The Contingent Workforce in Texas – What Every Corporate Counsel Using Temporary, Contract, or Leased Employees Needs to Know

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I. INTRODUCTION

The contingent workforce consists of independent contractors, on-call workers, temporary workers, leased workers, and contractors. These workers range from unskilled and semi-skilled clerical and industrial workers, to highly skilled contract professionals and consultants. Typically, the relationship will have three parties: the contingent worker;[1] a temporary agency or placement firm;[2] and the company that utilizes the contingent worker.[3] Sometimes called "alternative" work arrangements, the contingent workforce in the United States has reportedly doubled in size between 2002 and 2007, and is estimated to have almost doubled again between 2007 and 2010.[4]

1. This is the individual who provides the service. In economic terms, the worker exchanges his time and skill for remuneration.
2. This party provides a service of consistent stable source of labor. In economic terms, it is a labor retailer. It may provide education, training, testing, certification, and benefits to the contingent worker.
3. This party utilizes the labor. In economic terms, it is a consumer of labor. It may have also formerly been a traditional employer of the contingent worker.
4. Marshall Goldsmith, *The Contingent Workforce,* BUSINESS WEEK (May 23, 2007), http://www.businessweek.com/careers/content/may2007/ca20070523_580432.htm. "Data shows that the staffing industry has doubled in just the last five years, from about a $60 billion a year industry to an over $120 billion a year industry, and analysts project it will become a $200 billion industry by 2010.".

Presently, these workers comprise an estimated 10% of the United States workforce.[5]

Among the reasons cited for this growth of alternative working arrangements are providing corporations with a wider range of skilled workers, creating a transition for unemployed and underemployed workers, as well as expanding legal benefits and protections for both the temporary employee and hiring company. The corporate counsel should be aware of a broad range of state and federal regulations, originally directed toward the traditional employer/employee relationship, which impact the use of contingent workers.

Contingent working arrangements have been criticized on the basis that they create an imbalance of power between the contingent worker and the entities which "rent labor".[6] Other critics have objected to the use of contingent workers on Marxist grounds, contending that the relationship alienates the worker from his product.[7] The New Testament also appears to reject the contingent worker arrangement: "One servant cannot serve two masters: for he will hate the one, and love the other; or else he will hold to the one, and despise the other."[8]

Apart from the potential Marxist, biblical, or other criticisms,[9] it appears that the contingent working arrangement will continue to exist in our society.[10] The purpose of the Article is to provide the corporate counsel a practical framework for an-

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5. *See* Marisa DiNatale, *Characteristics of and Preference for Alternative Work Arrangements, 1999*, MONTHLY LABOR REVIEW (Mar. 2001), http://www.bls.gov/opub/mlr/2001/03/art2full.pdf. The U.S. Department of Labor, Bureau of Labor Statistics does not track contingent workforce, apart from traditional workers.
6. *Developments in the Law – Employment Discrimination: Temporary Employment and the Imbalance of Power*, 109 HARV. L. REV. 1568, 1648 (1996).
7. Kai Nielson, *Alienation and Work in Moral Rights in the Workplace*, 28, 31 (Gertrude Ezorsky, ed., 1987) (describing contingent labor as "alienating and estranging").
8. Luke 16:13 (King James).
9. On January 31, 2010, a terrorist group bombed a temporary agency in Frankfurt, Germany. A letter sent to the German tabloid Bild stating "with this action we protest against temporary employment which is immoral, against common decency and exploits human beings." Workforce Magazine, Feb. 24, 2010.
10. *See, e.g.,* Lance Morrow, *The Temping of America*, TIME, Mar. 29, 1993, at 47; Marc Silver, *The Truth About Temping*, U.S. NEWS & WORLD REPORT, Nov. 1, 1993, at 95; Jerry Flint, *A Different Kind of Temp*, FORBES, Feb. 28, 1994, at 54.

alyzing the potential benefits and liabilities of using a contingent workforce, including contract, leased, or temporary labor.

For the corporate counsel, the central legal and factual issue is "who is the 'employer' of the contingent worker?" This issue is critical because state and federal laws governing employment are typically directed to the traditional "employer/employee" relationship. The classification assigned to the relationship can trigger the application of a wide range of responsibilities and liabilities for all parties.

II. FEDERAL LEGAL CONSIDERATIONS

A. Background

Most federal statutes contain an initial section of definitions of terms used in the statute. If no definitions are provided, the federal or state common-law definitions will control. In 1996, the federal government created the "Dunlop Committee" which recommended that "the definition of employee in labor, employment and tax law should be modernized, simplified, and standardized."[11] Until that day, the corporate counsel should be aware of the following federal statutes which create responsibilities and liabilities on users of a contingent workforce.

1. Internal Revenue Service

The Internal Revenue Service (IRS) requires "employers" to withhold federal income taxes on employees.[12] The employer is obligated to pay these withheld taxes tothe Department of the Treasury.[13] Moreover, if the employer fails to forward the withheld wages, criminal liability is possible.[14]

The IRS has traditionally used a 20 Factor Test to determine whether a worker is either an "employee" or an "indepen-

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11. *Report and Recommendations of the Commission on the Future of Worker-Management Relations*, (Jan. 9, 1995), reprinted in No. 6 Daily Labor Report (BNA) Special Supplement, pg. 36 (Jan. 10, 1995). *available at*: http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm.
12. IRS Publication 15 (Circular E) *Employer's Tax Guide* 2010, http://www.irs.gov/pub/irs-pdf/p15.pdf.
13. Ani Hadjian, *Hiring Temps Full-Time May Get the IRS on Your Tail*, Fortune, Jan. 24, 1994, at 34 (advising uncertain employers of temporary workers either to err on the side of caution and file the W-2 forms required for regular employees, rather than the 1099 forms required for independent contractors).
14. 26 U.S.C. § 6672(a) (2010).

dent contractor."[15] No particular factor was deemed to be dispositive, and the relative weight of each factor depended upon the facts of each case.[16] Moreover, no particular number of factors was required to assign employee status.[17] Intending to streamline and simplify the 20 Factor Test, the IRS has organized it into eleven main tests, divided into three groups. These groups are: behavioral control, financial control, and relationship of the parties.[18]

The IRS provides its training materials for assistance in making the determination, but cautions against reliance on the materials to support a position.[19] The IRS also provides the form SS-8 to enable a potential "employer" to obtain a pre-determination of the worker's status.[20]

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15. 26 C.F.R. § 31.3401(c) (2010); Rev. Rul. 87-41, 1987-1, C.B. 296. These factors are: 1. Instructions by the principal as to how, when, and where the work is to be performed; 2. Training provided by the principal; 3. Integration of the individual's work in to the overall business operations of the principal; 4. Services must be rendered personally by the individual or the individual can hire employees, assistants or subcontractors; 5. Hiring, paying and supervising of assistants is done by the principal; 6. Continuing relationship between the parties; 7. Hours of work set by the principal; 8. Full-time required; 9. Work on principal's premises; 10. Order or sequence of work set by the principal; 11. Regular reports (written or oral) required by the principal; 12. Pay by hour, week or month (pay on a commission or per-assignment basis indicates independent contractor); 13. Payment of business and travel expenses by principal; 14. Furnishing of tools, equipment and materials by principal; 15. Individual's investment in facilities or equipment; 16. Opportunity for profit or loss; 17. Work for more than one principal at a time; 18. Services available to the general public; 19. Principal's right to discharge indicates employee status; and 20. Individual's right to terminate the relationship indicates employee status.
16. *Id.*
17. Internal Revenue Service, Priv. Ltr. Rul. 89-41-024 (July 13, 1989).
18. IRS Publication 15 (Circular E) *Employer's Tax Guide* 2010, http://www.irs.gov/pub/irs-pdf/p15.pdf. For the purposes of this Article, it will continue to be referred to as the "20 Factor Test".
19. Department of the Treasury, Internal Revenue Service, Independent Contractor or Employee? (Training 3320-102 (10-96) TPDS 84238I) (1996), http://www.irs.gov/pub/irs-utl/emporind.pdf.
20. If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, a *Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding* can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status.

2. Social Security

The Social Security Act requires employers to withhold social security taxes from an employee's wages.[21] It also requires employers to make contributions based upon the employee's wages.[22] In a well publicized case, a federal district court found that topless dancers were "employees" of the cabaret, rather than independent contractors, despite the fact they were able to work at other establishments.[23] In that case, the court found that the employer exercised control in setting show times, establishing standards of conduct, and deducting from the entertainer's credit card tips. The Department of Labor ordered the cabaret to pay federal withholdings and penalties based upon the entertainer's earnings.[24]

3. Occupational Safety and Health Administration

The Occupational Safety and Health Administration ("OSHA") is the federal agency charged with implementing standards for providing a safe workplace.[25] Although OSHA compliance falls primarily on the "employer" of the worker,[26] the duties imposed by OSHA generally follow the right of control over the particular work site, rather than traditional notions of "employee" or "independent contractor". Under OSHA's "Multi-Employer Citation Policy", all entities at a work site can receive citations for regulatory violations.[27] Additionally, OSHA requires record-keeping for employee injuries,[28] and retention of those records for up to the length of employment plus thirty (30) years.[29]

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21. 26 U.S.C. §§ 3101-3211 (2010).
22. *Id.*
23. *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995). *See also Strippers Sue to Be Classified as Employees, Not Independent Contractors*, National Law Journal (June 9, 2009), http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202431330996&slreturn=1&hbxlogin=1.
24. *Id.*
25. http://www.osha.gov/ (last visited October 28, 2010).
26. *Employer Responsibilities*, OSHA, http://www.osha.gov/as/opa/worker/employer-responsibility.html.
27. *Id*. This policy divides entities into four categories; (1) Creating Employer; (2) Exposing Employer; (3) Correcting Employer; and (4) Controlling Employer. Under OSHA policy, each of these "employers" can be cited for a workplace violation.
28. OSHA, Forms for Recording Work-Related Injuries and Illness (2004), http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf.
29. 29 C.F.R. § 1910.1020 (2010).

4. Fair Labor Standards

The Fair Labor Standards Act of 1938 ("FLSA") regulates terms and conditions of employment, including minimum hourly wage, overtime payments, child labor and exposure to workplace hazards.[30] Although the FLSA defines "employee" as including "any individual employed by an employer,"[31] the Act also specifies that "to employ" includes arrangements in which one party "suffers or permits" another party to work.[32] Courts typically apply an "economic realities" test[33] to determine employee status and coverage under the Act. In 2008, the Fifth Circuit found that sales workers employed by a life insurance company were "employees", not independent contractors applying the "economic realities" test.[34] As employees, the workers were able to make claims for overtime compensation.[35] Moreover, there can be "joint employers" under the FLSA, both of whom are jointly and severally responsible.[36]

5. ERISA

The Employee Retirement Income Security Act of 1974 ("ERISA") generally governs employee health and welfare benefits, including pension funds.[37] ERISA defines "employee" as "any individual employed by an employer."[38] The United States Supreme Court has correctly described this definition as "circular"[39] and adopted a common law test to determine employer

30. 29 U.S.C. § 201 et seq. (2010).
31. *Id*. at § 652(6).
32. 29 C.F.R. § 785.6.
33. *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm*., 20 F.3d 938 (9th Cir. 1994).
34. *Hopkins v. Cornerstone Am*., 545 F.3d 338 (5th Cir. 2008). An interesting twist to this case is that one salesman was previously accused of sexual harassment. In that case, he had testified that he was an "independent contractor", not an employee. The trial court ruled that the earlier testimony that he was an independent contractor "judicially estopped", or precluded, him from now claiming that he was truly an employee.
35. *Id.* at 343 (A five factor non-exhaustive test was used to determine the "economic realities" of the employment).
36. 29 C.F.R. § 791. *See* http://www.dol.gov/opa/media/press/esa/esa20090438.htm (affiliated hospitals agree to pay 700 employees more than $2.7 million in overtime back wages to resolve U.S. Labor Department lawsuit).
37. 29 U.S.C. § 1001 et seq.
38. 29 U.S.C. § 1002(b).
39. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

status under ERISA.[40] In *Darden*, the Supreme Court read the term "to incorporate traditional agency law criteria."[41]

In a well-publicized case, Microsoft agreed to pay $96.9 million to settle ERISA claims made by "permatemps" pay-rolled as independent contractors and temporary agency employees.[42] The settlement followed the Ninth Circuit's holding that the permatemps were entitled to ERISA benefits and retroactively granted retirement benefits and stock options to the workers.[43]

6. Immigration

Employers are required to comply with the Immigration Reform Control Act of 1986 ("IRCA")[44] which generally involves confirming immigration documentation and work authority, and completing an I-9 Employment Verification form upon hiring.[45] The employer's failure to comply can result in civil and criminal penalties. IRCA's "labor through contract" provision applies when a company gains the services of an individual without directly hiring them, usually through a third-party or independent contract. Under the "labor through contract" provisions, the fact that a company knowingly uses contingent

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40. *Id.*
41. *Darden*, 503 U.S. at 318. ("Thus, we adopt a common law test for determining who qualifies as an "employee" under ERISA, a test we most recently summarized in *Reid*: In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." (citing *Community for Creative Non Violence v. Reid*, 490 U.S. 730, 751-52 (1989)); *Cf.* Restatement (Second) of Agency § 220(2) (1958) (listing non-exhaustive criteria for identifying master-servant relationship).
42. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1197 (9th Cir. 1996). The Vizcaino lawsuit followed an IRS audit which found the workers to be Microsoft "employees" under the "20 Factor Test".
43. *Id.*
44. 8 U.S.C. § 1324 et seq. (2010).
45. *See generally Enforcement Guidance on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Questions 8-9, 11 (BNA) (1997), http://www.eeoc.gov/docs/conting.html.

workers through contract rather than direct employment provides no defense.[46]

7. Civil Rights

The Civil Rights Act of 1964, "Title VII", prohibits discrimination "because of [an employee's] race, color, religion, sex or national origin."[47] Like ERISA, Title VII defines an "employee" as "an individual employed by an employer."[48] The courts have found joint employer status under common-law principles of agency and right to control the worker,[49] and the Fifth Circuit Court of Appeals has endorsed the "economic realities" test.[50] The Fifth Circuit has also applied a hybrid common-law/economic realities test.[51] The EEOC advises that contingent employees typically qualify as protected "employees" of a staffing firm, the client company, or both.[52]

8. Age Discrimination

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits discrimination against workers based upon their age.[53] The ADEA contains the circular definition "em-

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46. 8 C.F.R. § 1274a.5 (2009). Use of labor through contract. "Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986, to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act."; *See also* Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million in Lawsuit on Illegal Workers* (Mar. 19, 2005), NEW YORK TIMES, http://www.nytimes.com/2005/03/19/business/19walmart.html.

    In 2005, Wal-Mart Stores Inc. and the Department of Homeland Security reached a multi-million dollar settlement on charges stemming from the "labor through contract" provision of the IRCA. According to the charges, Wal-Mart was aware of its contractor's employment of undocumented workers to clean its stores.
47. 42 U.S.C. § 1001 et seq. (2010).
48. *Id*. at § 1002(b).
49. *Amarnere v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 347-48 (S.D.N.Y. 1984), *aff'd,* 770 F.2d 157 (2nd Cir. 1988).
50. *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986).
51. *Muhammad v. Dallas City Cmty. Supervision & Corr. Dept.*, 479 F.3d 377, 380 (5th Cir. 2007).
52. Equal Opportunity Employment Commission, EEOC Notice 915.002 (2000).
53. 29 U.S.C. § 621 et seq.

ployee".[54] Courts have used the Civil Rights Act, or Title VII test to determine whether an entity is subject to the ADEA, as well as whether a worker is protected by the ADEA.[55] The EEOC has issued a Notice 915.002 assigning joint responsibility for discrimination compliance.[56]

9. ADA

The Americans with Disabilities Act ("ADA") creates a statutory framework for employers in their relationship with employees with disabilities.[57] The ADA also mandates that employers make reasonable accommodations to those employees with disabilities.[58] The ADA only defines "employee" as "an individual employed by an employer."[59] The ADA does not limit its protections solely to "employees." Rather, it protects "individuals."[60] The EEOC advises that disabled contingent workers qualify as protected "employees" of a staffing firm, the client company, or both.[61] Additionally, the EEOC has issued a Notice entitled "EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms."[62] In addition to the ADA, the Rehabilitation Act of 1973[63] broadly prohibits discrimination by entities which receive federal funding.[64] In 2009, the Ninth Circuit found that a disabled independent contractor was entitled to the protections of the Rehabilitation Act of 1973.[65]

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54. *Id*. at § 630(f).
55. *Rogers v. Sugar Tree Prod., Inc.*, 7 F.3d 577, 581 (7th Cir. 1993).
56. EEOC Notice 915.002 (2000).
57. 42 U.S.C. § 12101 et seq.
58. *Id*. at § 12182(b)(2)(A)(i).
59. *Id*. at § 12111(4).
60. *Id*. at § 12112(a); 29 C.F.R. § 1630.4.
61. Equal Opportunity Employment Commission, EEOC Notice 915.002 (2000).
62. EEOC Notice 915.002 (2000) (suggesting that short term placement of a disabled worker may constitute an "undue hardship" for the staffing agency, effectively exempting the agency from the "reasonable accommodation" requirements).
63. 29 C.F.R. § 701 et seq.
64. 29 U.S.C. § 791.
65. *Fleming v. Yuma Reg'l Med. Ctr*., 587 F.3d 938 (9th Cir. 2009) (holding that the Rehabilitation Act of 1973 required accommodation for a disabled independent contractor working for a company that receives federal funding).

10. FMLA

The Family and Medical Leave Act ("FMLA") mandates that employers provide leave, preservation of health benefits, and job restoration following a covered leave.[66] The FMLA adopts the circular definition of "employee".[67] A contingent worker, however, must work at the facility of the secondary employer before FMLA liability attaches.[68] The present regulations provide that, when two or more businesses exercise some control over the worker, "the businesses may be joint employers under the FMLA."[69] A recent Seventh Circuit decision found that three entities were not "joint employers" for FMLA purposes.[70] The finding can be significant since the workers for joint employers are consolidated for the FMLA criteria of "50 employees within a 75 mile radius."[71]

11. National Labor Relations Act

The National Labor Relations Act ("NLRA") governs relationships between labor organizations and employers in the private sector. Most recently, the National Labor Relations Board held that temporary employees are excluded from the employer's business unit unless all parties consent.[72] "A joint employer, under the Board's traditional definition, is comprised of two or more employers (e.g. A and B) that 'share or codetermine those matters governing essential terms and conditions of employment' for bargaining unit employees."[73] For coverage under the NLRA, courts have recognized "joint employers."[74]

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66. 29 U.S.C. § 2601 et seq.
67. *Id*. at § 2611(3).
68. 29 C.F.R. § 825.111(a)(3).
69. *Id*. at § 825.106. "Among the factors to be considered are: (1) the nature and degree of control over the worker; (2) the degree of supervision, direct or indirect, of the work performed; (3) the power to determine the pay rates or the methods of payment to the worker; (4) the right, directly or indirectly, to hire, fire or modify the employment conditions of the worker; and (5) preparation of the payroll and payment of wages."
70. *Moldenhauer v. Tazewell-Pekins Consol. Commc'n Ctr*., 2008 WL 2927018 (7th Cir. 2008) (holding city, county, and private entity were not "joint employers" for FMLA).
71. 29 C.F.R. § 825.110.
72. *Oakwood Care Ctr*., 343 NLRB No. 76 (Nov. 19, 2004), *overruling* M.B. Sturgis, (331 N.L.R.B. No. 173; 170 DLR AA-1, E-1, Aug. 31, 2000).
73. 29 U.S.C. § 201 et seq.
74. *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp*., 368 F.2d 778, 780 (5th Cir. 1966).

12. National Health Care

On March 23, 2010, President Obama signed substantial updates to the "Healthcare Insurance Portability and Accountability Act" ("HIPAA").[75] Among its provisions is a requirement that any employer with more than fifty (50) full-time employees pay a monetary penalty if it fails to offer health coverage. A key question will be whether contingent workers will be included in this count.[76]

13. Federal Workers' Compensation

Generally, workers' compensation schemes are implemented through state law. However, federal law provides the exclusive workers' compensation remedy for workers injured on or over navigable waters,[77] on the outer Continental Shelf,[78] on federal property,[79] or fulfilling certain government contracts.[80] Insurance coverage under these schemes is mandatory with civil and criminal penalties for non-compliance.[81] Captains and crewmembers on vessels maintain a negligence remedy against

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75. At the time of publication, the new updates have not been codified in the United States Code. Formerly, the key requirement of HIPAA is the limitation or prohibition on the dissemination of healthcare information. *See* 45 C.F.R. § 164.102 et seq (2010).
76. The FMLA regulations, discussed above, specifically include contingent workers to determine applicability.
77. The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., provides compensation and medical benefits to employees injured on, over, and adjacent to the navigable waters of the United States. *See Randall v. Chevron*, 13 F.3d 888 (5th Cir. 1994) (applying LHWCA to workers injured "fortuitously" over navigable waters).
78. The Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq., incorporates the LHWCA as the exclusive compensation remedy for workers engaged in oil, gas, and mineral operations on the Outer Continental Shelf. *See Kerr-McGee Corp. v. Ma-Ju Marine Serv., Inc*., 830 F.2d 1332, 1335 (5th Cir. 1987).
79. The Non-Appropriated Funds Instrumentality Act ("NFIA"), 5 U.S.C. § 8171 et seq., extends the LHWCA to civilian workers compensation from non-appropriated funds, typically military PX's and Naval Stores.
80. The Defense Base Act ("DBA"), 42 U.S.C. § 1651 et seq., extends the LHWCA to workers working under a contract with the United States involving a defense base, including Iraq and Afghanistan. *See Univ. of Rochester v. Dir., OWCP*, 618 F.2d 170, 173 (2nd Cir. 1980).
81. 33 U.S.C. § 938(a) (2010). Criminal penalties include a "fine of not more than $10,000" and by "imprisonment for not more than one year." If the employer is a corporation, the "president, secretary, and treasurer thereof shall be also severally liable for such fine or imprisonment."

their employer under the Jones Act,[82] in addition to common-law rights under the general maritime law.

B. CONCLUSION

Federal statutes and regulations, most of which were originally directed to a traditional employer/employee relationship, can govern the relationships with the contingent workers. The corporate counsel should be aware of these federal statutes to assist the corporation with compliance. However, in order to comply with the applicable statute or regulation, the corporate counsel must identify relevant factors to insure the proper classification of the contingent worker.

III. TEXAS LEGAL CONSIDERATIONS

A. Background

Like the federal framework, Texas law regarding the rights and obligations of the contingent workforce is not integrated. Texas law generally covers workers' compensation, unemployment compensation, and liability for *respondeat superior*, as well as a host of regulatory statutes. One of the critical issues for a corporate counsel in Texas is determining liability for personal injuries to the contingent workforce.

1. Personal Injuries to Contingent Workers

A corporation may be liable for personal injuries to employees and non-employees. The extent of liability depends upon the classification of the worker. This is because the classification of the worker sets the legal duty, or standard of care, owed to the worker. The generalities of Texas law regarding liability for personal injuries are relatively clear: (1) the party with the right to control the details of the work is considered the employer and responsible for securing workers' compensation coverage;[83] (2) actual control may provide evidence of the right to control;[84] and (3) any employer who maintained coverage from under the Workers' Compensation Act is generally immune from suits by employees or their representatives.[85] However, a

82. 46 U.S.C. § 688 et seq (2010).
83. *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 75-76 (Tex. App.—Houston [1st Dist.] 2009, no writ).
84. *Exxon v. Perez*, 842 S.W.2d 630 (Tex. 1992); *see also Bliss v. NRG Indus.*, 162 S.W.3d 434, 437 (Tex. App.—Dallas 2005, review denied).
85. *Perez*, 842 S.W.2d at 630; *see also Lockett*, 285 S.W.3d at 75.

contingent employee found not to be a "borrowed employee" or an employer choosing not to participate in the workers' compensation system is not barred from bringing a personal injury claim.[86] Therefore, proper categorization of workers is critical to determining potential liability for personal injuries to contingent workers.

a. Wingfoot and the "One Employer Rule"

The Texas Supreme Court has recently decided two cases, *Wingfoot*[87] and *Garza*,[88] addressing workers' compensation liability for personal injuries to contingent workers. *Wingfoot* and *Garza* clearly recognized co-employers.[89] Previously, dicta in a Houston Court of Appeals case indicated there could be only one "employer" for workers' compensation immunity purposes.[90]

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86. *Hunt Constr. Group, Inc. v. Konecny*, 290 S.W.3d 238, 243 (Tex. App.—Houston [1st Dist.] 2008, review denied).
87. *Wingfoot Enter. v. Alvarado*, the Court determined whether an employee claimant could have more than one employer for the purposes of Texas Workers' Compensation Act. 111 S.W.3d 134, 139-40 (Tex. 2003) (the so-called "dual employer" doctrine). *See* A. Larson, 3 Larson's Worker's Compensation Law §67-68 (2001).
88. *Garza v. Exel Logisitcs*, Inc., the Supreme Court was asked to determine whether the client company of the temporary employment agency was an "employer" and if so, whether it was a subscriber to workers' compensation coverage. 161 S.W.3d 473 (Tex. 2005).
89. *Western Steel Co. v. Altenberg*, 206 S.W.3d 121, 123 (Tex. 2006). "An employee may have more than one employer within the meaning of the TWCA and each employer may raise the exclusive remedy provision as a bar to the employee's claims." *Garza*, 161 S.W.3d at 475. *Wingfoot*, 111 S.W.3d at 145. The Court noted that "the Workers' Compensation Act has express definitions of 'employer' and 'employee' that should be given effect when applicable, even if that results in an employee's having more than one employer for the purpose of workers' compensation." The Court held that "the evidence shows that Alvarado was hired by a temporary staffing company with all the indicia of an employee, worked for the staffing company at its client's place of business, and was directed in the details of her work by the client. Alvarado had two 'employers' for workers' compensations purposes." Mosqueda v. G & H Diversified Mfg., Inc., 223 S.W.3d 571, 582 (Tex. App. — Houston [14th Dist.] 2007, writ denied). "The definitions of 'employee' and the exclusive remedy provision may apply to more than one employer of an employee." *Neal v. Wis. Hard Chrome, Inc.*, 173 S.W.3d 891, 893 (Tex. App. — Texarkana 2005, no writ); *Morales v. Martin Res., Inc.*, 183 S.W.3d 469, 471-72 (Tex. App. — Eastland 2005, no writ); *see also Bliss*, 162 S.W.3d at 437.
90. *Smith v. Otis Engineering Corp*., 670 S.W.2d 750, 751 (Tex. App. — Houston [1st Dist.] 1984, no writ). "In a situation where one entity "borrows" the employee of another, there may be some division of authority between the parties as to the right to control the employee's perform-

This rule had been summarized as "where one entity borrows another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties."[91] However, older Texas case law had recognized dual or joint employers. For example, a worker who filed suit against two companies alleging that both were his employers lost in a summary judgment since the court held that neither was required to prove that it was his employer in order to invoke the workers' compensation defense.[92] Similarly, a worker who signed a release admitting that two companies were both his employers was estopped from bringing a negligence suit against one of the employers.[93]

At common law, an employer was liable for personal injuries to employees sustained in the course and scope of their employment.[94] The Texas Workers' Compensation Act ("the Act") now provides the exclusive remedy to employers from employees' personal injury claims for covered employers.[95] To accomplish this, the Act gives broad immunity to employers from common law employee personal injury suit. Instead of common law damages, receipt of workers' compensation benefits is the exclusive remedy for such employees.[96]

To establish immunity as a borrowing employer, a defendant in a lawsuit may file a motion for summary judgment or may seek a jury finding that it was the borrowing employer. Generally, the filing of a motion for summary judgment is preferred since it avoids additional litigation expenses.[97]

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ance of the particular task; however, the law continues to require that one party be named the employer and all others be classified as third parties outside the purview of the workers' compensation law.".

91. *Archem Co. v. Austin Indus., Inc.*, 804 S.W.2d 268, 269 (Tex. App.—Houston [1st Dist.] 1991, no writ).
92. *Zavala-Nava v. A.C. Employment, Inc.*, 820 S.W.2d 14, 16-17 (Tex. App.—Eastland 1991, writ denied).
93. *Standridge v. Warrior Constructors, Inc.*, 425 S.W.2d 472, 475 (Tex. App.—Houston [14th Dist.] 1968, no writ).
94. *Kirby Lumber Co. v. Chambers*, 41 Tex. Civ. App. 632, 95 S.W. 607, 613-14 (1906, writ ref'd).
95. TEX. LAB. CODE ANN. § 408.001 (West 2006). The present exclusive remedy provisions state in part: "Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.".
96. *Id.*
97. TEX. R. CIV. P. 166a (2010).

b. Statutory Definitions

The terms "employee," "employer," and "independent contractor" are all defined in the Act. The Act contains a detailed and extensive definition of employee and independent contractor and a more limited definition of employer.

i. "Employee"

Under the Act, an employee is "each person in the service of another under a contract of hire, whether express or implied, or oral or written."[98] The term includes "an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business." It also includes "a person, other than an independent contractor or the employee of an independent contractor, who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer."[99] The Act also includes workers engaged in illegal activities.[100]

The Act excludes a crew member of a vessel in interstate commerce[101] and "a person whose employment is not in the usual course and scope of the employer's business."[102] The Act also excludes workers covered under a federal workers' compensation scheme discussed above.[103] Insured employers of those workers are generally granted immunity by the federal statute.

ii. "Employer"

The Texas Workers' Compensation Act defines "employer" for purposes of coverage under the Act.[104] For purposes of the

98. TEX. LAB. CODE ANN. § 401.012(a) (West 2006).
99. *Id.* at § 401.012(b).
100. *Id.* at § 401.012(d).
101. 46 U.S.C. § 688. Such individuals engaged as a master or member of the crew of any vessel should have their remedies under the "Jones Act" and the General Maritime Law.
102. TEX. LAB. CODE ANN. § 401.012(c); Crew members on any vessel should be covered under the Jones Act and have a direct negligence remedy against their employer. *See* 46 U.S.C. § 688 (2010).
103. TEX. LAB. CODE ANN. § 406.091(a)(2).
104. "Employer" means, unless otherwise specified, a person who makes a contract of hire, employs one or more employees, and has workers' compensation coverage. TEX. LAB. CODE ANN. § 401.001 et seq (West 2006). For purposes of the foregoing definition, an employer has "workers' compensation coverage if the employer has either obtained an approved insurance policy or secured payment of compensation through self

Act, an "employer" is required to have workers compensation coverage.[105] The Act defines employer as "a person who makes a contract for hire, employs one or more employees, and has workers' compensation insurance coverage."[106] Formerly, the Act defined both employer and "subscriber." A subscriber was defined as an employer who paid premiums on a workers' compensation policy.[107] Under the old Act, a "subscriber" rather than an "employer" was immune. The provisions of the new Act broaden the class of immune employers by omitting the requirement that the employer directly purchase compensation coverage.[108]

iii. "Independent Contractor"

The Act defines an "independent contractor" as "a person who contracts to perform work or provide a service for the benefit of another."[109] The term includes a person who "acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship."[110] The term also includes a person who is free to determine the manner in which the work is performed in addition to being required to furnish the necessary tools, materials, employees, and skills necessary to perform the work.[111]

The Act also defines an owner operator in a trucking or delivery business. Under the Act, an owner operator "means a person who provides transportation services under contract for a motor carrier."[112] An owner operator is an independent contractor.[113]

c. Case Law

Texas courts have long struggled with application of the borrowed servant doctrine. As posed by the Texas Supreme

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insurance as provided under the Act." TEX. LAB. CODE ANN. § 401.011(44) (West 2006).

105. *Id.*
106. TEX. LAB. CODE ANN. § 401.011(18) (Supp. 2009).
107. TEX. REV. CIV. STAT. art. 8309 § 1 (repealed).
108. *Pederson v. Apple Corrugated Packaging, Inc.*, 874 S.W.2d 135, 138 (Tex. App.—Eastland 1994, writ denied).
109. TEX. LAB. CODE ANN. § 406.121(2).
110. *Id.* at § 406.121(2)(a).
111. *Id.* at § 406.121(2)(b)(c)(d).
112. *Id.* at § 406.121(4).
113. *Id.*

Court, "[w]hether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question."[114] Simply stated, the entity with the right to control the details of the work is the employer.[115] For example, a temporarily employed laboratory chemist at a chemical manufacturing facility was found to be the borrowed employee, even though the deceased considered herself an independent contractor.[116]

A medical resident in a residency program assigned to work at a hospital was found to be a borrowed employee of the participating foundation, instead of the hospital, since the Foundation's Director of Surgical Education "was responsible for overseeing and directing the details of treatment."[117] Similarly, a temporary worker payrolled by a temporary labor company assigned to work at a toy store warehouse was found to be a borrowed employee of the toy store since the "appellant was given instructions by Toys-R-Us concerning the manner in which she was to perform the tasks assigned to her, and she was provided with the tools to perform such tasks by Toys-R-Us."[118]

A truck driver for a limestone distribution company was found to be an independent contractor even though the distribution company told the truck driver where to pick up and drop off loads in addition to being required to turn in load tickets to receive payment.[119] "Although Limestone told Mathis where to pick up and drop off loads, and Mathis had to turn in his load tickets to get paid, he had broad discretion in how to do everything else."[120] Therefore, Texas Supreme Court held the driver not to be a borrowed employee of the distribution company.[121] Thus, Texas courts consistently hold that workers assigned to and controlled by third parties become the borrowed employee of the third party.

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114. *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 225 (Tex. 1963).
115. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 357 (Tex. 2002); L*imestone Prod. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002); *Lockett v. H.B. Zachry Co*., 285 S.W.3d 63, 75 (Tex. App.—Houston [1st Dist.] 2009, no writ).
116. *Lockett*, 285 S.W.3d at 77.
117. *St. Joseph Hosp.*, 94 S.W.3d at 543.
118. *Marshall v. Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193, 196 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
119. *Limestone Prod. Distributors*, 71 S.W.3d at 312.
120. *Id.*
121. *Id.*

To determine the right to control issue, Texas courts look to various factors. Generally, a court will first look to whether the lending and borrowing employers had a contract assigning the right to control. For example, courts of appeals have held that when no contract determines the worker's status or alleged employer's right to control the work, the right to control is measured by other factors.[122]

i. Contractual Agreement Regarding Worker Control

If there was a contract assigning the right to control, the court will assign the parties' meaning unless the actual control was exercised contrary to the terms of the contract.[123] For example, a temporary worker was held as a matter of law to be an employee of a landscaping company he was assigned to because the contract between the temporary agency and the landscaping company "expressly granted to [the landscaping company] the right to control [the employee]."[124]

Similarly, a truck driver was held not to be the employee of the common carrier company because the contract between the truck driving company and the common carrier company defined the relationship as that of an "independent contractor," and no evidence was produced to show that the common carrier company exercised enough actual control over the driver to make the driver its employee.[125] The court of appeals stated that "if a contract is so worded that it can be given a certain or definite interpretation, then it is not ambiguous, and it can be construed as a matter of law."[126] Additionally, the court of appeals considered evidentiary factors aside from the contract in determining who actually had the right to control the truck driver and found the factors favored the relationship established in the contract.[127]

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122. *Texas Prop. and Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.*, 208 S.W.3d 523, 543 (Tex. App.—Austin 2006, rehearing denied); *see also Alice Leasing Corp. v. Castillo*, 53 S.W.3d 433, 441 (Tex. App.—San Antonio 2001, writ denied).
123. *Texas Prop. and Cas. Guar. Ass'n*, 208 S.W.3d at 543; *see also Alice Leasing Corp.*, 53 S.W.3d at 441.
124. *Rodriguez v. Martin Landscape, Inc.*, 882 S.W.2d 602, 604 (Tex. App.—Houston [1st Dist.] 1994, no writ).
125. *Texas Prop. and Cas. Guar. Ass'n*, 208 S.W.3d at 543-44.
126. *Id*. at 543.
127. *Id.* at 543-44.

A contract need not be a formal written agreement between the parties. For example, a temporary employee's daily time ticket established "a contractual right to direct and control the details of [the employee's] particular work at the time she was injured.[128] The temporary employee claimed that the time ticket did not constitute an enforceable contract.[129] The appellate court found no evidence that conflicted with the client company's right to direct and control the work as expressed in the time ticket.[130] The court held that the temporary laborer was the borrowed employee of the manufacturing firm, entitling it to the exclusive remedy defense.[131]

Some contracts do not expressly assign the right to control the work.[132] One Texas case involved an employee-sharing arrangement between a temporary employment agency and a plastics manufacturing plant. The parties had a written contract that addressed which of the two would maintain workers' compensation insurance coverage and which would pay for that coverage. The contract "[did] indicate that [the staffing agency] maintained many responsibilities toward its employees even after they [were] assigned to [the borrowing employer]."[133] However, the court of appeals upheld the granting of summary judgment citing the testimony of the parties to determine who had the right to control or who exercised actual control over the details of the work.[134]

In summary, Courts typically uphold the parties' meaning unless the actual control was exercised contrary to the contract. The parties' agreement could be recorded on a formal written contract, or simply as boilerplate language on a daily time ticket.

ii. No Contract Agreement Regarding Worker Control

If actual control is exercised by a party without a contractual right to control, the courts will disregard the contract. For

128. *Mosqueda v. G & H Diversified Mfg., Inc.*, 223 S.W.3d 571 (Tex. App.—Houston [14th Dist.] 2007, review denied).
129. *Id.* at 576-77.
130. *Id.* at 580.
131. *Id.* at 583.
132. *Flores v. N. Am. Technologies Group, Inc.*, 176 S.W.3d 442 (Tex. App.—Houston [1st Dist.] 2004, writ denied).
133. *Id.*
134. *Id.* at 449-51.

example, in a case in which the contract specifically gave the right to control the details of the work to a labor supplier, the Texas Supreme Court stated that "a contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered but is not controlling."[135] The Court noted that because "the record in the present case is replete with evidence of [the refinery's] right of control over [the worker],"[136] the contract provisions were inconclusive and reversed the case for a new trial.

If the parties did not have a contract which addressed the right to control, the courts will look to the actual working relationship to determine which party had the legal right to control the details of the work. Of course, the exercise of actual control of the work is evidence of which party held the right to control.[137] For example, a temporary worker who admitted to receiving training from the client company's supervisor; speaking with the client company's employees when posing a question or concern; receiving all orders from the client company; and who's dealings were with the client company was found to be the employee of the client company at the time of her death.[138]

Some cases list several factors to determine whether or not the details of the work were controlled by an alleged employer. In a wrongful death claim, the Texas Supreme Court outlined five factors to determine that a truck driver was not the employee of a limestone distribution company.[139] The factors are, "(1) The independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job."[140] These factors, together, were enough to provide conclusive summary judgment evidence that the truck driver was an independent contractor and not a borrowed employee.[141]

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135. *Exxon v. Perez*, 842 S.W.2d 630 (Tex. 1992).
136. *Id.*
137. *Id.*; *see also Bliss v. NRG Indus.*, 162 S.W.3d 434, 437 (Tex. App.—Dallas 2005, review denied).
138. *Lockett v. H.B. Zachry Co.*, 285 S.W. 63, 76 (Tex. App.—Houston [1st Dist.] 2009, no writ).
139. *Limestone Prod. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).
140. *Id.*
141. *Id.* at 313.

The Texas Supreme Court also considered six factors to determine whether the company which was sent a compressor with three operators maintained the right to control the operators of the compressor.[142] The Texas Supreme Court held that the company which was sent the compressor did not exercise actual control over the details of the work based on these factors.[143] Similarly, a crane operator was held not to be the borrowed employee of a steel erection subcontractor based on the same factors.[144]

Other cases have identified factors in addition to, or outside of, the above factors to determine the right to control. A federal court applying Texas law found that a lending employer had expressly relinquished right of control by sending his employees to another employer with instructions to "do as they said."[145] The court said this type of direction expressly placed the worker under the borrowing employer's control. The lending employer did not attempt to exercise any control over the worker while the borrowing employer's foreman did.[146]

The Texas Supreme Court has also focused on whether the borrowed employee is doing something in the general or special employer's normal scope of business.[147] The Court held that a bulldozer operator was under the supervision and control of a farmer's general scope of business, rather than his original employer, at the time the bulldozer backed over the farmer.[148] However, the Court implied the result might have been different if the injury was caused by some mechanical or maintenance defect in the bulldozer.[149]

A worker for a temporary labor agency was found to be a borrowed employee of the toy company while working in the

142. *Producers Chem. Corp. v. McKay*, 366 S.W.2d 220 (Tex. 1964). The Court considered (1) the nature of the general project; (2) the nature of work to be performed by personnel and machines furnished; (3) the length of the special employment; (4) the type of machinery furnished; (5) acts representing an actual exercise of control; and (6) the right to substitute another operator of the machine.
143. *Id.* at 226; *see also Regalado v. H. E. Butt Grocery Co.*, 863 S.W.2d 107 (Tex. App.—San Antonio 1993, no writ).
144. *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191 (Tex. App.—Dallas 2003, review dismissed).
145. *Dennis v. Mabee*, 139 F.2d 941 (5th Cir. 1944).
146. *Id.* at 944.
147. *Hilgenberg v. Elam*, 198 S.W.2d 94 (Tex. 1946).
148. *Id.* at 96.
149. *Id.*

warehouse.[150] The court of appeals reported some factors from an affidavit executed by the sales manager of the temporary labor agency which stated that all persons were given all instructions and job details by the toy company, were paid by the toy company by the hour and that the temporary labor agency provided workers' compensation insurance. In addition, the court of appeals found that no one from the temporary labor agency ever supervised the worker or instructed the worker on how to perform tasks. Instead, the toy company supervised, instructed and provided tolls to the worker. The worker did not submit any contrary evidence. The court of appeals affirmed that the toy company had the right to control the worker at the time of the accident.[151]

d. Texas Pattern Jury Charge

A trial court in Texas would probably submit the Texas Pattern Jury Charge on the question of employer status. The Pattern Jury Charges are drafted by a committee of the State Bar of Texas consisting of both plaintiff and defense attorneys. They are drawn from both statutory and common law authority and are considered the approved manner of submission of questions to the jury.

The Pattern Jury Charge pairs the borrowed employee question[152] with an independent contractor question. The instructions accompanying the questions suggest that the two questions be submitted disjunctively. That is, an entity or individual is either a borrowed employee or an independent contractor, but not both.[153] The Pattern Jury Charge contains an instruction that: "[a]n employee ceases to be the employee of his

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150. *Marshall v. Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

151. *Id.*

152. 2 State Bar of Texas, Texas Pattern Jury Charges PJC 19.04 (1994). The present pattern jury charge on "borrowed employee" reads: A "borrowed employee" is one who, while in the general employment of one employer, is subject to the right of another employer or his agents to direct and control the details of the particular work inquired about and is not merely cooperating with suggestions of such other employer.

153. 2 State Bar of Texas, Texas Pattern Jury Charges PJC 6.08. The independent contractor jury question reads: A person is not acting as an employee if he is acting as an independent contractor. An "independent contractor" is a person who, in pursuit of an independent business undertakes to do specific work for another person, using his own means and methods without submitting himself to the control of such other person with respect to the details of the work, and who represent the

general employer if he becomes the 'borrowed employee' of another. One who would otherwise be in the general employment of one is a borrowed employee of another if such employer or his agents have the right to direct and control the details of the particular work inquired about."[154]

If a contract is at issue in the case, the Pattern Jury Charge suggest the following instruction: "[a] written contract expressly excluding any right to control over the details of the work is not conclusive if it was mere subterfuge from the beginning or was persistently ignored or modified by subsequent or express agreement of the parties; otherwise such a written contract is conclusive."[155]

2. Liability to Third-Parties for Acts of Contingent Workers

Generally, employers are liable for the negligence of their employees done in the course and scope of employment.[156] The employer must generally have the right to control the details of the work before liability attaches.[157] Specifically, the employee's act must (1) fall within the scope of the employer's general authority; (2) be in furtherance of the employer's business; and (3) before the accomplishment of the object for which the employee was hired.[158]

Although Texas has a rule that only one employer generally exists for workers' compensation purposes, no such rule necessarily acts as a bar to two employer liability for injuries to third parties.[159] Liability can attach to the employer who ratifies the

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will of such other person only as to the result of his own and not as to the means by which it is accomplished.

154. 2 State Bar of Texas, Texas Pattern Jury Charges PJC 6.03.

155. 2 State Bar of Texas, Texas Pattern Jury Charges PJC 6.09; *El Paso Field Services Mgmt. v. Lopez*, 2010 Tex. App. LEXIS 4038 (Tex. App.—Houston [1st Dist.] 2010).

156. W. Page Keeton, et al., Prosser & Keeton on Torts, § 70 (5th ed. 1984).

157. *Hilgenberg v. Elam*, 198 S.W.2d 94, 95 (Tex. 1946) (employer of bulldozer operator is not liable for operator's negligence while under the control and direction of another). *See Guerrero v. Harmon Tank Co., Inc.*, 55 S.W.3d 19, 25 (Tex. App.—Amarillo 2001, review denied).

158. *Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760, 767-68 (Tex. App.—San Antonio 2002, writ denied).

159. *White v. Liberty Eylau Sch. Dist.*, 880 S.W.2d 156 (Tex. App.—Texarkana 1994, writ denied).

acts of his employees while under the control of another.[160] For example, a security guard company was held liable for the acts of its guard while a borrowed servant to another, since it later ratified the acts of the guard.[161] Also, employers can probably be liable for acts of an employee who was negligently hired or retained.[162] A security company avoided liability for the acts of its guard, while a borrowed servant to another, since the security company did not know nor should it have known the guard was incompetent.[163] Similarly, a department store was found not to be negligent in hiring an off-duty police officer who detained and allegedly assaulted a customer, where the officer had no complaints on his record when hired.[164]

An owner or occupier of land can be liable for injuries to another arising out of an activity or instrumentality conducted on the premises if it had the right to control, or exercised active control over a subcontractor's work without using reasonable care.[165] One court has held that liability is not limited to owners or occupiers of land but extends to any party which has the legal right to control part of the premises.[166] To determine if a duty is owed, courts will look to whether the control was such that the subcontractor is not free to complete the job its own way.[167]

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160. *Gulf Oil Corp. v. Williams*, 642 S.W.2d 270 (Tex. App.—Texarkana 1982, no writ).

161. *Id.*

162. *Ogg v. Dillard's, Inc*., 239 S.W.3d 409 (Tex. App.—Dallas 2007, writ denied).

163. *Gulf Oil Corp.*, 642 S.W.2d at 270.

164. *Ogg*, 239 S.W.3d at 409.

165. *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291-92 (Tex. 2004); *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 607 (Tex. 2002); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985).

166. *Ponder v. Morrison-Knudson Co.*, 685 F. Supp. 1359, 1363-65 (E.D. Tex. 1988).

167. *Fitz v. Days Inns Worldwide, Inc.*, 147 S.W.3d 467, 473-74 (Tex. App.—San Antonio 2004, review denied); *Davis v. R. Sanders & Assoc. Custom Home Builders, Inc.*, 891 S.W.2d 779, 781-82 (Tex. App. —Texarkana 1994, no writ); Staublein v. Dow Chem. Co., 885 S.W.2d 502 (Tex. App.—El Paso 1994, no writ) (finding owner of premises not liable for injuries to employee of food service contractor who fell when milk crate on which he was standing broke, since premises owner owed no duty because it did not have the right to order the employee to use the milk crate).

Generally, to be liable in common law negligence, an entity must owe a legal duty of care to others.[168] When a party is not able to exercise control over a worker, courts may find no duty was owed to the worker or others injured by the worker's negligence. For example, a chemical company was held not to be liable for injuries caused by police officers who were hired to direct traffic outside the plant because the company lacked the right to control the details of their work.[169] Similarly, an architectural firm was found not liable for injuries received by a subcontractor's worker because the firm had no right to control the manner in which the subcontractor performed the work. Having no control, no duty was owed by the architects.[170]

3. Texas Workforce Commission

The Texas Unemployment Compensation Act[171] provides for unemployment compensation. Courts have used the "right of control" test to determine whether a claimant is an employee or an independent contractor.[172] The Texas Workforce Commission ("TWC") cautions employers against labeling employees as independent contractors since "if the TWC rules that an employer has failed to properly report all wages and pay taxes, it will assess back taxes and interest."[173] The TWC warns that there is a likelihood that the IRS would become involved and recommends seeking a ruling from the TWC's Tax Department for any employer in doubt over their workers.[174]

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168. *Butcher v. Scott,* 906 S.W.2d 14 (Tex. 1995) (dismissal of negligence claim which failed to allege a legal duty owed to the plaintiffs).

169. *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 219-21, 228 (Tex. App.—Houston [14th Dist.] 1994, no writ).

170. *Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W.2d 522, 525-29 (Tex. App.—El Paso 1994, writ denied).

171. TEX. LAB. CODE ANN. § 201 et seq.

172. *Limestone Prod. Dist., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) ("The test to determine whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work."); *Barnett v. Tex. Employment Comm'n*, 510 S.W.2d 361, 363 (Tex. App.—Austin 1974, *writ refused*).

173. TWC Audits, http://www.twc.state.tx.us/news/efte/twc_audits.html; *see Merchant v. State*, 379 S.W.2d 924 (Tex. App. — Austin 1964) (persons doing insect extermination work were "employees" for whom their employer was required to remit unemployment taxes).

174. . TWC Audits, http://www.twc.state.tx.us/news/efte/twc_audits.html.

4. Staff Leasing Services

The Staff Leasing Services statute regulates staff leasing operations in Texas.[175] The statute expressly provides that "for workers' compensation insurance purposes, a licensee and its client company shall be co-employers."[176] The party seeking the protection must hold a valid license in the state.[177]

The leasing statute applies only to full-time workers whose normal work week is at least 25 hours.[178] It excludes four broad categories of employers. These include a temporary help service, an independent contractor, a public company, and a temporary common worker defined by the Temporary Common Worker Employer statute discussed below.[179]

The statute also excludes "an employee hired to support or supplement a client company's work force in a special work situation," including employee absences, a temporary skill shortage, a seasonal workload, or a special assignment or project.[180]

5. Labor Hall Statute

Additionally, Texas has a "labor hall statute" titled the Temporary Common Worker Employer statute.[181] The statute is significant in that any agency which operates a central meeting location and supplies untrained workers on a temporary basis is deemed to be the "employer" of those workers.

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175. TEX. LAB. CODE ANN. § 91.001 et seq. It defines staff leasing as: "[A]n arrangement by which employees of a license holder are assigned to work at a client company and in which employment responsibilities are in fact shared by the license holder and the client company, the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consist of assigned employees of the license holder."
176. TEX. LAB. CODE ANN. § 91.042(c); *see Vega v. Silva*, 223 S.W.3d 746, 748 (Tex. App.—Dallas 2007, no writ) ("Under subsection (c), the staff leasing company and the client company are considered co-employers for the purposes of the staff leasing company's decision to elect or deny workers' compensation coverage. As a result, both the staff leasing company and the client company are subject to the exclusive remedy provision of the Workers' Compensation Act.").
177. *Hodges v. Tex. TST Inc.*, 303 S.W.3d 880 (Tex. App.—El Paso 2009).
178. TEX. LAB. CODE ANN. § 91.001(2).
179. *Id.* at § 91.001(14).
180. *Id.* at § 91.001(2).
181. TEX. LAB. CODE ANN. §§ 92.001-92.031.

The statute states: "[e]ach license holder is the employer of the common workers provided by that license holder" and "a license holder may hire, reassign, control, direct, and discharge the employees of the license holder."[182] Therefore, under this statute, a temporary agency is the statutory employer of the worker.

To satisfy the statute, an employer must generally satisfy four elements. First, it must operate a labor hall defined as "a central location maintained by a license holder where common workers assemble and are dispatched to work."[183] Second, the work assignment be temporary, but the statute does not define the length of the anticipated service. Third, the employees must be "common workers." That is, they must be individuals who perform labor involving physical tasks that do not require a particular skill, training or particular knowledge in an occupation, craft, or trade.[184] Lastly, the employer must obtain a license to operate as a temporary common worker agency.[185] Failure to obtain a license is a Class A misdemeanor.[186]

The Attorney General opinion interprets the statute stating that "a person who operates as a temporary common labor employer has all of the responsibilities to his employees attendant with the employer/employee relationship, including the obligation to provide workers' compensation or unemployment insurance to the extent imposed on employers by other law."[187] The person who provides temporary common laborers is liable under the Act even if no license was obtained since that "would be contrary to the letter and spirit of. . .the act."[188] Consequently, the possible status of a temporary agency as a "labor hall" under the statute may determine employer status regardless of the right of control or other common-law factors.

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182. *Id.* at § 92.021(a)(b). *See Wingfoot Enter. v.* Alvarado, 111 S.W.3d 134 (Tex. 2003); *See also Richmond v. L.D. Brinkman & Co.*, 36 S.W.3d 903, 906 (Tex. App.—Dallas 2001, review denied). The court of appeals held: "Although the statute provides that the licensed temporary common worker employer is the employer of the common worker, the user of the temporary worker could still be a second employer.".

183. *Id.* at § 92.002(6).

184. *Id.* at § 92.002(3).

185. *Id.* at § 92.011.

186. *Id.* at § 92.031(b).

187. Op. Tex. Att'y Gen. No. DM-243 (1993).

188. *Id.*

6. Personnel Employment Services Statute

The Texas Legislature has also enacted a Personnel Employment Services statute which applies to "a person who, regardless of whether for a fee, directly or indirectly offers or attempts to obtain permanent employment for an applicant or obtains or attempts to obtain a permanent employee for an employer."[189] The statute excludes "a personnel service operated by a person in conjunction with the person's own business for the exclusive purpose of employing help for use in the business."[190] It prohibits an employment service from referring an applicant except upon a valid job order, or advertising a position without a verifiable job order by the employer.[191] It also prohibits referring an applicant to "employment harmful to the applicant's health or morals if the personnel service has knowledge of the harmful condition."[192]

A defendant violating the statute is liable for actual damages produced by the violation plus reasonable attorney's fees and court costs.[193] Further, a party which commits a "knowing" violation is liable for three times the amount of actual damages plus reasonable attorney's fees and court costs.[194]

7. Migrant Worker Statute

"A labor agency who furnished a migrant or seasonal worker is liable under this subtitle as if the labor agent were the employer of the worker, without regard to the right to control or other factors used to determine an employer-employee relationship."[195] Labor agents without workers' compensation insurance cause those who the migrant worker is referred to be jointly liable with the labor agent in actions to recover personal injuries or death, but the agent is not liable apart from the party to whom the migrant worker is referred.[196] The labor

189. TEX. OCC. CODE ANN. § 2501.001(9) (West 2004).
190. TEX. OCC. CODE ANN. § 2501.002(2).
191. TEX. OCC. CODE ANN. § 2501.101(3)(4).
192. *Id.* at § 2501.101(10).
193. *Id*. at §§ 2501.201, 2501.203.
194. *Id.*
195. TEX. LAB. CODE ANN. § 406.163(a). A labor agent is defined as: "a farm labor contractor for purposes of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 et seq.); or otherwise recruits, solicits, hires, employs, furnished, or transports migrant or seasonal agricultural workers who work for the benefit of a third party."
196. *Id.* at § 406.163(b).

agent must notify and present evidence of coverage under the Act to each person with whom they contract.[197]

IV. RECOMMENDATIONS

A prudent corporate counsel should advise the corporation of the various legal benefits and liabilities of a contingent workforce. This advice begins with proper classification of the workers. For close calls, an official pre-determination can be requested from the IRS.[198] Three particular areas generally require attention and consideration. They are (1) contractual relationships with the contingent workforce; (2) insurance coverage for the contingent workforce; and (3) human resources issues in dealing with a non-traditional workforce.

A. Contracts

A corporate counsel using non-traditional labor should consider clearly delineating rights and responsibilities through written contract. Such contract could be consummated with both the labor supplier, and the contingent worker. Additionally, either the labor supplier or the contingent employer, or both, could detail the relationship in a written contract with the worker. Consideration should be given to each of the federal and state regulations applicable to the employment relationship. For example, corporate counsel should consider each of the Twenty Factors, which entity controls each factor, and whether the contract should reflect that control. Likewise, the corporate counsel should consider whether any contract expressly assigns duties and obligations under the applicable state or federal statute.

B. Insurance

In general, workers' compensation insurance policies provide coverage for personal injuries only to "employees". General liability policies, on the other hand, typically exclude "employees" from coverage. Therefore, proper categorization may be necessary to determine coverage under the particular policy. Consideration should also be given to additional endorsements

197. *Id.* at § 406.163(c).

198. SS-8 form. http://www.irs.gov/pub/irs-pdf/fss8.pdf. Following submission of an SS-8, a Private Letter Ruling will be issued. Although the IRS does not issue such rulings on hypothetical situations, occasionally it will issue an "Information Letter" addressing a proposed situation.

to one or both parties' insurance, such as an "Alternate Employer Endorsement," or a waiver of subrogation endorsement.

Additionally, workers' compensation premiums are typically derived from the employee's payroll wages. Proper payroll categorization is necessary to determine the amount of insurance premiums submitted to the workers' compensation carrier. Corporate counsel should also recognize that most insurance policies contain a contractual right for the carrier to audit the insured. In a workers' compensation context, mis-categorization of a particular class of workers could lead to significant retroactive premiums demanded by the carrier and potential change in its National Council on Compensation Insurance ("NCCI") experience rating.[199] A contract with the temporary labor supplier may also address insurance coverage issues.

C. Human Resources

The corporate counsel should coordinate policies with the human resources department, including those related to hiring, firing, and discipline of any contingent workers, including independent contractors and temporaries. Additionally, corporate counsel should be taken to ensure that employment policies are properly directed to "employees". Other policies related to business practice should be directed to "non-employees". As discussed above, a non-employee could become an employee if the corporation exercises employment-related control over the worker. Various statutes and regulations also mandate records retention.[200] Typically, different records are required to be maintained for employees versus non-employees. Again, in light of the classification of the workers, the corporate counsel should co-ordinate and assist in the retention program. Each of the state and federal concerns listed above should be considered in preparation of an employee manual, employee training, ER-

199. http://www.ncci.com. Adjustment premiums resulting from the use of Experience Ratings. Experience rating plans take the form of *retrospective plans* or *prospective plans*. Under retrospective plans, premiums are modified after the fact. That is, once the policy period ends, premiums are adjusted to reflect actual loss experience of an insured. In contrast, under prospective plans, an insured's past experience (usually for the immediate preceding three years) is used to determine the premium for the current year of coverage.

200. *See, e.g.* 29 C.F.R. § 1904 (2010), entitled *Recording and Reporting Occupational Injuries and Illnesses*, and 29 C.F.R. § 1910.1020 (2010).

ISA plans, records retention, and other corporate policies and procedures.

V. CONCLUSION

The use of contingent labor continues to grow. It can provide flexibility in workforce size and composition, and immediate cost savings. It may also create new legal relationships and liabilities for the corporation. The corporate counsel should be aware of the potential legal rights and responsibilities of managing a contingent workforce and evaluate the legal benefits and liabilities created by the use of contingent workers.