworthiness has been established over time only exacerbates the need for background investigation. At the same time, the vast popularity of "Web 2.0" has resulted in a flood of publicly available and readily accessible information about aspects of a prospect's or employee's personal life that formerly were known only to a small circle of acquaintances. To keep their customers and hire the "best and the brightest" while, at the same time, reducing the risk of lawsuits alleging discrimination or violation of the Fair Credit Reporting Act or state laws prohibiting adverse action based on lawful off-duty conduct, companies should now develop and implement policies that address: (1) the information sources that will be considered in the application vetting process; (2) the standards for evaluating that information; and (3) the procedures that will be followed for obtaining the information.

Creating Trust that Will Maintain the Flow of Information from Prospects and Employees

Just when companies need more information than ever before to vet prospects and workers, the prospects and workers are becoming more fearful of sharing information — particularly sensitive personal information, such as a Social Security number or health information — because of the endless stream of high profile security breaches and the costs of identity theft. In the 1990s and at the start of the millennium, organizations learned that enhanced privacy protections for consumer data provided a competitive edge in the marketplace for goods and services. Well into the new millennium, state legislatures are beginning to recognize the need to protect sensitive information, and a number of states have enacted laws to safeguard employee, applicant and consumer privacy. A focus on employee data protection will provide a competitive edge in the job market, particularly for multinational corporations whose workforces include citizens of the European Union and the British Commonwealth where data protection regulation is more robust. Firms can address this challenge and comply with relevant state laws through a multi-functional group, with representatives from Human Resources, Information Technology, the Legal Department and management who can provide guidance on how the organization will safeguard, use and disclose employee data.

Capitalizing on Web 2.0

Web 2.0, the interactive Internet, is here to stay, and it is not "just for kids" as demonstrated by the explosive growth of the social networking site Facebook among the "over-30 crowd." While social networking websites were constructed to foster teenage socializing, forward-looking companies already are seeking to convert this communication platform into a business tool. As one example, the chief executive officer of a major Boston-based hospital uses Internet networking to explain the hospital's anti-union stance to youthful rank-and-file, and a major automaker relies on an internal "business networking site" to foster communication among geographically and organizationally disparate components of the corporation. The advantages for large, geographically dispersed, or decentralized companies are particularly significant. Those firms can create communities across national or international lines and promote efficient use of corporate resources. As "Gen Facebook" matures and enters the workforce, its members will seamlessly employ enterprise-wide networking tools to get the job done.

Location Tracking and Other Employee Monitoring

Inexpensive computer chips loaded with radio frequency identification (RFID) technology as well as dashboard- and cell phone-based global positioning systems (GPS) now permit businesses to track their workforce both within and outside a facility. These location-tracking tools permit enhanced productivity, particularly for organizations with a mobile workforce. Meanwhile, increasingly sophisticated electronic monitoring technology can contemporaneously review and analyze virtually every communication and bit of data transmitted across a corporate network, helping to safeguard sensitive customer data and confidential business information. Pervasive monitoring, however, has its costs in adverse employee relations, especially in workplaces that are unionized or where a union is attempting to organize. In addition, changes in both communications and monitoring technology and several recently decided cases demonstrate that "antique" e-mail policies must be updated and revised policies need to be communicated to the workforce in a way that will create a positive spin rather than the specter of "Big Brother." Finally, electronic monitoring policies should contemplate a significant number of contingent workers.

2. Practical Steps to Take Today

- Determine and formalize a plan for selecting information sources that will be utilized to vet workers and prepare procedures and standards that will be followed to obtain information and evaluate information received.
- Include protocols in contracts with contingent worker providers that ensure company privacy requirements are met.
- Make certain that the company does not receive any unnecessary information about contingent workers.

D. Wage & Hour Concerns

The nation's wage laws are ill-equipped to govern the complexities of the modern organization. Enacted in 1938 to create jobs after the Great Depression, the Fair Labor Standards Act (FLSA) is designed to regulate hours of work in an economy where one in five workers is employed on a farm and the factory whistle signals the end of the urban workday. This Great Depression clockwork world bears little resemblance to the workplace we know today, and even less to the global workplace of the future.

The FLSA's very antiquity makes it an attractive weapon for aggrieved workers and the plaintiffs' bar. As businesses adapt to compete in the 21st century economy, wage and hour compliance is key to reducing employment liability. Smart companies will find ways to manage their labor needs efficiently even as FLSA actions adapt to target new wage practices. Savvy companies can make these essential changes now to prepare for the new workforce, while practicing preventative strategies for wage and hour liability. Successful companies will outsource inefficient business lines, form strategic alliances, and learn to manage core employees effectively. Each of the below three initiatives presents opportunities for success, but requires planning to minimize liability.

1. Independent Contractors: Outsource to Compete

Competition in the new economy requires focusing the business on core competencies at which the organization excels, and assigning other functions to outsiders who are equally efficient in their own field. Whether these outsiders are individuals, businesses, or labor pools, they can perform nonessential functions for a 21st century organization far more effectively than a department or line of a traditional corporation.

Entrepreneurs and existing companies should think creatively about outsourcing — beyond the call center or security desk and out to the routine functions that have carried over from the old model. Areas that may be suitable for contractor or consultant assignment and have been successfully outsourced include benefits administration, payroll processing, accounting, collections, warehouse operations, logistics, and even administrative or executive personnel. For example, growing companies or those facing a major strategic shift may bring in a consulting CFO on a temporary basis to guide the organization.

Outsourcing beyond established vendor tasks and into formerly core business areas requires careful planning, precise contractor agreements, and ongoing vigilance to ensure that the independent contractor relationship remains an asset to the organization. First, identify areas in which the company's non-integral functions can be handled by an independent contractor whose services are less expensive and more effective than those the company currently performs for itself. The company may also examine existing tasks or projects assigned to employees that might be better suited to the use of consultants or contractors. Assessing non-core functionality suitable to outsourcing also requires an understanding of how the contractor relationship can be structured to avoid FLSA and other legal liability.

To identify functions appropriate for complaint outsourcing, firms should consider:

- the nature and degree of control necessary for the work to be performed at a level consistent with company needs;
- the tools and equipment the contractor must invest in to perform the outsourced tasks;
- whether the tasks or projects assigned to the independent contractor require special skills or expertise;
- if the nature of the task or project is suitable to a payment structure based on deliverables other than hours worked;
- whether the task or function is one for which the company has a constant need or is required only periodically; and
- if the task or service is one that is an integral part of the business.

For wage law purposes, these are factors that courts, the Department of Labor, and the plaintiffs' bar will assess in determining whether the contract relationship is truly independent, or whether it subjects the company to liability as an employer of the contract labor. Where the independent contractor tends to work under little supervision, using tools and expertise applicable to other organizations, invoicing for goods or services rather than straight hours of work, and providing a function extraneous to the organization's core operations, the contracting company is less likely to be viewed as an employer.

Moving to a contractor or consultant model requires careful structuring of the outsourcing agreement. These sample best practices are starting points for planning a compliant and cost-effective agreement:

- prepare a thoroughly vetted form agreement that can be customized to fit the particular situation;
- pay independent contractors pre-negotiated fees for tasks or projects, rather than by hours worked;
- if an entire business function is not being outsourced, set a project or task end date to establish boundaries to the contractor relationship;
- consider appropriate indemnity, attorneys' fees, and liability clauses;
- make strategic choices about choice of law provisions;
- when possible, have the contractor perform all services off site; and
- when assessing contractor performance, evaluate contract compliance rather than performance of individuals.

To transition to this model beyond existing outsourced functions, companies should first examine the organization for inefficient or low-return business functions or groups. Then, identify potential functions for outsourcing and issue Request for Proposals (RFPs) to qualified contractors to determine whether making the transition will be cost effective. If results are favorable, employees performing these tasks can be identified and reviewed for reassignment. Existing employees should ***not*** be accepted into a contractor relationship. When the organization is prepared for outsourcing, the RFP process should go through a purchasing department with appropriate oversight, rather than a process equivalent to hiring. Finally, the company will be prepared to transition to the outsourced function. Periodic reviews of the contract relationship must be conducted to ensure that the contractor is both contributing to the organization's efficiency and complying with applicable standards for independent contractor status under wage and other laws.

2. Joint Ventures, Separate Liability

The new organizational model also involves establishing partnerships or joint projects to gain larger contracts and perform symbiotically. Careful companies will recognize that these relationships offer as many pitfalls as opportunities. Under the

FLSA, entirely separate employers may be sufficiently connected to share liability as joint employers for each other's employees and employment practices. Joint employers are responsible, both individually and jointly, for compliance under the Act. Additionally, alternative causes of action, such as racketeering suits, may trap a compliant partner into liability for a vendor's illegal conduct. In practice, the financially stronger partner is likely to bear the burden of a partner's labor violations.

In an economy where ventures form for single projects and then disband, stable organizations will be increasingly attractive targets for plaintiffs. Companies must know with whom they are doing business and strategically manage joint ventures to avoid unnecessary liability.

Courts and the U.S. Department of Labor generally examine the "economic realities" of the relationship between the alleged employer and worker and weigh various factors to determine joint employment status. Companies engaged in joint ventures, outsourcing, or paying temporary workers can minimize the risk of joint-employer liability through established procedures.

- Identify areas where the retention of a temporary worker or workforce is the best means for completing existing or contemplated projects. When structuring the relationship, consult legal counsel and consider factors similar to those described above for establishing a valid contractor relationship.[33]
- Review existing relationships with contractors and sub-contractors to determine joint employment risks in light of these factors.
- Audit existing relationships and agreements with employee leasing firms, PEOs, and third-party providers. Establish objective criteria for approving these contracts, including: joint liability indemnification; the economic resources of the provider to meet contractual indemnification commitments; adequate compensation and benefits and a warranty of compliance with industry standards, including documentation of employment law systems and training.
- Consider establishing new relationships with compliant vendors, and issue RFPs to determine cost-effective alternative sources for labor functions.
- Consider drafting a policy to guide how the company will interact with its contingent workforce, and prepare other practices to lessen the risk that managers use contingent workers in an inappropriate manner.

These initial steps provide a basis for assessing some of the major risks in existing and anticipated relationships.

Careful policies allow companies to anticipate and avoid new wage law risks, such as suits brought by employees under the Racketeer Influenced and Corrupt Organizations (RICO) Act. In a new wave of RICO suits, companies doing business with vendors or partners who rely on illegal workers, sub-standard labor practices, or other disreputable cost-cutting measures may find themselves targeted by workers, whether legal or undocumented, in public allegations of labor exploitation.[34] These suits operate on a variety of novel and unproven theories, but inevitably involve adverse publicity around allegations such as human trafficking, wage-fixing, fraud, and extortion.

When a business partner's rates appear implausibly low or the contracting company observes signs that vendors are employing undocumented workers, steps must be taken to sever the relationship and establish contracts with reputable partners. Maintaining awareness of joint employment factors and auditing business relationships will reduce the risk of liability based on noncompliant wage practices of a vendor or partner.

3. Limited Workforce, Limitless Workspace

While a company may outsource or contract for non-essential tasks, it retains the best of its workforce to carry out core functions. Those employees, however, may work anywhere, under the wage laws of one or many states. Assume a scenario where a small company employs workers who live all over the United States, with each employee "telecommuting" to the company's "office" located in San Francisco. The company classifies its employees as exempt from overtime. Which state's law applies? California law — where the company's office is located — or the law of Arizona, Maine, or Florida, where its employees actually live and work from home? Can an employee working in Maine claim to be under California law if California law provides better remedies? Conversely, if Maine's laws are more favorable, can California residents claim remedies under Maine law because the classification decision was made by corporate counsel in Maine? What if the company's employees routinely make short business trips to other states? Does the law of each state the employee "works" in govern the employee's overtime eligibility or benefits?

In determining whether to enforce a choice-of-law agreement or which state law governs an employment relationship, courts have generally used either a "significant-contacts" test or a "governmental-interests" test. Yet, perhaps because many employees are no longer required to be physically present at the place of business and can either choose or be expected to live and travel in other states, the law in this area is far from settled. Thus, some courts have held that any work performed while an employee is physically present in a state—even if only for a day—obligates the employer to comply with that state's employment laws.[35] In other cases, even if an employee has never set foot in a state he or she could attempt to claim the benefits of that state's laws if one of the decision-makers of the challenged policy happens to live there.

Companies can take several steps to protect themselves while wage and hour law in this area is still in flux. First, where the company or employee has significant ties—operating or living, working, or traveling—to highly regulated states such as California, employees should work under employment agreements that clearly designate which state's law will govern the employment relationship. While taking such a step will not guarantee a court's determination of which state's law will apply, not having any designation means that, whatever choice of law a company may have had, or would have liked to have had, it will play no part in a court's analysis of which state's law *actually* governs. Second, a firm should be cognizant of, and compliant with, the employment laws of not only the state where it is located and the states where its employees live, but also with the employment laws of those states to which, and through which, its employees travel, regardless of the actual amount of time they may spend in those states. Again, even if applicable state employment laws conflict, doing nothing risks exposing the company to unanticipated liability.

4. Practical Steps to Take Today

- Ensure that third-party providers of contingent workers have the financial means to meet indemnification agreements, which may result in larger providers becoming the preferred providers.
- Use a third-party vendor to investigate and audit all outside business partners to ensure, to the extent possible, that they comply with applicable wage law.
- Draft vendor, partner, and employment contracts to reduce liability and direct a forum for potential disputes, understanding that if contingent worker arrangements do not pass the economic realities test, there will be corporate veil piercing.

E. Executive Compensation

Executives generally consist of the group of employees tasked with the decision-making and strategic development of a company, including a chief executive officer (CEO), a chief financial officer (CFO), a chief operational officer (COO), a general counsel (GC) and a lead human resources executive (HRE). In a model of small companies in a large network of companies, executive services may be provided in two general ways: (1) each small company has its executive officers; or (2) similar services are bundled and provided to various small companies ("bundled services"). An example of the latter would be if one company housed the CFO, GC and HRE as quasi-outside advisors to each of the small companies. The difference between the bundled services and independent outside advisors is that the bundled services providers would have a pre-determined client base (similar to an in-house legal department) and objectives would not include seeking additional clients, but maintaining service to the pre-determined client base to which services are provided.[36]

1. Factors and Components of Executive Compensation

Often, the first step in determining executive compensation is benchmarking compensation to what other executives are receiving in the industry. While in a small company-large network model, benchmarking will be valuable, the company would also have to consider benchmarking within the company (as a large disparity of compensation in a small company has a higher negative impact on employee morale than in a larger company), as well as benchmarking within the network. Benchmarking within the network also keeps cost control in line for the services provided.

There are generally several components to executive compensation: base salary, short-term incentives and long-term incentives. In order for a small company to be successful, a major portion of the executive compensation should be tied to performance, rather than to mere continued employment. In the new business model, base salary will be relatively low compared to larger companies in the industry peer group, but there should be a proportionately larger upside for attainment of performance goals that add to the success of the company.

The model for performance-based compensation will be critical to the success of the individual small company as well as the network. Short-term incentives generally consist of a cash bonus based on the company's performance over the course of the year, as the company outlines pre-determined performance goals that are critical to its upcoming financial year. Long-term incentives are generally equity-based and tied to the company's performance over a period longer than a year. Rewards for performance can be tied to myriad goals depending upon the short-term or long-term strategic goals of the company, such as net profit, revenue, cash reserves or earnings per share, determined on an absolute basis or as compared to a peer group. Performance goals may also be tailored to the particular service provided by the executive. For example, the performance goals for an HRE may be a reduction in employee turnover.

After setting the compensation for executives, another consideration that a firm will address is whether to have an employment contract for services. The primary purposes for an employment agreement is to help the company entering into the agreement retain the executive (*e.g.*, by providing penalties to the company for termination such as in a severance provision) and set forth parameters of employment (*e.g.*, describing duties and defining cause), while protecting the executive by providing for post-termination compensation and benefits, in connection with an involuntary severance with or without a change in control. With smaller companies and a large network, a company must balance the constancy and assuredness that an employment agreement may provide with having the ability to be nimble and change its workforce. In the current environment, no severance is paid if an executive is terminated for cause, where cause is narrowly defined. In an environment where small companies need to be fluid to compete, poor performance should be a factor in a company being able to no longer utilize the service of an executive without the company being penalized by paying severance.

As performance-based compensation tends to vary year to year, companies may wish to provide financial planning tools to executives, such as a non-qualified deferred compensation plan, so that income taxes may be deferred and income provided upon retirement. Non-qualified deferred compensation plans generally allow executives to defer compensation beyond the amount allowed under a qualified deferred compensation plan, such as a 401(k) plan. By providing a non-qualified deferred compensation plan, the executive may regulate the flow of income over the course of his or her life. The deferral of compensation also helps a company smooth out its cash flow paid as compensation. The downside to non-qualified deferred compensation plans is that such plans are subject to creditors, and if the company becomes insolvent or bankrupt, the executive will lose his or her deferrals.

2. Bundling Services

One approach to certain executive services that the new business model may consider is bundled services, as mentioned above. All companies in the network would use the bundled services to not only reduce costs for redundant services, but also to provide continuity of services and cohesiveness on strategy across the network.

Generally, the bundled services group would not generate any income and compensation to the group needs to be provided by the network of companies that actually produce revenue and pay into a compensation pool. The compensation pool may consist of cash or a combination of equity and cash of each company. The provision of equity must comply with the granting documents of the company's equity plans, as well as applicable securities laws. Equity compensation typically aligns executive's decision-making with the long-term desires of shareholders. Stock ownership guidelines may also be established for bundled service providers. With a provision of payment from the network companies, the bonus pool concept of compensation should be used to determined the proper apportionment of the incoming cash and equity. Also, determination of performance-based incentives needs to be pre-established before the applicable short-term or long-term performance periods.

In addition, if executives are viewed as independent contractors, the service agreement will be structured in a very different manner than an employment agreement. For example, independent contractor agreements typically do not have severance clauses. In addition, the provisions allowing for involuntary termination or cancelling a contract typically have less constraints than the typical employment agreement.

For a group of executives providing bundled services, whether a non-qualified deferred compensation plan is appropriate should be considered. Generally, non-qualified deferred compensation plans are "top-hat" plans, established for a select group of management or highly compensated employees.

If all or a majority of the employees in a company are "a select group of management or highly compensated employees," then the "top-hat" status no longer exists and the plan may become subject to ERISA, which requires adherence to funding, vesting and fiduciary rules.

3. Practical Steps to Take Today

- Companies should determine whether employment contracts are appropriate if heading towards the model of small companies/large networks. If employment contracts are in place, do not include automatic renewal clauses, consider not renewing the contract (which may result in a risk of losing the executive), and have shorter contract terms.
- Review compensation plans and determine whether the plans could be broadened so that independent contractors or consultants may participate.
- Monitor proposed and pending legislation as there will be efforts to control/limit executive compensation.

F. Traditional Labor Law

The "old" model of employment involved large dominant companies that provided full-time stable employment for many years to large groups of employees with multiple talents, roles and skill sets to produce a host of related (and sometimes unrelated) goods and services. These employers provided the perquisites and benefits of stable full-time employment, including stable income, training and professional development, insurance, retirement security, a sense of community and a significant source of individuals' social interactions and networking. The "new" model, by contrast, is comprised of much smaller, more nimble and autonomous teams of people, set up as independent contractors or small firms, linked by networks, coming together in temporary combinations for various projects and dissolving once the work is done.

From the perspective of labor law and collective bargaining, this new world poses challenges and opportunities for businesses with union relationships, for those that are union-free and wish to remain that way, as well as for organized labor itself.

1. Existing Union Relationships

Companies with existing union agreements may be best served by strengthening the overall relationship and negotiating the provisions needed for flexibility and to adopt to the new workforce model.

Companies should maintain and build on strong collaborative relationships where they may already exist. There are many highly successful, flexible and adaptive companies with employees who are represented for purposes of collective bargaining, but the hallmark of those relationships is a history of candor, honesty, trust and fair-dealing. Significant changes in the ways companies have to do business always present challenges and risks for all parties, including labor unions and the employees they represent. Those challenges are best met in situations where there is a core level of trust and confidence. This helps labor unions understand that their interests are ultimately tied to the long-term best interests of the businesses that employ their members, which helps all parties embrace change with confidence and imagination.

Critical components of successful labor agreements to make them adaptable for the future, will include the following:

- **The ability to subcontract work.** If the growing paradigm for work and successful enterprises is the appropriate use of smaller specialty firms that can do things better, faster and cheaper, companies must have the ability to utilize the best resources to produce their goods or provide services. This means, especially for "non-core" or "component" functions, organized labor will have to compete to keep this work in the bargaining unit and management will need to have the ability to select the best option.
- **The ability to flexibly assign work and avoid work jurisdiction disputes.** Companies need the ability to assign work across job classifications within a bargaining unit, or to non-unit employees or nonemployees, as collaborative working relationships involving a growing number of service providers on a particular job or work site become more and more prevalent. "Project labor agreements" to which all participating unions are parties have been used successfully for years on complex construction projects of long duration to minimize, for example, jurisdictional disputes. This may serve as a useful model for future collaborative working relationships on small as well as large projects.
- **Efficient means to address new or changed job classifications and functions.** The rate of change in the scope and content of work is likely to increase over time,

and labor-management agreements that have quick and efficient means to address these issues will fare better in the evolving world.

- **Efficient means for dispute resolution.** Binding arbitration is the preferred method of dispute resolution and has served the labor-management community well for many decades. But as the speed of change accelerates and the need to make staffing and organizational decisions increases, it will be important to have efficient, reliable and expedited means of resolving disputes over these issues in the future. Disputes over the organization and staffing of work are inherently difficult decisions to reverse once implemented, and expedited means of addressing and resolving those issues will be critical to timely decision-making in this evolving world of work. Informal channels of dialogue — such as the labor management committee to address problems involving unforeseen needs for organizational change may also become more prominent in the unionized workplace of the future.

2. Challenges for Unions

For unions, the changing landscape of the workplace presents both challenges and opportunities. On the one hand, the decrease in the number of large businesses with hundreds or thousands of regular full-time employees poses numerous challenges in terms of organizing large groups of members. On the other hand, to the extent that growing numbers of workers become part of a project-based work society, unions could play an increasing role in becoming both the source of project-based labor to companies and the source of the traditional perquisites of stable full-time employment to its members whose work lives are tied less and less to a specific company. This harkens back to the days of the union hiring hall where labor was obtained "as needed" on a daily, weekly or project basis from the union, which served as the recruiting and training ground for workers in certain crafts and industries.

A familiar modern model from which much could be learned are the guilds and unions that represent workers in the film industry, where work is often sporadic and members work for many different firms over time. The Screen Actor's Guild, as an example, provides to its members many of the perquisites of regular full-time employment in the context of a somewhat irregular, project-based work life, including insurance, retirement benefits, educational and professional development, as well as a sense of community that is often otherwise lost in a project-based work world.

Many unions and professional associations may refocus their energies and resources to this model, although they will certainly have competition from employment agencies and other organizations that will seek to fill this same void for the project-based worker. Companies that need labor — especially skilled labor on a sporadic or project basis may increasingly embrace such models, as they may offer a reliable source of skilled and specialized labor, and relieve the companies of the responsibilities of maintaining and administering fringe benefit programs for the project-based workers.

3. The Current Union-Free Environment

For companies that are union free and wish to remain that way, there are many opportunities and challenges, some familiar and some new:

- **Focus business and full-time regular employment opportunities on core competencies and mission.** These are the areas where employment now and in the future will likely provide the greatest stability and the greatest opportunity for high levels of employee satisfaction, competitive wages and benefits, job security and a shared sense of community and belonging. These kinds of workplaces are the most difficult for unions to organize.
- **Contract out to networks of high quality specialty suppliers and vendors those functions of the business that are not "core."** This is especially true for those where the demand for work is variable or project based, and where specialty firms have the edge in terms of talent, technology and effectiveness by virtue of their focused concentration on producing particular goods or providing particular services that are necessary elements or building blocks of what is provided to customers or clients. These are areas of operations which, if done "in-house," are typically less well managed and provide more uncertain opportunities for satisfying and stable employment, thereby creating heightened risks of union organizing.
- **Take great care in utilizing temporary workers.** In *M.B. Sturgis*[37] the National Labor Relations Board (NLRB) issued a controversial decision that overturned almost

30 years of NLRB precedent and permitted unions to organize a temporary staffing agency's employees together with the contracting employer's regular employees, without the consent of both the staffing agency and the contracting employer. Under this ruling, so long as the regular and agency employees in the petitioned-for bargaining unit shared a sufficient community of interest, the bargaining unit would be found appropriate. While this decision was reversed four years later, in *H.S. Care L.L.C.,*[38] there is always a risk under a new NLRB that the *Sturgis* approach would be embraced once again, and firms should plan for the use of temporary workers accordingly. Several options exist to minimize the risk of a "community of interest" finding even under *Sturgis*. First and foremost, consider utilizing a separate company with its own employees to perform discrete or separable functions that may have historically been handled by temporary workers. There are growing numbers of examples in manufacturing and service settings of teams of employees of different employers operating under "one roof" to perform their own separate functions, directed by their own employers, whose activities are networked together by the contracting business that brought them all together. If that is not a realistic option for the organization, take steps to minimize the integration of temporary agency employees with regular employees and to make clear that they do not share a "community of interests;" for example:

- o use "work modules" where activities of the temporary employees are physically separated from regular employees to some extent;
- o provide significant differences in wages, benefits and other conditions of employment;
- o ensure that the staffing agency has a supervisor on site who provides direction to the contingent workers (instead of the contracting company providing such direction); and/or
- o be vigilant about phasing out the use of temporary employees when the need is gone, or at least having material fluctuations in employment levels among the temporary workers that are radically distinct from the fluctuations in employment levels for the contracting employer's employees.

4. Practical Steps to Take Today

- The ability to subcontract must be dealt with now. Determine core competencies to be performed in-house and plan to outsource other functions. Companies must be able to efficiently use collaborative teams of regular employees and temporary workers, independent contractors and specialty suppliers and vendors.
- Re-shape collective bargaining units now. Anticipate that contingent workers will be combined with regular employees and that the law under *Sturgis* will return. Companies must weigh this scenario against efficiencies so that regular employees and contingent workers do not share a community of interest.
- Prepare for the need to subcontract non-core functions and an influx of contingent workers and revise job descriptions.

G. Trade Secrets & Intellectual Property Protection

1. Managing Trade Secrets and Preparing Appropriate Restrictive Covenants

The new world of a fluid, project-based workforce presents a special challenge for the protection of trade secrets and intellectual property. A recent study found that nearly 60% of employees who quit or are asked to leave their jobs secretly take proprietary data from their employers.[39] These numbers are startling for a workforce of regular employees who are supposed to develop bonds of loyalty to their employer. However, this study may show that workers are already viewing themselves as independent agents, and that the bonds of loyalty to the company that were a part of the old model are already breaking down.

Regardless of the causes behind the theft of trade secrets, this presents a major challenge for the new model of a flexible, contingent workforce. The need to protect trade secrets and intellectual property will only be magnified by the use of a mobile workforce of free agents that is constantly being assembled for different task-based projects and disbanded at the project's conclusion. Increased turnover of the workforce will provide greater opportunities for the theft of critical confidential information. What can companies do to prevent this loss of vital intellectual property?

In the past, companies relied on (varied) state law on restrictive covenants and noncompete agreements to protect confidential information. In the future, the use of a highly mobile contingent workforce may make those covenants obsolete. For example, with a vast number of employees working for PEOs or other staffing agencies, and generally filling positions based on short-term needs, it may be difficult, if not impossible to enforce a covenant to prevent a worker who filled a critical project position for 90 days from working for a competitor for six months or a year. This will be especially true if the employer is a PEO or staffing agency. Worker mobility may become the paramount public interest, for both individuals and businesses who need their services, in a world of specialized free agents. If the touchstone of this new model is worker mobility, then courts may very well look less favorably on restrictive covenants than they have in the past.

Thus, to prepare for this new task-based workforce, companies need to implement a comprehensive program for the protection of trade secrets. Businesses need to take three basic steps. First, identify jobs and tasks that fit into the new model. Is it engineers, software programmers or salespersons who can be shifted to the project based model of organizing work? Then, identify what information or intellectual property those contingent workers will either create or have access to in the course of performing their duties. A clear understanding of the trade secrets and intellectual property at risk will be needed to implement effective policies. Second, review current agreements to protect confidential information. This review should include agreements with direct employees and agreements with PEOs or temporary agencies to make sure that any intellectual property developed by contingent workers becomes the intellectual property of the contracting company. Agreements can be prepared today that are tailored to specific projects by following some important guidelines:

- **Make sure the agreements properly and effectively assign all inventions and improvements created by the contingent worker during the project to the company.** Does it ensure that the work product belongs to the company? If not, revise all agreements with regular employees and agreements with PEOs and staffing agencies to accomplish this goal.
- **The agreement must properly define the relationship between the contingent worker and the company.** If the worker is actually an employee of the staffing agency, then the relationship must be defined, and the company must have the ability to secure confidential information.
- **The agreement requires a clear definition of the duties and responsibilities of the contingent worker.** By defining clearly the duties and responsibilities of the contingent worker, the company can define its obligation to protect and keep certain information confidential. The agreements with staffing agencies and PEOs must include language that appropriately protects confidential information.
- **The company must review its use of restrictive covenants to ensure they are appropriate under the applicable state laws.** The agreements must be appropriate for contingent workers for a court to enforce a covenant against a worker who completed a 90-day assignment. Be mindful that agreements appropriate for contingent workers may affect agreements with regular employees.

Finally, firms must look at how their computer systems create and store the electronic data to be used or accessed by the contingent workers. The company must develop policies and practices, along with technological firewalls to segregate, as much as possible, the work of these different project groups to prevent broader theft of information. In the modern digital era, workers can walk out with the equivalent of dozens of boxes of paper files concerning future projects, product development ideas, and sales and marketing plans and financial data all on a single thumb drive. The ability to prevent digital theft of trade secrets and confidential information is critical. A task force comprised of members of the company's Legal, Human Resources and Information Technology teams should be formed to investigate the steps that should be taken now to segregate and protect data on computers. Some of the steps that the task force should take include:

- Ensure that all work product is created is saved on the company servers and nothing is created or stored "off-line."
- Limit access, via separate servers, firewalls and/or password protections, to keep data cordoned off and limit access to data on a need to know basis. Determine whether data should be segregated and protected by department, by project, or some combination and what data the contingent workers will need to perform their duties and how access can be limited to only that data.

- Determine the types of reports and materials contingent workers should provide on a regular basis to update the company on their progress so the company captures the full value of the work performed.
- Prevent the copying of materials onto portable drives or at least be able to detect what information has been downloaded and by whom without costly computer forensic analysis.
- Monitor emails to prevent contingent workers from emailing files to their home email addresses or to competitors.

These measures will help the company prepare for and create maximum value for the company from the talents of the new mobile workforce while protecting the critical confidential information of the company.

2. Practical Steps to Take Today

- Companies must review and revise all agreements to properly and effectively assign all inventions and improvements created by contingent workers during a project to the company. Agreements with contingent workers and with PEOs and staffing agencies should expressly state that the work product belongs to the company. The agreements should properly define the relationship between the contingent worker and the company. The agreements with contingent workers, staffing agencies and PEOs should also have language protecting confidential information.
- The Company should implement policies and practices concerning the use of computers and access to company computers and confidential information. Work product must be stored on company computers and not kept "off-line" on either the contingent worker's, the PEOs' or staffing agency's computers. All work product created is saved on the company servers to ensure all work product and inventions are kept by the company.
- Implement practices that limit access, via separate servers, firewalls and/or password protections to confidential data so contingent workers only have access to materials and data relevant to their project. The contingent workers should have access to data needed to perform their duties and should not be able to access other data, which should reduce the risk that confidential information could be misappropriated. The company should also implement data monitoring protocols to detect and prevent digital theft of trade secrets and confidential information, including downloading to removable drives or forwarding to outside email accounts.

H. Reductions In Force And WARN

1. Reductions in Force

In March 2009, the U.S. Department of Labor (DOL) announced that the current recession so far caused 5.1 million job losses for Americans, with 663,000 jobs lost in March alone, and that the unemployment rate was up to 8.5%.[40] There are no clear indicators telling us when the reductions in force will ease up, but even as companies continue implementing reductions in force, consideration must be given now to the economic recovery, and what the future ebb and flow of human capital should look like.

As companies contemplate doing business with a new workforce, those companies currently engaged in layoffs should look further down the road and decide how much of their operations lend themselves to engaging an outside service provider, and plan for additional cuts in the traditional workforce, and transitioning that work to service companies. The usual concerns present themselves in the new scenario, but there are peculiar concerns regarding statutes requiring the giving of notice under the federal Worker Adjustment and Retraining Notification Act[41] (WARN).

2. WARN

WARN is difficult enough to apply in the traditional work setting,[42] and determining whether it applies in the context of future downsizing within the new workforce presents its own additional complexities for both service providers and the companies that use them. Reduced to its essentials, WARN requires employers having as few as 100 or more employees to give 60-days' notice prior to a "plant closing" involving the termination of 50 or more employees at a single site (or an operating unit within a single site), and the same 60-days' notice prior to a "mass layoff" involving either 500 employment terminations at a single site of employment, or, if fewer, 50 or more employment terminations that constitute 33% of those working at a single site of employment.

If there is an alteration in the size of the workforces, there is an open question as to whether employment losses suffered by employees of the service provider are to be combined with employment losses suffered by employees of the company to determine if WARN thresholds are met, such that notice is required. The confusion is created by the WARN regulations, which provide in relevant part:

> Under existing legal rules,…contractors…are treated as separate employers or as a part of the… contracting company depending upon the degree of their independence… Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.[43]

While the definitions of plant closing and mass layoff turn on the number of full-time employees who suffer an "employment loss,"[44] neither the statute nor the regulations directly address whether a jointly-employed employee of a service provider suffers an "employment loss" and is therefore counted toward the notice triggering thresholds when the contracting company terminates its use of that worker. However, the regulation defining who is an "affected employee," which determines who is entitled to receive notice if WARN is triggered, states that contract employees are not "affected employees" of the business to which they are assigned, and therefore not entitled to notice.[45] A good argument can therefore be made that, in order for the DOL to have concluded in its WARN regulations that a service provider's employee (such as an agency "temp") is not an "affected employee" of the customer, the DOL must have determined that an agency temp does not suffer an "employment loss" when the customer terminates its use of the worker. This is because the definition of *affected employees* is "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer."[46] In addition, it can be argued that a customer's termination of its use of an agency temp is not the kind of "employment loss" that Congress intended to address in the WARN Act, given that the worker's primary employment relationship is (arguably) with the temporary agency. Indeed, the contracting company really has no knowledge of, or control over, whether the service provider will in fact terminate the services of the worker in question, or reassign the worker to some other project.

Despite the foregoing arguments, there is a risk of a court concluding that jointly employed service provider employees should be counted in determining whether the contracting company has instituted a plant closing or mass layoff (*i.e.*, that service provider employees should be counted toward the 50 and 500 employment-loss thresholds and should be included in both the numerator and the denominator in applying the 33% test). This risk will be greatest in situations in which: (1) the worker was initially located by the contracting company and referred by the contracting company to the service provider; (2) the worker does not have a previous history of having been placed by the service provider at different customers; or (3) the contracting company has used the worker for an extended period of time.

WARN issues are present in two other new workforce situations as well: (1) where a company transfers its own employees to a service provider, and (2) when a contracting company decides to change its service provider vendors.

There is within WARN a sale of business exclusion, such that where a business is sold, the transfer of employment from seller to buyer is not deemed to cause an employment loss for the employees of the seller, even though there is a technical termination of employment occasioned by the change of employer.[47] When the DOL issued its WARN regulations, the agency squarely considered the question of whether the sale exclusion would apply where a company subcontracts part of its operations to a service provider, transfers employment of employees from itself to the service provider, and the employees involved do not lose a day's work (they just change employers, and essentially continue doing what they did before — just the same as what typically occurs in a sale). The DOL rejected the suggestion that no notice should be required "where work is contracted out and the contractor hires the former employer's old workers to perform the contracted work."[48] However, the issue remains unsettled. Based on the DOL's refusal to exclude WARN's application to this situation, where the only employment loss is technical, a company contemplating the transfer of a substantial part of its workforce to a service provider would be prudent to build sufficient time into the process for giving a formal WARN notice if the numbers are such that notice would be required if the employees being transferred were simply terminated.

Similarly, the sale of business exclusion *may* not apply to a change of service providers, even though the new service provider hires substantially all of the replaced provider's employees, and thus the same employees continue to have the same jobs, albeit with different employers. This is so because there is no express change of vendor provision to be found in WARN (while there *is* a sale of business provision). However, the Tenth Circuit Court of Appeals looked into a change of vendor situation, and held that a covered sale *may* be found in a change of contractor situation, provided there is some exchange for consideration between the parties involved.[49] Similarly, the Seventh Circuit Court of Appeals addressed transfers of employment that resulted from a series of corporate transactions other than a standard sale of assets, and held that the WARN sale exclusion should apply because almost all of the employees did not miss a day's work and an "operating agreement that handed over the running of the plant . . . was the equivalent of a sale" for WARN purposes.[50] Thus a sale of part or all of an employer's business could be found in a change of vendor situation if there is a series of transactions consistent with the functional understanding of a sale. Material fact questions on this issue may require a trial over whether a "sale" has occurred.[51] Because this area is unsettled, a service provider should in its service contracts allow the termination process to occur in such a way that the service provider has time to give WARN notices upon cessation of providing services. If there is a replacement vendor, and not enough time to give WARN notices, the outgoing vendor would do well to enter into some kind of transaction with the incoming vendor, to establish indicia of a sale.

In an early WARN case involving a service provider, a hotel management company received short notice from the hotel owner that the hotel was closing, and the management company did not give 60-days' notice. The Second Circuit Court of Appeals suggested that the hotel management company, in order to meet its own WARN obligation, *should* have built sufficient mechanisms within its contract with the hotel owner to enable the management company to provide statutory WARN notice.[52] Another federal circuit court rejected the suggestion by the Second Circuit for a cancellation provision, and expressed the view that there is no such broad requirement placed on service providers.[53]

The WARN regulations allow for the possibility of unforeseen contract cancellations (which may allow a shorter notice period), and describes that event as follows: "A principal client's sudden and unexpected termination of a major contract with the employer."[54] The negative implication of this characterization of a contract termination *sudden and unexpected* suggests that there may be times when a major contract termination is *not* sudden or unexpected. The broad test is stated within the regulations as follows:

> The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.[55]

Where a contract renewal is coming up, and the service provider may receive less than 60-days' notice of non-renewal before the end of the contract term, the WARN regulations contemplate that a solution would be the giving of a conditional notice:

> Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event.[56]

The practical problem for a service provider giving conditional notice is that its star performers may immediately start looking for employment elsewhere, and may be gone when the contract is not cancelled, but renewed. To avoid all of these problems, a service provider should seek to have at least 60-days' (70-days' to be practical) notice from its contracting company for a non-renewal decision, so that notices can be drafted and timely distributed in the event of non-renewal.

Where a service provider is engaged for a specific project that will be temporary in nature, WARN compliance can be achieved without notice simply by making sure that the workers engaged for the project understand that their engagement is indeed temporary:

> c) Temporary employment. (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that

their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.[57]

***Note that the regulations focus on the *employment* being temporary and also on the *project* for which the employees are engaged as being temporary.** The burden that is squarely placed on the employer by the regulations can be met by clearly stating the nature of the temporary project in offer letters and other employment documents given to workers (and preferably signed by them) when they are engaged for the temporary project.

Of course, analysis of the federal WARN is not enough. Service providers and the companies that use them must also be aware of state laws that create WARN-like obligations. As of this writing, there are nine (9) such local jurisdictions (California,[58] Hawaii,[59] Illinois,[60] Maine,[61] New Jersey,[62] New York,[63] Tennessee,[64] Wisconsin[65] and the Virgin Islands[66]). New York and the Virgin Islands require 90-days' notice. Further assessment should be given to the renewal and notice of non-renewal provisions of contracts for services performed in those jurisdictions.

3. Practical Steps to Take Today

- Plan now your likely timeline for the shift of employees from your company to a service provider, so you can provide timely WARN notice.
- Document that contingent workers are temporary workers and that the project for which they were engaged is only temporary in nature.
- If you are a service provider, make sure that your contract clauses providing cancellation and non-renewal rights of contracting companies give you enough time to provide WARN notice if your contract is cancelled or not renewed.

I. Workers' Compensation & Unemployment Insurance

1. Managing Workers' Compensation and Unemployment Insurance

A marketplace staffed with a high proportion of contingent workers can produce substantial cost savings to an organization with respect to workers' compensation and unemployment insurance premiums. It is assumed that either: (1) the vast majority of such workers would not be considered employees under existing workers' compensation and unemployment laws; or (2) the states would collectively amend existing law to allow individuals greater freedom and economic opportunity by allowing them to work as independent contractors.

The reduction in the size of an organization's employment ranks will have a swift impact on the firm's financial obligations as a result of changing workers' compensation and unemployment insurance premiums. However, simply reducing the headcount of an organization will not necessarily have a direct, or pro rata, decrease in those premiums. There are a number of factors that comprise the pricing of workers' compensation insurance and unemployment insurance that are not directly related to headcount.

2. Workers' Compensation Considerations

It is possible to outsource jobs and have as a consequence an *increase* in the cost of workers' compensation premiums and flat administrative costs associated with maintaining employees more likely to be injured and require time off. One important factor, among many, used to determine workers' compensation premiums is the National Council on Compensation Insurance (NCCI) classification for the business. As a general matter, governing classifications at a specific job or location (other than standard exceptions) producing the greatest amount of payroll becomes the classification for the business. For example, if production employees, such as machine operators, produce the greatest payroll when compared with other classifications, then the production classification will become the governing classification. In some instances, separate functions of the business will be separately rated. For example, an employer-operated daycare in a bank is rated separately from the bank, and the firm will have multiple classification codes. Certain classifications obviously carry a much higher risk than others. A firm with a governing classification for dangerous production work will carry a higher premium than a firm with a governing classification for office work.

A second important factor in setting workers' compensation premiums is a firm's experience rating, that is, the actual injury and claims experience. A work environment with exceptional OSHA compliance and exceptional safety experience (no or very few claims), but which has numerous jobs otherwise considered to be high risk could have a lower premium than a firm with lower risk positions but with dismal OSHA compliance and a high incidence of preventable injuries. This demonstrates that it is not always the case that a reduction in raw numbers of employees creates a cheaper workers' compensation premium. The key to reducing premiums is to have a workforce with a low-risk governing classification, an exceptional safety program and very low claims experience.

3. Unemployment Insurance Factors

Unemployment insurance premiums are calculated in a manner that is very similar to workers' compensation premiums. NCCI classification and historical claims experience are the primary factors driving the cost. Additionally, many states add surcharges, for example, half a penny per dollar of payroll to the premium cost. There is an unavoidable catch-22 with respect to unemployment insurance, however. While the premiums are calculated based upon a percentage of payroll, which will come down as the workforce shrinks, firms will create a surge in unemployment claims, which will only serve to increase the claims experience for some period of time.

4. Bridging the Gap in the New Workforce

Workers' compensation and unemployment systems are employer-funded social welfare programs. Presumably, the incidence of work-related injuries will trend with historical rates and the demand for services on a project basis will create a large pool of individuals that are not covered by workers' compensation and others who are between projects not eligible for unemployment insurance because they will not have been employed. As a result, social "life maintenance" communities would need to provide a mechanism to fill the void for contractors and allow for pooled risk coverage, much like the actors' unions presently provide.

An alternative consideration is the creation of 401(k)-style accounts that are funded by companies, industry groups, the contractors themselves and the government. For example, the company engaging a contractor for a project may agree to pay X pennies on the dollar as a surcharge, and would pay the surcharge, along with the contractor's portion, directly to a fund manager who would be responsible for procuring workers' compensation and unemployment insurance coverage for the contractor. This type of portable benefits package would provide contractors with the flexibility to be mobile but provide the overall system with stability in these social programs.

This alternative scenario would allow fund managers the potential to negotiate more cost effective rates by pooling much larger numbers of workers together than can traditional employers. As a practical matter, this style of social-service funding would require legislative action and stringent regulations by state and/or federal government agencies. Moreover, government would still find itself in a stop-gap role with respect to individuals that will inevitably remain uninsured. The utility of such a benefit account could extend to other areas, such as health care insurance.

5. Practical Steps to Take Today

- Companies should conduct an insurance review and risk analysis related to the loss of the limited liability and exclusive remedy benefits that workers' compensation provides in a new workforce model. Make sure that insurance includes coverage as a third-party in case a contingent worker is injured. There will no longer be workers' compensation preemption. Individuals who are presently limited to recovery of workers' compensation benefits will now be eligible to file civil lawsuits for personal injuries occasioned by the company's negligence, which have no limitation on the types and amounts of damages they are entitled to collect. General liability insurance premiums could increase dramatically and the imposition of punitive damages, typically not covered by general liability insurance, would become a self-insured risk.
- Companies should consider joining self-insurance pools or trusts with respect to workers' compensation insurance. Most states allow firms in common trades to join together and pool their collective work injury risk. If enough businesses join, this can be a substantial overall savings to the individual companies. The pools or trusts are then typically administered by a third-party administrator through a trustee.

- Firms should conduct an extensive review of their workforce makeup as it relates to the computation of workers' compensation and unemployment insurance premiums. As managers consider the most efficient methods to outsource operations, also consider what type of workforce will remain in light of the potential cost of premiums. It could be more cost effective to jettison manufacturing operations rather than retain them, or, it may prove to be more financially advantageous to maintain a manufacturing operation and outsource marketing, supply chain, procurement and other functions. Not only will such a review prepare the company for a new workforce model, but will lead to a much better understanding of, and potential to reduce, present workers' compensation and unemployment costs.

J. Independent Staffing/Staffing Organizations

1. Procuring and Training Workers Through Staffing Agencies

Even before the recent economic downturn there was an increasing utilization of individual consultants/contractors and workers employed by or referred through third-party staffing agencies. While the use of these workers comes at a price, the belief is that using labor in this way reduces costs and facilitates the engagement and disengagement of workers more efficiently than through at-will employment. While, just in time use of workers is believed to be more cost effective, under the new workforce model, use of such workers will require efficient methods to:

- identify the specific resources/talent needed;
- identify agencies that can provide such resources; and
- prepare to contract with staffing agencies for the resources the company will need.

As part of the procurement process, staffing agencies and provider organizations must develop nondiscriminatory ways of offering, evaluating and engaging the services of workers. The provider organizations also must assume (and utilizing companies must require) the obligation to train workers — both initially and on an ongoing basis. Much like the original guilds and today's building trade unions' training programs, staffing agencies will assume the lead role for training their represented workers. No longer will companies have, or accept, the obligation to train workers. Instead, acquiring and maintaining appropriate skill sets will become a primary responsibility for each worker and training will be provided by his or her staffing agency. Such training must include all training required on employment and labor laws. Undoubtedly, staffing agencies will resist accepting responsibility for training workers as providing such training is an indicia of employee status.

2. Tax Interests and Government Pressures

Both federal and state governments have an interest in maintaining centralized and frequent collection of income and other taxes. A great deal of the tax revenue that funds ongoing government functions (apart from the debt) comes from employer collected income taxes. So government has an ongoing interest in increasing and speeding up the income tax collection process. So it is and will continue to be resistant to and closely scrutinize independent contractor relationships, which slow the transference of taxes from pay period to quarterly. Furthermore, governments have an often stated purpose of providing safety nets. From an employment perspective the principal safety nets are unemployment and workers' compensation and in a handful of states, state-funded disability programs. Unemployment and disability tax revenue are expressly earmarked into funds used for this purpose. Chronic and high unemployment has largely drained state unemployment insurance (UI) funds and most states are borrowing from the federal government to meet benefit needs.

Self-employed workers' income is not subject to UI taxes, but such workers, when they cannot find self-employed work, often try to re-characterize themselves as having been employees, rather than contingent workers. Thus, accepting a former employee as a contractor only plays with fire. Having no history as being self-employed coupled with returning to the company and the same work environment, albeit in somewhat more limited capacity, will likely result in a finding that the worker is an employee and not a contractor. In fact, we have developed a set of "Golden Rules" for this purpose, which should be applied objectively when evaluating the engagement of contractors:

- *Do not* be the first to engage a contractor.
- *Do not* accept a former employee as a contractor.
- *Do not* convert a contractor to an employee.

- *Do not* engage a contractor to perform work already being done by an employee.
- *Do not* engage one with a recent history of employment elsewhere.

Of course, in states where there are income taxes, withholding at the source by employers is a quick way of keeping the state's income tax coffers restocked. The severe drain on social services and state resources by the current economic climate is likely to make the rebuilding climate susceptible to both higher taxes and new laws that will further discourage the engagement of the self-employed or otherwise require income tax withholding by companies that owe fees for services and goods provided by nonemployees. As the economy emerges from the current conditions, an increasing desire to engage contingent workers can be anticipated but this will statutorily compete with other pressures to have such individuals be employees of some "employer" rather than freelancers.

The majority of states currently use a statutory rather than common law test for determining employment or independent contractor status. It is anticipated that more states will adopt statutory tests, often a version of the ABC test, which makes it very difficult to establish an independent contractor relationship. This may simplify contractor status determinations, but increase the UI tax revenue from such determinations.

Staffing entities that provide for services that evaluate "employment status" of workers and payroll may be forced by new laws to simply become the employer of all workers that they provide rather than act as referral agencies or intermediaries, except under rare and stringent circumstances. As the purveyors of such workers, these companies' capitalization and capacity to timely meet tax obligations is likely to be of heightened concern and state laws aimed at regulating PEOs are likely to be expanded to extend to all staffing agencies and/or co-liability will be legislated, at least at the state level. Companies seeking these just in time services will need to be equally concerned with the ability of an agency to provide qualified staff but also its financial responsibility to meet the payroll tax obligations of an employer.

3. SUTA Dumping

Another emerging issue will probably also play out further with the restructuring during downsizing and future reorganizations and rebuilding and that is the primarily state-level concern about SUTA Dumping (SUTA stands for State Unemployment Tax Act). Unemployment insurance is really the product of federal law with its administration delegated to the states for administration.[67]

In 2004, the DOL, through a federal law, pressured states to enact laws, largely formulaic, which have had the impact of consolidating related employers into a single UI account for each state. The stated purpose was to prevent rate manipulation by employers transferring employees around to minimize adverse UI claims experience. The consequence is that states are trying to both fold related employers into a single account and are increasingly resistant to related employers establishing separate accounts. Consequently, when employers reorganize and consolidate or separate for legitimate organizational purposes, the states will at least try to block such measures. With the move of workers to PEOs or staffing agencies as a way of controlling costs, states are planning legislation and litigation to require such new employers to pay at the using companies rates. For example, Company A that acquires workers from unrelated Company X, may find that Company X must pay UI taxes at and through Company A. Although this approach is extremely difficult to administer, a company up-staffing for a recovering economy will likely be faced with this more socialized approach to such taxes. The long-term impact of these SUTA Dumping laws is to push labor into a single pool related to the entity using the services.

So, while entities are seeking just in time and contingent workers with fluidity to shift from project/company to company, the governments' needs for income tax and dedicated funds' revenue (SDI, UI, FICA) will be pressing for less flexibility. At this time, the widespread dismissal and furloughing of workers has over-extended all UI funding sources. These overstretched resources are already encouraging both states and the federal government to increase future wage bases (upon which such taxes are calculated). For example, currently California and the federal government use the historically low wage base of $7,000 for taxing UI/FUTA purposes, however, California has a bill pending that would raise the base to $16,000 in 2009, an increase of more than 100%! Thus, the adverse UI experience will likely significantly increase future tax rates. In the end, while companies have been quick to divest themselves of workers or trim their work weeks, the long term price that all will pay will come in the form of higher taxes, much higher taxes.

4. Practical Steps to Take Today

- Identify the resources and skills that will be needed under the new model, determine where to procure such talent and contract with staffing agencies that can meet your needs.
- Require that staffing agencies provide all mandated training, including training required for employment and labor law purposes.
- Prepare to treat workers as contract labor, rather than employees.

K. Health Insurance

1. Likely Effect of Pending Health Care Proposals

Current health care proposals could accelerate the trend to smaller, more decentralized business organizations and independent contractors, by imposing rules making health care more available to this model of doing business. The Obama Administration has proposed a "National Health Insurance Exchange," which will offer private health plans and a public plan that will allow individuals and small businesses to purchase health coverage on a small group or individual basis.[68] Separately, as of February 5, 2009, thirteen Senators have co-sponsored the "Healthy Americans Act" (S. 391), which would require all adult residents of the United States to purchase health insurance from approved private insurers or employer-provided plans providing coverage at least to the level that is provided to federal employees. Premium costs would be subsidized by the government for individuals below 100% of the federal poverty level.

Either the President's proposal or S. 391, if enacted, would have the effect of uncoupling, for the first time since World War II, the virtually exclusive connection between employment and the delivery of health care coverage to the American workforce.

Under the current system of employment-based health coverage, many employers and employees report the phenomenon of workers who remain employed, as opposed to working as free-lance independent contractors, because of the practical requirement of health insurance coverage. For various reasons, (having children in the home, or a family member with health issues) many workers in America seek employment primarily because it offers health coverage. The existence of a non-employment based health coverage alternative to private working individuals would arguably free those individuals to leave the constraints of a full-time employment environment for more entrepreneurial pursuits. At a minimum, the de-coupling effect would offer affordable alternative health care and remove the present obstacle to individual workers being able to work out of home-offices and shops around the country.

In addition to government-based health care delivery, a vehicle already available under the existing structure may come to the forefront as the workforce evolves to a smaller organizational structure.

2. Risk-Pooling: The Key to the Small Organization Concept

Apart from the prospect of a system of national health coverage, either under the President's proposal, or one based on the S. 391 model, a key issue of the delivery of health care to workers and their dependants in the new emerging environment will be how to leverage large organization risk-pooling of health costs in the small company/individual contractor environment.

At the heart of the modern health care delivery system is the concept of risk-pooling, in which the risk of catastrophic illness is spread across a large population of individuals. With the dramatic increase in health care costs and inflation over the past 25 years, smaller employers and self-employed individuals have found themselves at a distinct disadvantage competitively because of the impact of the small (or nonexistent) risk pool.

For example, a large organization with thousands of employees can take advantage of a large risk pool by maintaining a self-insured health plan backed up by stop-loss insurance (which insures the employer, not the employee, as in a fully-insured health plan). The self-insured plan is not subject to state insurance law minimum coverage mandates, and therefore delivers superior health coverage at a lower cost. However, the smaller the organization, the less practical this arrangement becomes because of the risks inherent in a small group, where a single premature baby, multiple coronary bypass surgery or cerebral hemorrhage can impose crushing liabilities on a plan covering only a few participants. In such a situation, the small organization can find it's health insurance, or stop loss coverage, increase dramatically in the years following the catastrophic claim.

This disparity in the effect of risk-pooling between small and larger employers is evident in the fact that smaller companies (2 – 199 employees) are half as likely to offer health coverage as larger employers (200 and more employees), and among those that offer such coverage, small employers shift a greater burden of cost-sharing, in the form of higher deductibles and co-pays, to their employees in order to keep premiums reasonably competitive with those paid by employees in larger firms.[69]

3. Risk-Pooling and ERISA

ERISA[70] generally was intended to provide a regulatory scheme for employee benefit plans established by an employer (including a group of employers affiliated through common ownership), for the exclusive benefit of its employees or an employee organization. Title I of ERISA does not apply at all to a plan that covers only owners of the company and their dependents. ERISA contains an internal bias in favor of larger employer and union-sponsored plans, particularly in the self-insured environment, through the approval of union-sponsored multi-employer plans and the restrictions on multiple employer welfare arrangements (MEWAs).[71]

The MEWA is a welfare arrangement covering the employees of two or more employers that are not members of the same control group. A MEWA may be an ERISA-covered employee benefit plan, or it may not be covered by ERISA at all. The ERISA-covered MEWA generally is a plan established by "a bona fide group or association of employers" that have some common business interest, such as an association of employers in the same industry.[72] MEWAs come in two flavors, self-insured, and fully insured. Under ERISA, a self-insured MEWA is subject to ERISA's regulatory requirements, but is also subject to state insurance law regulation to the extent such laws do not conflict with ERISA — therefore the self-insured MEWA is regulated by both ERISA and state insurance regulatory agencies.[73] Most state insurance regulatory bodies view the self-insured MEWA as an unlicensed insurance company, and in some states they are prohibited altogether. The MEWA rules, coupled with restrictive state insurance laws, effectively serve as a barrier to the formation of self-insured MEWA's that could effectively permit the pooling of a large number of smaller companies and individuals into large pools and permit effective reduction of health care costs.

However, if the MEWA is "fully insured," that is, if benefits under the MEWA are fully and directly guaranteed by an insurance policy or contract issued by a company that is qualified to do business in each state in which the MEWA provides benefits, then ERISA preemption applies, and the MEWA itself is not otherwise subject to state regulation.[74] A fully-insured MEWA may be an effective way for an association of employers and self-employed individuals to purchase health insurance through a larger risk pool than would otherwise be possible.

In the absence of Congressional action easing the restrictions on self-insured MEWAs, which does not appear to be forthcoming, creative navigation of the existing MEWA rules might still permit small organizations, through trade, professional and commercial associations, to leverage the power of the larger organization without having to incur the organizational downside of such a structure. It will be a significant challenge to the growth of the MEWA structure that, while ERISA at least accounts for the existence of the MEWA and provides a statutory scheme, its history has been clouded by unfortunate instances of poor, and in some cases fraudulent, practices by MEWA providers. These instances have caused the MEWA to become an enforcement priority for both the DOL and state insurance regulatory agencies.

However, this does not mean that competent and ethical MEWA operators may not in the future be able to meet the challenge posed by this pending seismic shift in the nature of the delivery of labor. Thus, there may yet be significant opportunities simultaneously for substantial cost savings and delivery of quality health coverage for workers who are a part of the movement to small organizations, and their families, through the MEWA vehicle. Just as the PEO movement was troubled, early in its history, with unsavory operators, after a period of reform, ethical and effective PEO providers entered the market, and the PEO industry became a substantial and thriving one. Indeed, currently, one of the most significant examples of penetration of the MEWA in the health plan market appears to be in the area of franchising, for example, where a franchisor sponsors a MEWA to provide health benefits to its unaffiliated franchisees.[75] Creative and ethical MEWA operators may be able to achieve a similar success with the coming revolution in the American workplace.

4. Practical Steps to Take Today

- As the federal government sorts out national health care coverage, companies should conduct a serious examination of their health insurance plans and consider reducing benefits (to prepare for national coverage) and offset the reduction with increases in other types of benefits or compensation.

- Review plan terms such as employee and dependent eligibility provisions to ensure that coverage is extended only to those specific classes of employee/dependent as permitted under the plan. Do not permit independent contractors and nonemployee directors to be covered under your plan.
- Avoid unintentionally establishing or becoming part of a MEWA. For example, do not allow a corporate merger, acquisition or divestiture to result in coverage under any employee benefit plan of the employees of an entity that does not qualify as part of the control group of the plan sponsor.
- Be sure your plan language clearly provides that only employees of members of the employer's control group may be covered under your plans, and provide protective language that the plan is deemed to be separately adopted as a single employer plan in case the employees of any unaffiliated employer are inadvertently covered under it.

L. Retirement Benefits

1. What Will the Future Hold

Retirement plan design is expected to take a major shift as the economy moves to meet the needs of the new workforce. Compensation programs that reward longevity and provide equal benefits regardless of individual skill and performance will no longer support companies' needs. Dollars previously invested in retirement plans will be redirected to other parts of the compensation package, particularly incentive pay.

2. Reduce or Eliminate Retirement Plan Benefits

Currently, many companies maintain retirement plans for their employees, however, no such benefits are permitted to be made to nonemployees such as independent contractors or workers on third-party payrolls. And often firms will also exclude employees who are classified as "project workers", temporary employees and seasonal employees. As is further discussed below, this has led to many situations where a contingent worker may feel that he or she is doing the same job as a benefits-eligible employee. This, in turn, has led to lawsuits where these workers claim benefits on account of being "misclassified". Businesses who want to encourage contingent workers will attempt to limit this disparity, however, due to the inappropriateness of retirement benefits for contingent workers, we are likely to see the field being leveled by reductions or eliminations of the retirement benefits currently in place for "regular" employees. Where retirement benefits are not eliminated, suggestions for how they may change are included below.

3. Reduce 401(k) Matching Contributions

A 401(k) plan is not required to provide matching contributions. Moreover, matching contributions can be reduced or eliminated, as long as the plan satisfies nondiscrimination tests and appropriately limits the amount of contributions. A change in the formula is permitted, so long as the change is prospective. During the economic downturn, many plan sponsors reduced or eliminated matching contributions. As plan sponsors recover from the downturn and rebuild, plan sponsors may choose to keep the reduced matching contribution formulas and redirect funds to other aspects of the compensation package. As an alternative, certain companies will substitute the current model of a "promised" fixed matching contribution rate with a more flexible discretionary structure so that workers view this benefit not as an entitlement but rather as a variable reward tied to company performance.

4. Reconsider Vesting Schedules

Firms are permitted to implement a vesting schedule, requiring participants to complete a specified number of years of service, within Internal Revenue Code limits, before most types of employer contributions become non-forfeitable. (Employee contributions always are 100% vested.) Forfeitures generally can be used to reduce employer contributions for the next plan year or paying certain permitted administrative expenses. Historically, many employers used the longest vesting schedules permitted by law, viewing these schedules as handcuffs that would retain employees for an indefinite time period. When building the new workforce, however, plan sponsors will need to evaluate the amount of time workers are needed and tailor vesting schedules to meet the desired timeframe. Companies must choose whether to shorten or even eliminate the vesting schedule — to attract and retain key talent, who may not intend to be employed for the duration of the vesting schedule — or keep longer vesting schedules, so that the plan sponsor can recapture forfeitures and redirect funds that would have been used for the next year's contributions or administrative expenses. In a departure from present practice, companies may provide shorter vesting schedules for rank and file employees who are part of a flexible workforce and longer schedules for executives who may be needed for a longer timeframe.

5. Redesign Profit-Sharing Contribution to be Discretionary and Eliminate Fixed Money Purchase Contributions

In an effort to maintain flexibility when the economy recovers, companies will redesign not only their matching contributions but also profit-sharing and money purchase contributions. This is in line with a general trend of keeping all benefits as flexible as possible.

6. Continue the Transition from Defined Benefit to Defined Contribution Plans

Companies will continue to move away from defined benefit programs to defined contribution (generally, 401(k)) plans. In the new workforce, firms may find that traditional retirement programs — where eligibility is determined on broad-based eligibility criteria and which reward longevity — no longer make sense. Moreover, plan sponsors will want to avoid the unpredictable (and increasingly enormous) liabilities associated with defined benefit plans. The members of the new workforce who are eligible for retirement benefits may appreciate the portability of defined contribution retirement programs. Companies that have maintained defined benefit plans may transition the plans to cash balance plans, which have many of the same characteristics as defined contribution plans. A *cash balance plan* is a defined benefit plan to which the company makes a contribution each year, that defines the promised benefit in terms of a stated account balance. Although cash balance plans were challenged in the courts on age discrimination and other grounds, the Pension Protection Act of 2006 and regulations issued by the Internal Revenue Service now make them a viable option.

7. Review Current Plan Eligibility Criteria and Administrative Practice to Best Immunize the Plan Sponsor from Eligibility-Based Lawsuits

With the new workforce, plan sponsors may reconsider whether they wish to exclude temporary and seasonal employees, as well as "project" workers. Some firms with large contingent workforces may wish to put all employees on the same playing field. This may cause a loosening of plan eligibility rules and an insistence that those who are paid by a third party (who are barred by law from receiving retirement benefits provided to employees) be provided comparable benefits by the third party. For organizations that wish to continue to exclude all contingent workers from their retirement benefits, there will be much tighter eligibility criteria than currently seen in many retirement plans. This will entail more precise wording in the eligibility provisions of retirement plans and precise and workable definitions, which are used in the workplace to distinguish different types of workers. For example, there are plans today that exclude classes of employees, such as "casual employees" or "project" workers whose jobs may look no different than a regular employee. Such criteria could be viewed by the Internal Revenue Service, DOL or a court, in a lawsuit brought by employees, as a sham attempt to save money on benefits. Therefore, companies must redouble their efforts to build real work-related distinctions into the classifications of employees who are or are not eligible to participate in a retirement plan.

8. Redouble Efforts to Exclude from Participation Individuals Whom the Plan Sponsor Believes Are Independent Contractors, But Are Later Reclassified by a Governmental Entity as Common Law Employees

When the new workforce is rebuilt, companies will want to make sure that only those individuals whom it wishes to be eligible are eligible to participate in its retirement plans. In particular, businesses will want to make sure that plan documents and summary plan descriptions clearly exclude from eligibility independent contractors, individuals employed by temporary and staffing agencies (including those jointly employed with temporary/staffing agencies), and independent contractors reclassified by a government entity as employees. Although the general rule is that only common-law employees may participate in a 401(k) plan, it is not always clear which individuals are common-law employees. A company's determination, and the IRS's determination, of who is a common law employee may differ; in such case, it is important that the plan document exclude "reclassified" employees from eligibility. Businesses have paid close attention to this issue since the Ninth Circuit Court of Appeals issued its decision in *Vizcaino v. Microsoft Corp.*,[76] which held that certain Microsoft workers who were originally hired as independent contractors, and later reclassified by the Internal Revenue Service as employees, were entitled to benefits under Microsoft's 401(k) plan and employee stock purchase plan. By redoubling efforts in this regard, companies can structure their retirement plans defensively to guard against future unwanted claims for benefits eligibility. Additionally, contingent workers should always be asked to sign waivers in which they expressly disclaim any entitlement to benefits.

Close examination of the length of time that workers are retained is also warranted. Benefit costs can be saved if, for example, workers will not be employed for more than 1000 hours per year and the plan contains a rule requiring at least 1000 hours of service prior to accruing a benefit.

9. Expand Opportunity for 401(k) Rollovers

Plans may, but are not required to, accept eligible rollover distributions from eligible retirement plans, such as 401(k) plans, 403(b) plans, and 457 plans, and some after-tax and Roth contributions. Members of the new workforce —who will move between companies more frequently — may wish to consolidate their retirement funds through rollover to the new company's plan. Notably, a plan can authorize acceptance of rollovers for those who would not otherwise qualify as eligible participants — so a 401(k) plan generally could implement maximum service requirements for purposes of deferrals and matching contributions, if any, but still allow new workers to rollover funds from prior plans. Rollovers, while an administrative burden to administer, have the advantage of increasing assets in the plan, which can reduce overall fees and expenses.

10. Practical Steps to Take Today

- Plan to reduce employer-provided retirement benefits, whether it is matching contributions, profit sharing or defined benefit plan accruals, in favor of benefits that the current workforce desires. Make a reallocation of resources in favor of incentive compensation over retirement plan accruals.
- Encourage contractual arrangements whereby retirement benefits flow from the staffing agency to enhance the benefit of being with a staffing agency and reduce the impulse to claim common law employee status.
- Plan eligibility criteria should be reviewed. Existing plan language should be tightened to best assure that those who are not employees do not get benefits. And all companies should make certain that in the event of worker reclassification, those who are excluded from coverage have no claim on benefits.
- Traditional defined benefit pension plans will become even less popular than they are today with their huge and highly variable cost structures. Instead, move toward a more predictable means of providing retirement plan benefits. Cash balance plans can replace some defined benefit plans, or simply freeze benefit levels with no additional benefit plan to take its place.

III. TWELVE PRACTICAL RECOMMENDATIONS TO IMPLEMENT TODAY IN ANTICIPATION OF THE NEW WORKFORCE

Below are twelve practical recommendations to overcome the employment and labor law challenges of the coming new workforce. Littler predicts that when the recession ends (potentially as early as the 4th Quarter 2009), 50% or more of the new workers joining business organizations as they rebuild will be contingent workers. Contingent workers are given a very expansive definition in this Report. They include contingent workers retained directly by the employer or arriving through staffing agencies or other organizations such as PEOs. Also included is the vast numbers of temporary workers including those with flexible or non-traditional work schedules. Of course the term also includes independent contractors and business consultants with the recognition that the IRS and other branches of government will set a high standard for independent contractor status given the fear that such workers present a tax enforcement challenge.

Before listing specific practical recommendations, it is critical to note that often parts of the contingent workforce are invisible to top management. This is understandable as many of these relationships evolved from vendor contracts that provided goods and supplies, but also services often delivered with on-site personnel. It is essential that the full contingent workforce become visible and that a compliance commitment is made at the highest levels of the organization with adequate resources to ensure it is accomplished. The following mandate is necessary to bring to life the many practical and specific recommendations provided below.

Mandate: Increase the Visibility of the Contingent Workforce and Make a Compliance Commitment.

One: Conduct a Compliance Audit to Prepare for the New Workforce and the Coming Enhanced Government Enforcement of Employment and Labor Law.

- Identify current contingent workers and the likelihood of growth in this workforce in your particular organization.

- Assess your current level of employment and labor law compliance recognizing the differences between the various sectors of your workforce (regular employees, flex-workers, contingent workers, temps, independent contractors, and others).
- Recognize the coming enhanced enforcement efforts including 250 additional DOL inspectors, $600 million more to enforce wage and hour laws, expanded workplace safety enforcement, and new regulations and enforcement initiatives regarding antidiscrimination law.
- See the Compliance Section of the Report, above at Part II, outlining the special role of contingent workers under the various employment and labor statutes.
- Consider making the audit and recommended improvements attorney-client privileged in anticipation of litigation.

Two: Consider the Appointment of a New Workforce Compliance Specialist: A Professional Responsible for Becoming an Expert on Employment and Labor Law Compliance for the Contingent Workforce.

- The application of current and proposed laws and regulations to the contingent workforce will involve complexity and uncertainty. This is supported by a quick review of the areas of law surveyed in this Report.
- The New Workforce Compliance Specialist will facilitate business plans to add contingent workers while keeping a focus on compliance in a new world of government enforcement of employment and labor laws.
- Define the reporting responsibility of this professional between Legal, HR, and Procurement. In many ways this professional can link resources from all three areas into a single force.

Three: Immediately Source or Pre-Source Contingent Worker Providers and Negotiate Key Provisions of the Vendor Contracts to Facilitate Employment and Labor Law Compliance.

- Staffing agencies and other providers of contingent workers will be on overload as the economy recovers. Sourcing specialized resources now will give your organization priority.
- With a majority of contingent workers being skilled, learn how the new professionals can be located and retained. Even if your organization has no current need, pre-source these resources.
- Negotiate key compliance requirements in your agreements including necessary background checks, safety requirements, antidiscrimination pledges and procedures, including recordkeeping and wage and hour requirements.
- Give special attention to the November 1, 2008, Federal Sentencing Guidelines and how the Guidelines require enterprise-wide compliance with qualifying codes of conduct and necessary training. Ensure that these new requirements are part of your contingent workforce agreements.

Four: Consider the Establishment of a Pilot Global Mobility Program if One Does Not Exist Within Your Organization.

- Few organizations in a post-recession economy will be able to adequately staff their required new workforce without considering global resources.
- Pre-identify how talent and resources can be quickly accessed worldwide. Learn what is available.
- Consider how to establish a low cost subsidiary outside the U.S. that can facilitate cross-boarder work authorizations.
- Organizations who do their homework now and make minimal investments will be ahead of competitors by six to eighteen months when the talent wars and outsourcing race begins.

Five: Review and If Necessary Revise Privacy Protocols to Match the New Workforce Requirements.

- In the struggle to have an effective contingent workforce and avoid joint employer status, workplace privacy policies and practices need review and probably revision.
- How much information can be required from nonemployees who have virtual or actual access to the workplace? How can an organization confirm that necessary background checks have been conducted?
- What privacy expectations exist concerning monitoring of nonemployee contingent workers?
- How do Web 2.0 policies impact employees differently from contingent workers?

- This is a classic area to be covered in a compliance audit and can draw upon the special expertise of your appointed new workforce professional.

Six: Ensure Wage and Hour Compliance by Third-Party Contractors, Vendors, and Other Contractors.

- The largest dollar risk in the workplace comes from the class action wage and hour epidemic. *Total Wage and Hour Compliance* (Littler Report 2008 Initiative)[77] is mandatory in the Age of Obama.
- The enterprise business and "economic realities" tests put organizations at risk for the wage and hour compliance of the entire new workforce (including many of the nonemployees in the contingent workforce).
- Ensure that contracts with vendors, third-party contractors, and staffing organization include wage and hour compliance mandates and indemnification language.
- Consider using a third-party certification agents and "blind" audits to provide extra evidence of compliance.
- Make sure the business terms are considered in evaluating compliance. Contracts that are so economically favorable that they make wage and hour compliance impossible (or highly unlikely), may be held to provide constructive notice of noncompliance.

Seven: Review Executive Compensation Agreements and Practices for Their Impact on the New Workforce.

- The rapidly changing work environment and business combinations may mandate major changes in executive selection, retention, and assignments. Minimize the economic penalties in executive compensation agreements for such needed changes.
- Monitor the flood of government executive compensation limitations and requirements that may be impacted by the growing new workforce.
- Examine how the new workforce may impact deferred compensation agreements and nondiscrimination tests.
- Consider opening certain executive compensation programs to nonemployee consultants and independent contractors.

Eight: Monitor and Avoid Traditional Labor Law Landmines Associated with the Arrival of the New Workforce.

- Employers with collective bargaining agreements need to immediately review provisions that could greatly limit the use of the new workforce. A collective bargaining agreement with an anti-subcontracting provision or even silence on this subject could prevent the necessary use of contingent workers.
- Anticipate that the Obama-appointed National Labor Relations Board may again include contingent workers in bargaining units with regular employees. Examine areas where a potential community of interest exists between the two workforces and consider possible changes.
- Consider the impact of a unionized workforce arriving in the form of contingent workers and what responses may be necessary.
- Consider the implications of the Employee Free Choice Act or similar legislation on organizing the contingent workforce and the role online social networks may play in providing preventive education.

Nine: Protecting Trade Secrets and Enforcing Covenants Not-to-Compete Within the New Workforce.

- Review, and as necessary modify, invention and proprietary information agreements with staffing agencies, contractors, and nonemployee individuals.
- Review and modify information access rules including identifying and marking confidential proprietary information.
- Control computer access and modify as needed downloading protocols.
- Re-examine the value and enforceability of noncompete agreements in the context of a contingent workforce and changing judicial and legislative requirements and prohibitions.

Ten: Planning for Reductions in Force and Meeting WARN Requirements Within the New Workforce.

- The hallmark of the new workforce is flexibility and the ability to quickly adjust to changing business conditions. Learn and consider implementing conditions that would prevent coverage by WARN (federal and state).

- Staffing agency employers need to understand and anticipate how their obligations could be impacted by abrupt business condition changes on the part of their clients.
- Establish expectations regarding future employment for contingent workers who are moving from project to project.

Eleven: Evaluate the Impact of the New Workforce on Workers' Compensation Coverage and Unemployment Insurance Taxes (as Well as Other Employment Taxes).

- Workers' compensation insurance costs and coverage will shift depending on the structure of the contingent workforce. Anticipate that limiting costs may expose the organization to civil litigation from injured contingent workers if workers' compensation pre-emption does not apply. Does your general liability insurance cover such situations?
- Determine which entities will be responsible for unemployment insurance and other taxes and factor this into revenue and expense decisions.

Twelve: Review and Revise Benefit Programs in Anticipation of the New Workforce.

- This is one of the most important practical aspects of preparing for the new workforce. Great change is coming and should be anticipated.
- Consider the future role of your organization in providing for health care insurance coverage and President Obama's pledge to have legislation passed by the end of 2009. Anticipate that your organization will likely have less of a role in providing medical insurance benefits as the contingent workforce expands.
- Consider the impact of MEWAs and make an informed decision regarding how it will impact your organization.
- Consider the reduced role of organizations in providing retirement benefits with the arrival of the contingent workforce. Examine your 401(k) program and the implications of the safe-harbor provision if your program has many highly compensated individuals.
- Evaluate the role of equity incentive programs with the new workforce and the threat of creating "common law" employees.

Bonus (A Thirteenth Practical Recommendation Included Within the Littler Dozen): Review Your Policies and Practices Concerning Flexible Employment Arrangements Involving the New Workforce.

- Employment laws are increasingly creating protection for workers who have or need flexible work schedules. Flexibility bias is one of the top concerns of the current Congress. Many existing laws and regulations provide protection for individuals and caregivers who require a flexible work schedule.
- The contingent workforce is staffed partly by individuals who value a flexible work schedule.
- Alleged gender bias is more often bias against part-time employment and flexible work arrangements. Policies and procedures should be reviewed to eliminate unjustified flexibility bias.
- Consider the business case for flexibility and whether this is a hallmark of the new workforce.

ENDNOTES

1 Kristina Cooke, *Recession will be worst since 1930s: Greenspan*, Reuters (Feb. 18, 2009), *available at* http://www.reuters.com/article/ousiv/idUSTRE51H0OX20090218 (last accessed Apr. 20, 2009).

2 *See, e.g.*, Frank Ahrens, *Economists: Recession to End This Year, But Unemployment Will Hit Nearly 10%*, Wash. Post (Apr. 10, 2009), *available at* http://voices.washingtonpost. com/economy-watch/2009/04/economists_recession_to_end_th.html (according to Blue Chip Economic Indicators Survey, 86% of private economists believe recession will end in the second half of 2009).

3 As used herein, the term *contingent workers* or *contingent workforce* refers not only to those individuals holding temporary jobs. Rather, these terms are used broadly to refer to both the employees traditionally thought of as contingent, *and* all other workers having any form of alternative work arrangements. Thus, included in the predictions and trends are temporary employees, staffing agency employees, consultants, independent contractors, flexible/on-call workers, and all other forms of temporary or alternative work arrangements.

4 Littler has been following the MIT model for nearly a decade and previously referenced it in its 2004 Report on the Contingent Workforce. *See* Garry G. Mathiason, *et al.*, *Strategic Initiatives for the Changing Workforce*, Littler Report, at 20-22 (Apr. 2004) *available at* http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=20.

5 *See* Robert J. Laubacher & Thomas W. Malone, *Two Scenarios for 21st Century Organizations: Shifting Networks of Small Firms or All-Encompassing "Virtual Countries,"* MIT Initiative on Inventing the Organizations of the 21st Century, Working Paper # 001 (Jan. 1997), *available at* http://ccs.mit.edu/21c/21cwpmain.html.

6 *See* Robert J. Laubacher & Thomas W. Malone, *Flexible Work Arrangements and 21st Century Workers' Guilds*, MIT Initiative on Inventing the Organizations of the 21st Century, Working Paper # 004 (Oct. 1997).

7 *Collaborative filtering* refers to online systems that profile consumer likes and dislikes and make recommendations based on those preferences. This system is already used today by some online companies, such as Netflix and Amazon.

8 Staffing Industry Analysts, Inc. (SIA) is the premier research and analysis firm covering the contingent workforce. Known for its independent and objective insights, the company's proprietary research, data, support tools, publications, and executive conferences provide a competitive edge to decisionmakers who supply and buy temporary staffing. In addition to temporary staffing, SIA also covers these related staffing service sectors: third-party placement, outplacement, and staff leasing (PEOs).

9 Ron Mester has been SIA's Managing Director since early 2002. The company has grown substantially in that time. Ron spent eleven years of his career with Towers Perrin, one of the world's ten largest consulting firms, where he advised Fortune 1000 companies in more than a dozen industries on human capital strategy, organizational effectiveness, and overall business strategy. Ron left Towers Perrin to become Executive VP of Sales and Marketing at MarketTools, a start-up providing web-based market research services, where among other things he originated and developed the concept for Zoomerang, which is today the world's top source of online surveys. He then served as President and CEO at Decise, a start-up delivering web-based market/competitive intelligence, before taking on his current role. Ron holds an M.B.A. from the Wharton School and a B.A. from U.C. Berkeley.

10 *Large companies* refer to companies having 1,000 or more employees.

11 Charts provided to Littler by SIA, which show the statistics used herein, are included in Appendix A. See also Dr. John Sullivan & Master Burnett, *Managing Contingent Labor Strategically*, (Mar. 15, 2009), *available at* http://www.ere.net/2009/03/15/managing-contingent-labor-strategically/ (work allocated to contingent labor has grown from 6% in 1989 to more than 27% in 2009; according to study completed in January 2009 by the Aberdeen Group, a majority of employers expect their use of contingent labor to increase in the next two years, with 10% of employers expecting a "significant growth."); Elizabeth Rice, *Contingent Workforce Management: Best Practices*, (Jan. 3. 2009), *available at* http://www.articlesbase.com/management-articles/contingent-workforce-management-best-practices-707059.html

12 *Bad Year for Job Losses*, Contingent Workforce Strategies Magazine, at 8 (Jan/Feb 2009).

13 U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, Feb. 2005, *available at* http://www.bls.gov/news.release/conemp.nr0.htm.

14 HR Institute, *The Future of Work—2015*, Canadian Management Centre Special Rep., at 7 (Sept. 2005).

15 *See* http://twitter.com/ (last accessed Apr. 21, 2009).

16 *See* http://www.linkedin.com/ (last accessed Apr. 21, 2009).

17 *See* https://www.rypple.com/about.shtml (last accessed Apr. 21, 2009); *The Rypple Effect*, The Economist (Dec. 30, 2008).

18 Matthew Fraser & Soumitra Dutta, *Barack Obama and the Facebook Election*, U.S. News & World Rep. (Nov. 19, 2008). A co-founder of Facebook was one of President Obama's key strategists. Masterminding a "highly effective Web blitzkrieg" resulted in Obama winning nearly 70% of the vote among Americans under age 25, the highest percentage of that age group won by any U.S. presidential candidate since exit polling began in 1976. President Obama's use of "virtual networks" for campaigning is now being taken to new levels by other politicians. For example, San Francisco Mayor Gavin Newsom recently announced online his candidacy for Governor of California. In what his advisers call a "new media-based campaign," Newsom is targeting technology-savvy young voters on Twitter and Facebook, where he has already garnered 270,000 and 40,000 followers respectively. Carla Marinucci, *Newsom Makes his Official Governor Bid Online*," S.F. Chron. (Apr. 21, 2009), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/21/MNJO175RRK.DTL&tsp=1.

19 Amanda Lehnart, *Adults and Social Network Websites*, Pew Internet & American Life Project (Jan. 14, 2009), *available at* http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx; *see also* Amanda Lehnart & Susannah Fox, *Twitter and Status Updating*, Pew Internet & American Life Project (Feb. 12, 2009), *available at* http://www.pewinternet.org/Reports/2009/Twitter-and-status-updating.aspx. According to the latter report, 11% of online American adults have used Twitter or another online service that allows users to share status updates. Users of these services also tend to be more mobile. Rather than accessing the Internet at home or work, these users tend in greater numbers to rely on laptops, blackberries, cell phones, and other wireless devices to access the Internet and participate in online social networking.

20 U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, (Feb. 2005), *available at* http://www.bls.gov/news.release/conemp.nr0.htm.

21 HR Institute, *The Future of Work—2015*, Canadian Management Centre Special Report, at 9 (Sept. 2005).

22 Dan Hanyzewski, Talent Link: A Brave New Breed, CONTINGENT WORKFORCE STRATEGIES, (Jan/Feb 2009).

23 U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, (Feb. 2005), *available at* http://www.bls.gov/news.release/conemp. nr0.htm.

24 A universe of research and reports exist regarding the transformation of the workforce. It is not Littler's role to recreate that work or do more than provide a mere sample. For more comprehensive treatment of the coming contingent workforce please see *Contingent Workforce Strategies Sourcebook* published by Staffing Industry Analysts, Inc. (2008). An early prediction of the employment model that is now being forecast for 2010 is Daniel H. Pink's *Free Agent Nation: The Future of Working for Yourself* (Warner Business Books 2002).

25 U.S. Dep't of Labor, Bureau of Labor Statistics, *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results From a Longitudinal Survey Summary*, (June 27, 2008). This survey focused on individuals born between the years 1946 and 1964. Some studies indicate that more recent generations are changing jobs and careers even more quickly. *See, e.g.*, Dan Hanyzewski (staffing director for Nike), *Talent Link: A Brave New Breed*, Contingent Workforce Strategies, (Jan/Feb 2009) (Per Bruce Tulgan, founder of generational-research firm Rainmaker Thinking, members of the "high maintenance" and "high-performing" "Generation Y" "don't like to stay too long on any one assignment"); Anne Fisher, *What do Gen Xers Want?*, Fortune (Jan. 20, 2006) (average employee in late 20s has already changed jobs 5 or 6 times), *available at* http://money.cnn.com/2006/01/17/news/companies/ bestcos_genx/.

26 *See* Benjamin J. Romano, *Microsoft Work Force Includes About 80,000 Vendors, Temps*, Seattle Times (Mar. 4, 2009), *available at* http://seattletimes.nwsource.com/html/microsoft/ 2008808755_msfttemps04.html?syndication=rss.

27 *Id.*

28 *See* Subadhra R. Sriram, *And Compliance for All*, Workforce Strategies Magazine, (Mar./Apr. 2009) (profile of Cisco's use of contingent workers); Subadhra R. Sriram, *Programmed to Succeed*, Contingent Workforce Strategies Magazine, (Jan/Feb 2009) (profile of 3M's contingent workforce management program).

29 *Joint employers* are separate and distinct entities that exercise some control over the work and working conditions of the same employee(s).

30 The general exception to this primary/secondary employer analysis under the FMLA applies to those employees who have worked for at least one year at the secondary employer's facility, in which case the employee's primary worksite is that location.

31 A PEO performs solely administrative functions for its clients, such as payroll, benefits, regulatory paperwork, and updating employment policies.

32 Specifically, the FCPA applies to any companies issuing securities registered with the Securities and Exchange Commission (SEC) under Section 13 of the Securities Exchange Act of 1934 (the "Act") or filing reports with the SEC under Section 15(d) of the Act, any other entities organized under U.S. law or having a principal place of business in the U.S., or any U.S. citizen, national or resident, any U.S. or foreign agent of these entities.

33 *See Vondriska v. Paychex Bus. Solutions, Inc.*, No. 8:07-CV-1322-T-24-TGW, 2009 WL 632889, at *7 (M.D. Fla. Mar. 11, 2009). The U.S. Department of Labor has provided the following factors as relevant to the determination of joint employment status: (1) the power to control or supervise the workers or the work performed; (2) the power, whether alone or jointly or directly or indirectly, to hire or fire or modify the employment conditions of the individual; (3) the degree of permanency and duration of the relationship; (4) the level of skill involved; (5) whether the activities the workers perform are an integral part of the overall business operations; (6) where the work is performed and whose equipment is used; and (7) who performs payroll and similar functions. WH Opinion Letter, 2001 WL 1558966 (May 11, 2001).

34 *See, e.g., Abraham v. Singh*, 480 F.3d 351 (5th Cir. 2007) (remanding RICO claim by immigrant workers alleging violations associated with H2B visas).

35 *See Sullivan v. Oracle Corp.*, 547 F.3d 1177, 1187 (9th Cir. 2008) (applying California wage laws to employees performing minimal work in the state), *superseded by* 557 F.3d 979 (2009) (withdrawing panel opinion and certifying questions to California Supreme Court).

36 This portion of the Report does not contemplate a fully independent contractor for services, as that model already exists, for example, in the form of a private law firm or an independent accounting firm.

37 331 NLRB 1298 (2000).

38 343 NLRB No. 76 (2004).

39 Ponemon Institute, *Data Loss Risks During Downsizing* (Feb. 23, 2009), *available at* http://scm.symantec.com/DLP/tw/resources/extra_pdfs/Data_Loss_Risks_During_Downsizing.pdf.

40 U.S. Dep't of Labor Press Release Number: 09-0364-NAT, *available at* http://www.dol.gov/opa/media/press/opa/OPA20090364.htm (visited Apr. 6, 2009).

41 29 U.S.C. §§ 2101 2109.

42 In September 2003, the federal Government Accounting Office issued a lengthy report highly critical of the confusion created by the WARN statute and implementing regulations. *See* U.S. Gov't Accounting Office, The Worker Adjustment and Retraining Notification Act: Revising The Act and Educational Materials Could Clarify Employer Responsibilities And Employee Rights, GAO-03-1003 (Sept. 19, 2003).

43 20 C.F.R. § 639.3(a)(2) (emphasis added).

44 29 U.S.C. § 2101(a)(2), (3).

45 20 C.F.R. § 639.3(e). *See also Bradley v. Sequoyah Fuels Corp.*, 847 F. Supp. 863 (E.D. Okla. 1994) (agency temps are not affected employees entitled to notice).

46 29 U.S.C. § 2101(a)(5).

47 29 U.S.C. § 2101(b)(1). *See Alter v. SCM Office Supplies*, 906 F. Supp. 1243, 1248 (N.D. Ind. 1995).

48 *See* 54 Fed. Reg. 16,042, 16,048 (DOL).

49 *See, e.g., Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) (first contractor ceded to second contractor its rights under various leases, subleases, and accounts receivable, and second contractor absolved first contractor of responsibility for potentially substantial liabilities).

50 *International Oil, Chem. & Atomic Workers, Local 7-517 v. Uno-Ven Co.*, 170 F.3d 779. 784 (7th Cir. 1999).

51 *See McCaffrey v. Brobeck, Phleger & Harrison, L.L.P.*, No. C 03-2082 CW, 2004 U.S. Dist. LEXIS 2768, at *11 (N.D.Cal. 2004).

52 *Local 217 v. MHM, Inc.*, 976 F.2d 805, 808 (2d Cir. 1992).

53 *Teamsters v. American Delivery Serv. Co., Inc.*, 50 F.3d 770, 777 (9th Cir. 1995); *see also Halkias v. General Dynamics Corp.*, 137 F.3d 333 (5th Cir. 1998); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996).

54 20 C.F.R. § 639.9(b)(1) (emphasis added).

55 20 C.F.R. §639.9(b)(2).

56 20 C.F.R. §639.7(a)(3).

57 20 C.F.R. § 639.5(c).

58 Cal. Lab. Code §§1400 — 1408 (West 2008).

59 Haw. Rev. Stat. §§ 394B-1 — 394B-13 (2008); Haw. Code R. § 12-506 (Weil 2008).

60 820 Ill. Comp. Stat. 65/1-99 (2008); Ill. Admin. Code tit. 56, § 230 (2008).

61 Me. Rev. Stat. Ann. tit. 26, § 625-B (2008).

62 N.J. Stat. Ann. §§ 34:21-1 -7 (West 2008).

63 N.Y. Lab. Law § 860 (McKinney 2008).

64 Tenn. Code Ann. §§ 50-1-601, 50-1-602, 50-1-603 (LexisNexis 2008).

65 Wis. Stat. §§109.07, 109.075 (West 2008); Wis. Admin. Code. DWD § 279 (2008).

66 V.I. Code Ann. tit. 24, §§ 471 — 478 (LexisNexis 2008).

67 Most people do not realize that although the states pay benefits out of UI taxes collected from employers (and employees in a handful of states), the administrative cost of running the agency that processes these claims is largely underwritten by the DOL. So when the DOL applies pressure to states, the state legislatures, unwilling to fund these costs, are generally very cooperative.

68 http://www.whitehouse.gov/agenda/health_care (last visited Apr. 5, 2009).

69 *See generally* Kaiser Family Foundation, *Employer Sponsored Health Insurance — A Comparison of the Availability and Cost of Coverage for Workers in Small Firms and Large Firms*, Nov. 2008, *available at* http://www.kff.org/insurance/snapshot/chcm0111898oth.cfm (last visited Apr. 4, 2009).

70 Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001, *et seq.*

71 ERISA § 3(40).

72 *See, e.g., Wightman v. Berkely Administrators of Texas, Inc.*, 2000 WL 287930 (N.D. Tex. 2000) (trade association satisfied commonality requirement because all employers adopting the plan were related to the trade association sponsoring it). MEWA status is important because if the requirements for ERISA coverage are met at the MEWA level, the MEWA, and not each adopting employer, will be required to meet ERISA's documentation, reporting and disclosure requirements. *See, e.g.*, DOL Opinion 81-47A. To meet this requirement, the employers, through the association, must control the design and activities of the MEWA. *See, e.g.*, DOL Opinion. 2005-24A.

73 ERISA § 514(b)(6)(a)(ii).

74 ERISA § 514(b)(6)(A)(i).

75 It is advisable to obtain a ruling from the DOL as to the ERISA-covered status of a MEWA before beginning operation.

76 173 F.3d 713 (9th Cir. 1999).

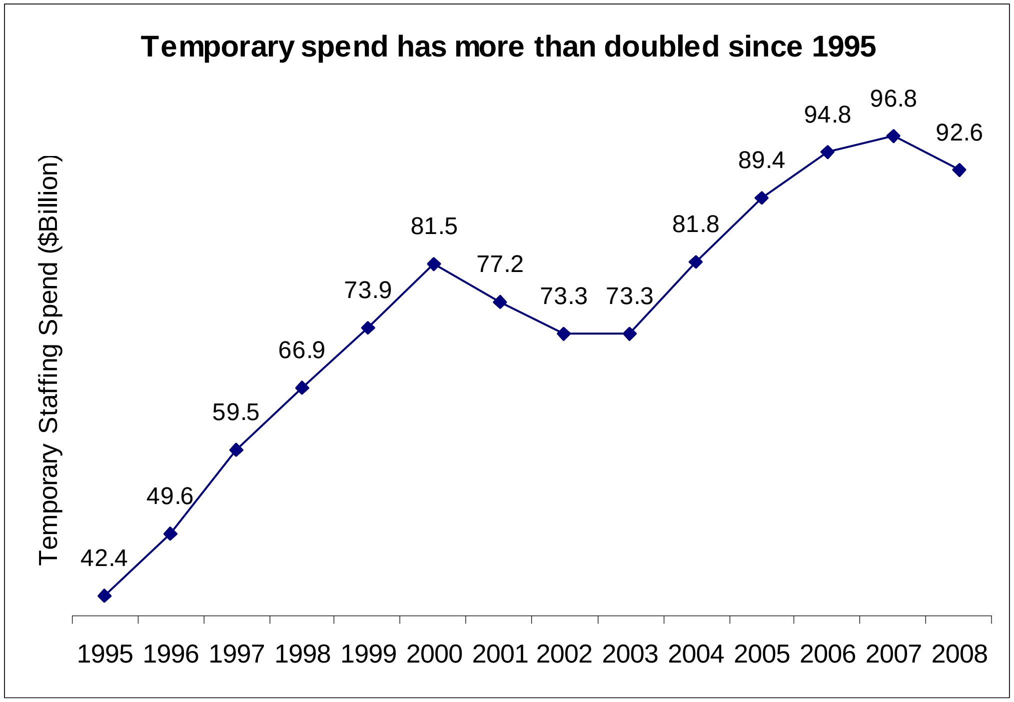
77 Littler Report, *Total Wage and Hour Compliance: An Initiative to End the Class Action War*, Apr. 2008, *available at* http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=24.

APPENDIX A:

Staffing Industry Analysts Charts on Contingent Worker Trends

STAFFINGINDUSTRY ANALYSTS

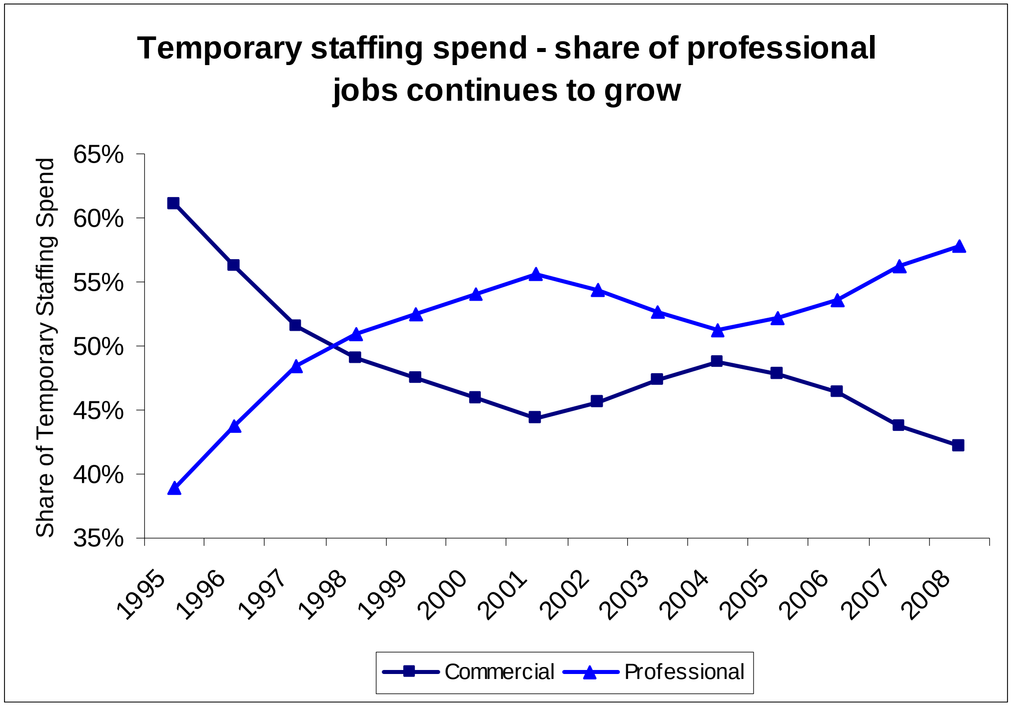
History shows that spending on contingent labor will more than recover after a recession



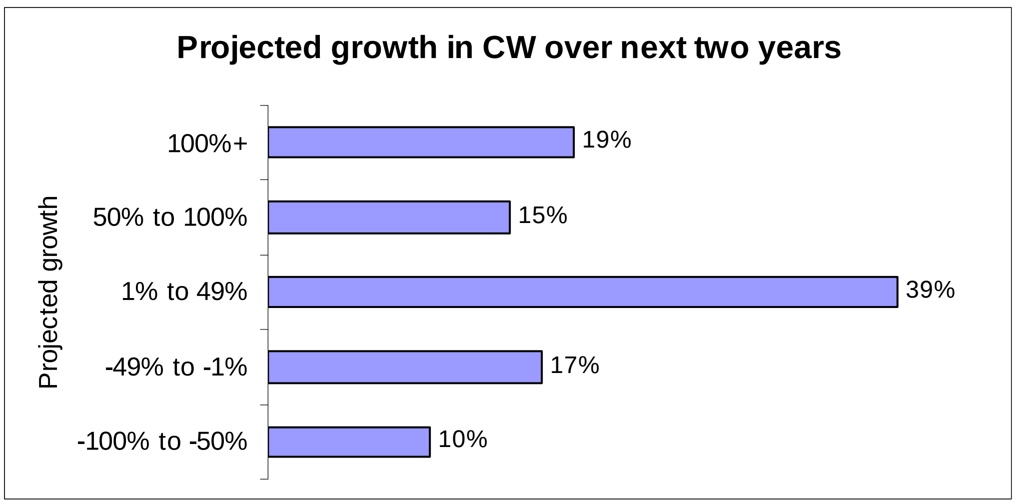
STAFFINGINDUSTRY ANALYSTS

Over time, spending on contingent labor has increasingly been for professional skills

(Note: “Commercial” = Office/clerical or industrial)

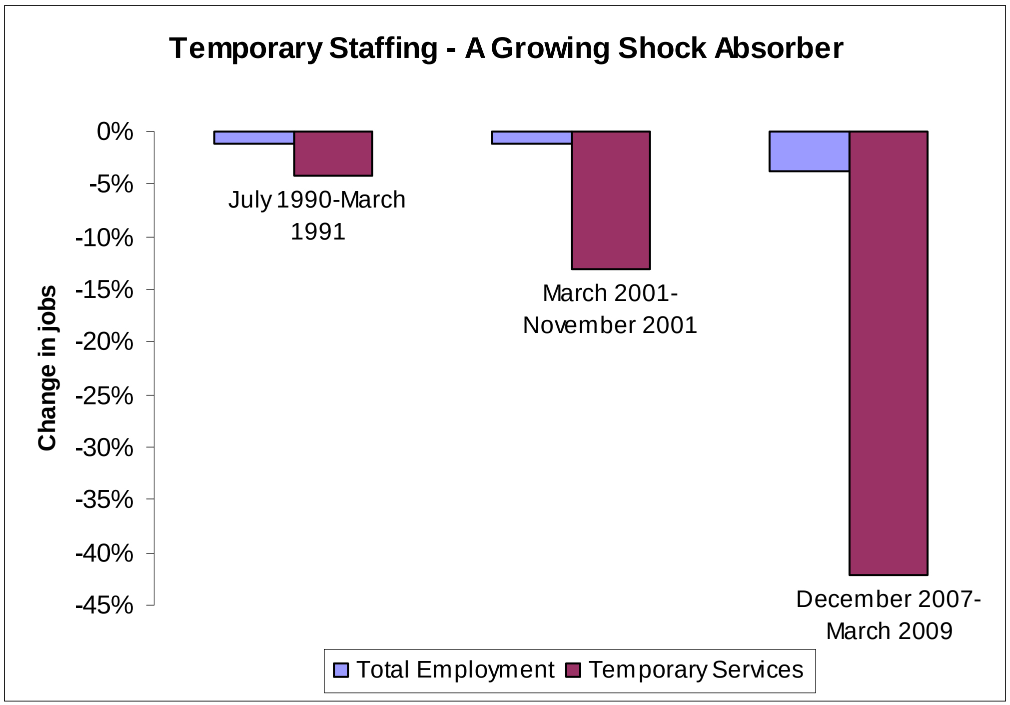


73% of companies (with 1,000 or more employees) said they would grow their contingent workforce by a median of 25% between late 2008 and late 2010. This is consistent with Littler's estimate that 50% of jobs "re-filled" after this recession will be contingent.



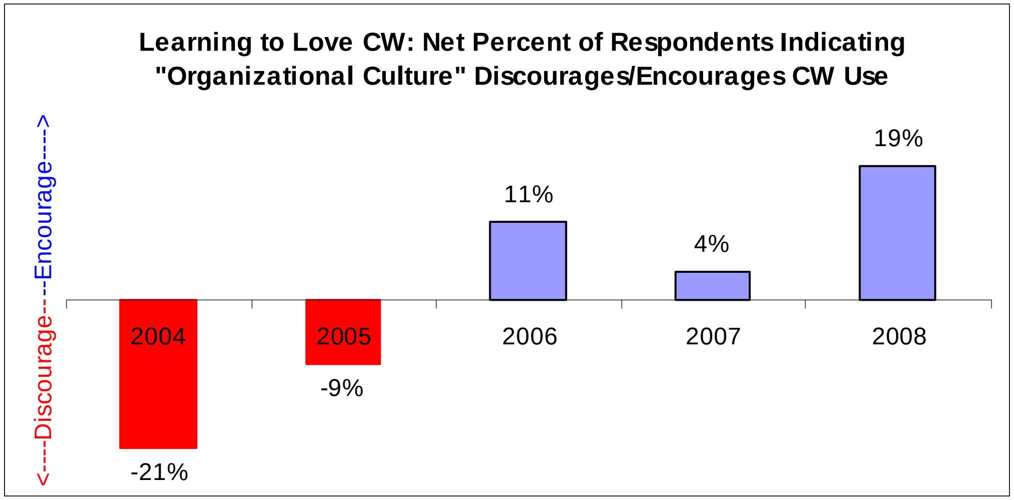
STAFFINGINDUSTRY ANALYSTS

The degree to which contingent jobs are eliminated more than "regular" jobs has significantly increased with each recession



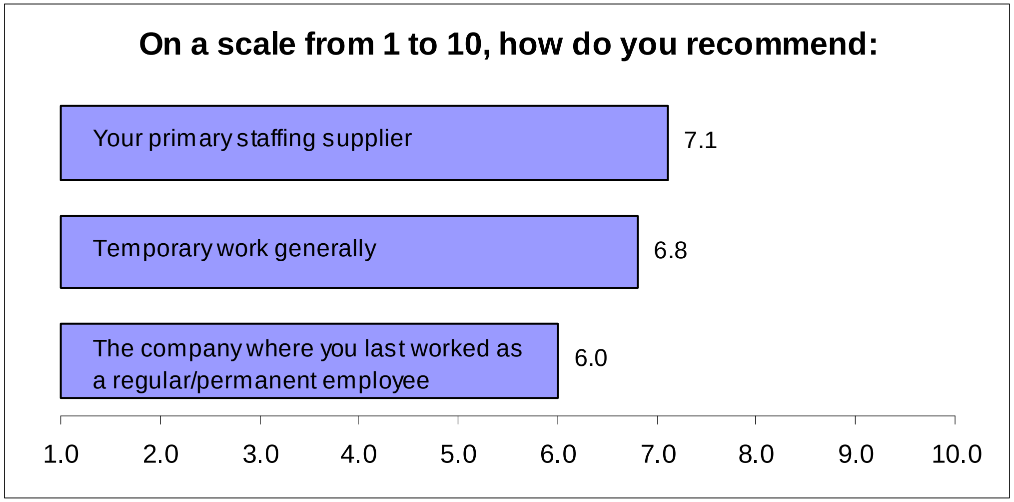
STAFFINGINDUSTRY ANALYSTS

The organizational cultures of many companies have changed from being obstacles to the use of contingent labor to being supportive



STAFFINGINDUSTRY ANALYSTS

Workers seem to like their staffing suppliers and temporary assignments better than their “regular” employers



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