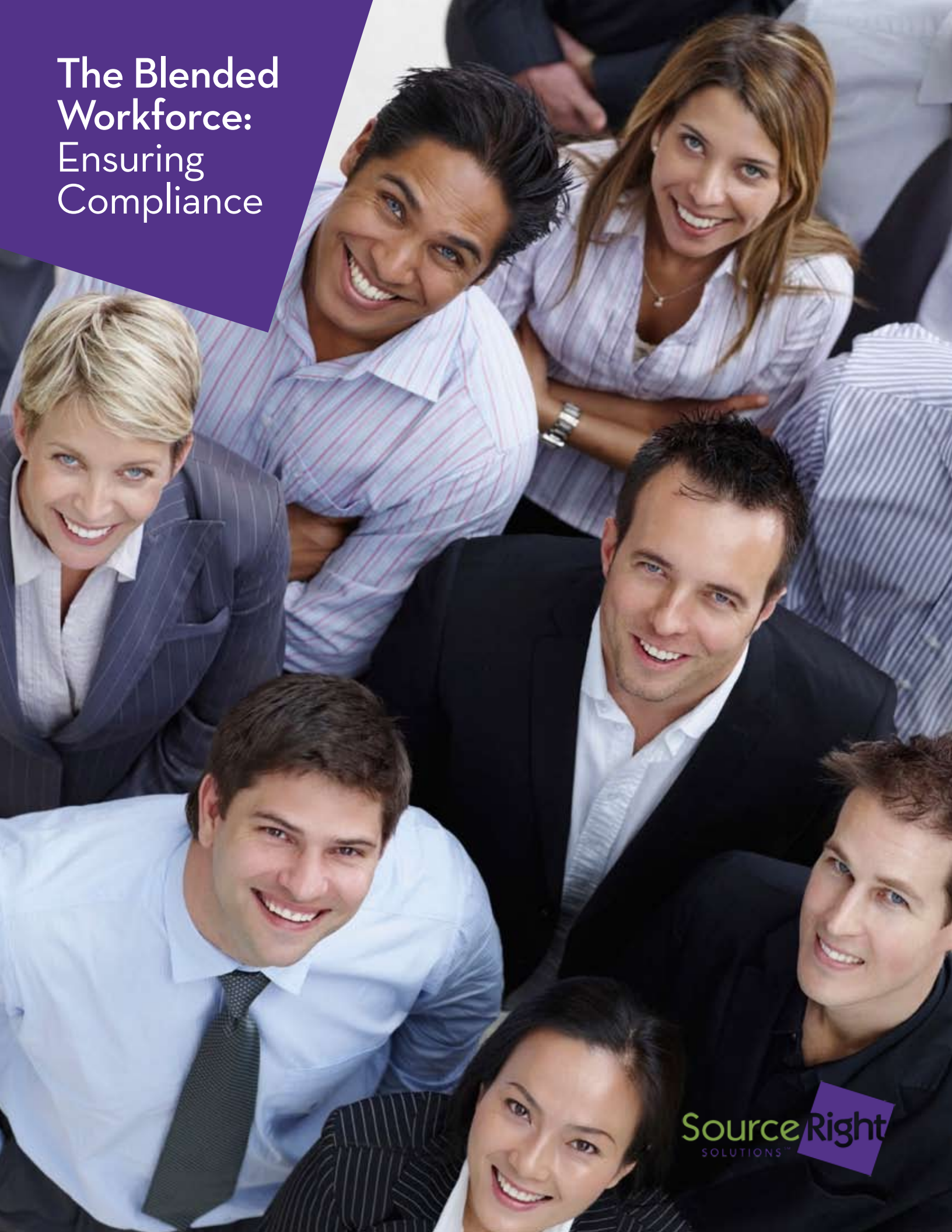


The Blended Workforce: Ensuring Compliance



AS COMPANIES EMBRACE MORE TYPES OF WORKERS IN A FLEXIBLE WORKFORCE, THEY NEED TO UNDERSTAND THE INCREASED COMPLEXITY OF STAYING IN STEP WITH REGULATIONS.

The Blended Workforce:

The past year has seen gradual improvement in the economy, but companies are understandably cautious about bringing on more employees. As a result, the current recovery has seen only modest increases in hiring. At the same time, however, there is a growing amount of work to be performed—from creating products to serving customers—and companies need workers to get those tasks done.

In short, there is a gap developing between growing demand and lagging hiring, and many companies today are turning to independent contractors and contingent workers to fill that gap. Such workers can be brought in to handle projects without long-term commitment or the benefits packages provided to traditional full-time employees and essentially keep work flowing while the company watches and weighs economic developments.



Meeting the Compliance Challenge

In fact, fully half of the new hires during the economic recovery will be some type of temporary worker, according to the employment law firm Littler Mendelson. “The numbers of professionals working in temporary or alternative work arrangements will continue to rise,” notes a report from the firm. “Flexible work schedules and telecommuting will increase as companies turn towards practical solutions to efficiently complete tasks while retaining talented individuals.” As a result, notes Littler, as much as 35 percent of the total workforce will be made up of such temporary workers.

While recent economic conditions have highlighted the importance of these workers, this is really just one indication of a longer-term trend. The use of free-agent workers and the creation of an “on-demand” workforce has been underway at U.S. companies for years. These workers not only let companies control employment costs and keep headcount options open, but they also provide heightened flexibility and rapid access to specialized skills—things that can be crucial in an era of changing technologies, markets, and business strategies.

“The blended workforce that consists of permanent

employees, consultants, independent contractors, and contingent workers is rapidly becoming the norm among U.S. companies,” says Rebecca Callahan, president of SourceRight Solutions. Executives recognize this, and they recognize the need to manage this new reality. In fact, more than 75 percent of large employers believe that a single, integrated hiring strategy for free-agent/contingent and full-time workers will result in higher workforce quality, according to the 2009 SourceRight Emerging Workforce Study. Many executives, therefore, are evaluating just how to create the most effective

mix of different types of employees.

However, administering the blended workforce requires different approaches in a number of areas—not the least of which is ensuring compliance with employment laws and regulations. Complying with the rules can be difficult enough with the traditional full-time workforce, and a blended workforce only makes matters more complex. So too does an evolving network of employment laws and regulations. To navigate this landscape, companies—and their HR professionals—will need to bring new levels of sophistication and

The Blended Workforce

Companies today often have various types of workers in place to increase flexibility and control costs. Each type of worker brings its own compliance challenges.

Type of Worker	Definition	Issues to Avoid
Full-time employees	Traditional workers who are essentially permanent staff.	Discrimination, disparity in benefits administration, and inconsistent application of labor laws.
Independent contractors	A person or business that provides goods or services to another entity under terms specified in a contract.	Potential misclassification challenges, requiring companies to treat and pay contractors as employees.
Contingent workers	Non-permanent workers, typically provided by staffing companies. A growing proportion of such workers are skilled and professional talent.	Could be considered “co-employees” of client company and staffing firm.

Conventional Wisdom: True or False?

When it comes to independent contractors, compliance is not always easy, as the following “common-sense” statements show.

1. My company can classify “common law employees” as independent contractors. True or False

2. We follow the IRS “employment test” for independent contractors, so we are completely covered. True or False

3. My contractors have a business license, a completed W-9 form, and a contract, so they are all “certified” independent contractors. True or False

4. Following well-established “industry practices” will not protect us entirely from independent-contractor misclassification judgments. True or False

5. Independent-contractor audits by state agencies are even more common and aggressive than IRS audits. True or False

6. An independent contractor’s errant application for unemployment benefits can trigger a comprehensive state and/or IRS audit. True or False

7. My contractors perform services for other competitors, so these workers are “certified” independent contractors. True or False

To determine whether someone is an employee or contractor, government agencies look at three broad areas: behavioral factors, such as whether the company has control over what the worker does and how the worker does his or her job; financial factors, such as how the worker is paid, whether expenses are reimbursed, and who provides work tools and supplies; and the type of relationship between the worker and the company—are there written contracts or employee-type benefits involved, for example? These factors are not so much rules as guidelines, and all are considered and balanced. Thus, if a company has behavioral control and financial control, the worker is likely to be deemed an employee, even if the relationship involves a contract and no benefits.

Answers: 1. False; 2. False; 3. False; 4. True; 5. True; 6. True; 7. False.

comprehensive oversight to compliance efforts. That won't always be easy. But it will be critical if they are to avoid the high cost of noncompliance.

Who Works Here?

With the blended workforce, a number of laws, such as those prohibiting discrimination, apply across the board, encompassing both on-demand workers and full-time employees. Companies naturally need to ensure compliance with the law in those areas. At the same time, however, employers have differing legal obligations related to each type of worker. These obligations are not always clear-cut and often require interpretation and a grasp of nuanced details. And, as many companies have found, it can be easy to get things wrong.

A key concern with the blended workforce is the need to ensure that independent contractors and contingent workers are not treated as full-time employees. Whether a worker is properly classified as an employee or a non-employee is not determined by how an employer views a worker or how that worker defines his or her relationship with the organization. It is decided by government regulators. If they determine that such workers have been misclassified, companies can find themselves on the hook for significant penalties.

Statistics show that in practice, this can be difficult to sort out. The IRS estimates that as many as half of the approximately 10 million independent contractors in the U.S. are classified incorrectly and should be considered employees. The

list of companies that have faced lawsuits challenging their classification of and treatment of workers includes such major organizations as Wal-Mart, FedEx, Allstate, and Starbucks.

Often, seemingly small things can trigger large problems. For example, with on-demand workers, compliance is not just a matter of keeping people off the full-time payroll. Companies should also avoid having these individuals work late without overtime pay, even if regular employees do so. And they should limit on-demand workers' involvement in employee events, such as parties and awards ceremonies, which can be construed as treating them like full-time employees. “You have to distinguish between the contingent worker and the employees and not cross that line,” says Karen Turner, vice president of Strategic Talent Optimization at SourceRight. “Including contingent workers in employee-only events is part of an IRS 20-factor test for determining whether such workers are misclassified and should be considered employees.”

What's more, companies will often look to contingent workers to fill full-time positions because those people are known quantities who have experience with the company. However, it's important to exercise caution here and make sure that these individuals are treated like an external applicant. That is not to say that companies should not move temporary workers to full-time positions—doing so can be an effective way to find the right people. But it needs to be done correctly, or the company could be at risk of not complying with fair-hiring practices.

Overall, the cost of misclassifying employees can be high. Employers can be responsible for all back taxes plus penalties; fines can average 40 cents for every dollar paid in compensation. Employers might also be required to pay for workers compensation, unemployment, family medical leaves, overtime pay, and stock options for these workers. Court judgments for individual cases can easily run into the millions of dollars—and that’s not counting the negative publicity, lost productivity, and legal costs such cases can generate.

Growing Government Interest

Today, employers are not only dealing with a complex compliance landscape, but their actions on this front are also under growing pressure. “There has clearly been an increase in compliance cases over the last few years, in particular because of cases reported through the EEOC [U.S. Equal Employment Opportunity Commission] of discriminatory hiring practices and unfair labor treatment” says Audra Jenkins, compliance leader at SourceRight. “That’s partly because of the economy, the lack of available jobs, and employers reducing benefits and wages, which leads to more employment-discrimination cases.”

Employers are also seeing increased scrutiny from government agencies. The IRS earlier this year said it would conduct 6,000 random audits over the next three years to look at employee classification issues. The 2011 federal budget includes a \$25 million “Misclassification Initiative.”

Outsourcing: Getting Help With Compliance

Compliance in the age of the blended workforce presents a growing challenge—one that requires specialized knowledge and skill. As a result, many companies are relying on outside staffing firms to help them stay within the bounds of employment law as they adopt more flexible, on-demand approaches to finding the right workers. Some staffing companies provide services in three key areas that can help strengthen compliance:

RECRUITING SERVICES. Processes and policies designed to streamline recruiting, optimize candidate quality, and significantly reduce hiring costs can also support effective compliance. The outsourcing partner can ensure that fair hiring practices are in place, that the candidate pool is sufficiently diverse, and that the entire recruiting process is carefully documented.

CONTINGENT WORKFORCE SERVICES. A provider may offer services specifically targeting the management of contractors and consultants, helping companies ensure that contractual agreements and the treatment of employees do not lead to “free agents” being classified as full-time employees by government agencies. If appropriate, the outsourcer may become the employer of record responsible for all employer-related activities, including payroll and health and welfare, for such contingent workers, so that those workers are clearly not client-company employees.

MANAGED SERVICE PROVIDER (MSP) PROGRAMS. Some providers will manage a number of staffing firms on a client company’s behalf to help ensure that the procurement of contingent labor is efficient, cost-effective, and in compliance with employment laws. The MSP approach provides a single point of contact. It also helps provide the oversight to avoid co-employment issues, in which workers are considered employees of both the staffing company and the client company—and therefore entitled to the benefits and rights of an employee.

Overall, the outsourcing of such staffing processes draws on the same strengths as the outsourcing of other processes. Staffing is a core competency for the outsourcer, meaning that it can invest in the resources and tools needed for effective compliance, draw on best practices from a wide experience base, and stay on top of a changing regulatory environment.

Social Media: Networking and Compliance

Social media have become widely used recruiting tools, with companies looking for employees via LinkedIn, Facebook, and Twitter. These channels provide a cost-effective way to reach a large pool of potential candidates. But they also raise some concerns—and uncertainty—in terms of compliance.

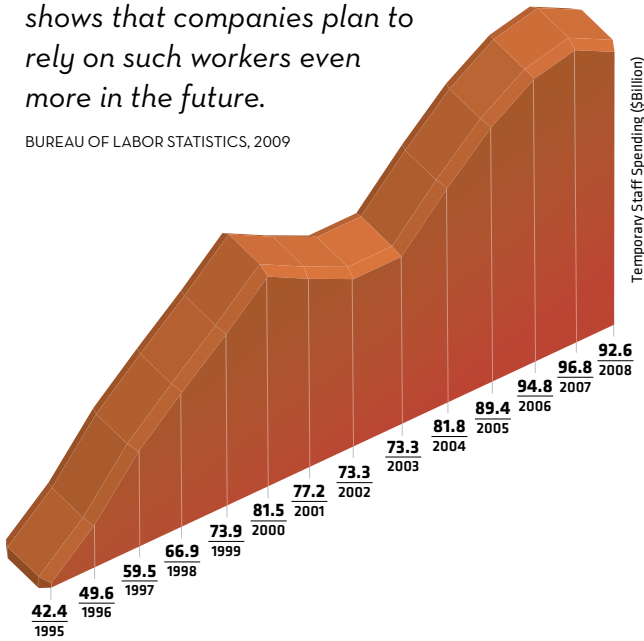
Because these online resources are relatively new, says Audra Jenkins, compliance leader at SourceRight Solutions, “there really aren’t clear government regulations to help guide employers on the appropriate approach to social media with networking and recruitment.” Some observers point out that regulators could decide that a social media site constitutes a pool of candidates that is lacking in diversity if minorities are under-represented in the user population. Others cite the common practice of checking out candidates on Facebook, where recruiters may find information that they should not be accessing, such as a candidate’s religion or sexual orientation.

The point is that social media outreach needs to be included in a company’s compliance program. “If a recruiter reaches out with a lead to someone they’ve found on Facebook, and that person responds, that is considered a contact you have to follow,” says Jenkins. That means the company needs to document its interactions with the candidate, ideally within an applicant tracking system. “These contacts over social media can seem harmless, but federal contract compliance auditors will want to know how these individuals made it into the candidate pool,” says Jenkins. “So there is a real need for good record-keeping in this area.”

Beyond the Traditional Workforce

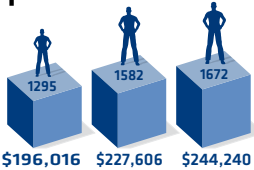
Spending on temporary/contingent workers has more than doubled since the mid-1990s, and research shows that companies plan to rely on such workers even more in the future.

BUREAU OF LABOR STATISTICS, 2009

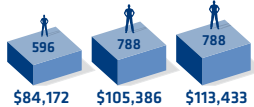


Regulators: A Sharper Eye

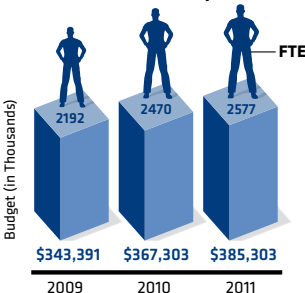
1 | Wage and Hour Division



2 | Office of Federal Contract Compliance Programs



3 | EEOC Strategic Objective: Justice, Opportunity, and Inclusive Workplaces



In the U.S., the federal government is devoting more resources to the enforcement of various employment regulations, with agencies increasing their scrutiny of everything from contractor status to diversity in hiring.

SOURCE: U.S. DEPARTMENT OF LABOR, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

And in the Congress, a number of bills designed to strengthen compliance detection and enforcement have been proposed, while at least a dozen states have strengthened employee classification rules and ramped up enforcement.

This increased scrutiny is driven by a number of factors—including financial considerations. In the wake of the recession, cash-strapped state and federal governments have become much more aggressive in looking for tax revenue. The U.S. Treasury estimates that there is a \$345 billion “tax gap,” the result of employers who under-report, underpay, or don’t file employee taxes. In many cases, there is an interest in overseeing the use of federal dollars, with companies that received Troubled Asset Relief Program (TARP) bailout funding seeing an increase in audits, says Jenkins.

Meanwhile, concerns about illegal immigration are leading to more audits of I-9 employees, or foreign workers eligible to work in the U.S.. So, too, is a heightened focus on security, with the Department of Homeland Security also performing I-9 audits. Homeland Security officials, says Jenkins, “can come on-site without notice to interrogate employees. If they find evidence that an employer knowingly hired an illegal alien, they have the ability to remove the employee and the employer representative in handcuffs. So compliance here is very serious.”

Companies doing business with the government are seeing heightened compliance activity. For example, recent changes at the Office of

Federal Contract Compliance Programs (OFCCP)—the Department of Labor organization charged with ensuring contractors’ compliance with non-discrimination laws—are leading to more thorough audits focused on diversity. “In 2011, the OFCCP will be looking closely at the hiring of the disabled and veterans coming back from Afghanistan and Iraq,” says Jenkins. For contractors, failure to comply with employment regulations can mean not just fines but also the loss of government contracts—potentially worth millions or even billions of dollars.

Building an Effective Program

For employers, compliance is a multifaceted issue that they will need to address with a comprehensive approach—something that is lacking at many companies. “Too often, employers don’t have clear corporate policies about how to handle a blended workforce, especially when it comes to compliance,” says Callahan. “Or they may have some policies in place, but those differ across the company or are not enforced consistently.”

In moving from a piecemeal approach to an effective, companywide compliance program, employers can start by conducting an operational analysis and risk assessment. This should identify gaps in compliance processes, areas needing improvement, and any issues that might trigger audits. It should include a review of all existing independent contractor relationships across the organization and examine those relationships in light

Who's Keeping Watch?

When managing the blended workforce, companies have to consider a range of factors that relate to complying with U.S. federal employment laws—as well as a variety of state, and even local, laws. Below is a sampling of some of the primary federal laws.

Employment Legislation	What It Does	Who Enforces It
Fair Labor Standards Act	Prescribes standards for wages and overtime pay.	Dept. of Labor Wage and Hour Div.
Independent contractor/employee classification	Guidelines help determine whether or not workers should be considered employees.	IRS, Dept. of Homeland Security, Dept. of Labor, joint task forces in various states
Americans with Disabilities Act	Prohibits discrimination against individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other areas of employment.	Dept. of Justice, Equal Employment Opportunity Commission
U.S. employment eligibility (Form I-9 laws)	Verifies a foreign employee's identity and eligibility to work in the U.S. Also prohibits discrimination of I-9 workers based on national origin or citizenship status.	U.S. Immigration and Customs Enforcement, Dept. of Homeland Security, Dept. of Justice
Family and Medical Leave Act	Requires unpaid, job-protected leave for eligible employees for the birth, adoption, or care of a child, placement or care of a foster child, or the serious illness of self or a family member.	Dept. of Labor Wage and Hour Div.
Civil Rights Act	Prohibits discrimination based on race, color, religion, national origin, sex, or pregnancy.	Equal Employment Opportunity Commission
Federal contractor labor practices (Executive Order 11246)	Ensures that applicable contractors doing business with the U.S. government do not discriminate and take affirmative action.	Dept. of Labor Office of Federal Contract Compliance Programs

of current state and federal regulations. As much as possible, it should determine the dollar cost of any current violations that it uncovers.

This analysis and assessment can provide a foundation for a compliance program that encompasses the entire blended workforce. Under this program, companies should determine who will be accountable for managing compliance across all types of talent—company as well as non-company workers. They should establish processes to screen potential workers in the areas of immigration, diversity, and security; monitor changing laws and regulations; establish agreements with on-demand workers; and

create, collect, and store worker documentation. A key point, says Callahan, is to “involve management, human resources, procurement, legal, and tax professionals—and any third-party staffing firms involved—in designing and executing the program. Compliance should not be seen as one group’s problem. Many parts of the organization touch on it; they should all be part of helping to ensure compliance.” As an enterprisewide effort, an effective program should have executive sponsorship and clearly identified stakeholders in critical departments across the company.

Companies should also consider their information

technology as they create compliance programs. Systems can help standardize data capture and reporting and give companies a central repository of workforce information. In particular, they can be used to track state and federal regulations and enforcement actions, as well as to document employment activity. For example, an effective applicant tracking system with sophisticated reporting capabilities can help companies show regulators that hiring practices are, in fact, in line. “Part of the OFCCP compliance audit entails determining if the employer has the documentation and records to tell the story of how it went from the 1,000 candidates who applied for

the job to the one person who was hired. Essentially, an auditor is interested in whether you can re-create those steps and if there is enough documentation to show the decisions and movement of the applicants through the hiring process,” says Callahan. “A good system can help you with that.

“The reporting capability is getting to be more and more important to employers,” Callahan continues. “When you’re able to pull a report and easily identify the components that the auditor is looking for, to have transparency and the data you need right at hand, it is easier to demonstrate compliance to the auditing agency.”

Case Studies: Minding the Details

Many observers have noted that the U.S. government has shown increased interest in the enforcement of employment regulations, particularly those related to diversity and discrimination. As a result, companies need to proactively ensure that their practices are in compliance—and that means working on many fronts to get a variety of details right. For example, a number of Fortune 500 companies, working with SourceRight, have focused on such initiatives as:

■ **Creating** an ongoing compliance-training program for recruiting staff, along with a new standardized assessment tool that helps make sure that people not only take the training but also understand the content.

■ **Establishing** a formal process for collecting hiring manager/interview panelist interview notes—something that was being done only sporadically, if at all. Such notes can be critical in demonstrating sound hiring practices to government auditors. The new process uses a standard, one-page candidate evaluation form that is electronically routed to interviewers for completion and then sent back to a central storage system for safekeeping.

■ **Conducting** internal compliance audits and assessments to uncover any gaps and areas of risk, and identify opportunities to address compliance problems early on.

■ **Replacing** the faxing of I-9 documentation with a more rigorous system. Faxing creates compliance risks because the employer cannot be sure that the documents being presented are valid originals. The new process involved creating single points of contact in remote offices to review original documents and, where necessary, using a notary to validate them. The approach was enhanced with an online I-9 verification system that shares information with the government's E-verify system.

A Single View of the Complex Workforce

To effectively manage compliance in today's blended workforce, companies need a clear, horizontal view across all types of workers, including regular employees, independent contractors, and contingent workers. But getting that view can be a challenge, because the information it requires is typically spread across a variety of systems in a variety of places. Information about contractors may be maintained in financial or ERP systems. Information about contingent workers may be in third-party providers' databases. And information about regular employees may be kept in an internal HR IT ecosystem that includes applicant-tracking systems, ERP systems, and HR portals. "At most companies there is no single system for managing the blended workforce," says Rebecca Callahan, president of SourceRight Solutions. "Instead, there is a complex, multi-vendor IT landscape with multiple technologies and multiple technology owners that you need work across."

Traditionally, companies have had to piece that information together manually, undertake a time-consuming and expensive integration effort, or go through the cost and disruption of implementing new systems. Now, however, some companies are taking another approach and using analytics to create a "universal" data platform. Drawing on analytics tools and technologies, they are pulling together information from various systems to give decision makers an accurate, consistent view of the entire blended workforce.

This approach uses standard links to gather data from existing sources, allowing companies to preserve and leverage their previous investments in technology. It then maintains a repository of this data, covering the full employment lifecycle of all aspects of the blended workforce. With this platform in place, companies can measure, manage, and analyze a range of employment metrics, including those related to compliance—across business units, employee levels, and various hiring groups or managers. They can give decision makers accurate, detailed updates, trend analyses, and alerts to potential risks—delivered via reports, scorecards, or dashboards that monitor key performance indicators, helping companies be more effective today, and in the future.

What's more, an audit can require companies to produce a great many records, and effective systems can make that process more efficient and help avoid the significant costs of digging through paper files. The use of such technology can also have an impact on compliance risk beyond the documentation. "Even if there are problems, making the investment in the technology and using it helps companies demonstrate that the company is working in good faith, doing all it can to take precautions to be compliant," says Jenkins.

Through it all, companies need to emphasize compliance training across the organization to help ensure that the people who are implementing policy know what to do and why they need to do it. This means not only educating HR professionals and business managers, but also keeping them up to date as things change—typically, by having a process for emailing compliance updates and alerts to relevant personnel.

Overall, effective compliance requires ongoing attention and management focus. For executives, competitive realities are driving a need to create an on-demand workforce able to shift quickly to meet fast-moving challenges and opportunities. "Companies need to understand and address the risks that come with this new approach," says Callahan. "Ultimately, that will help them reap the competitive benefits of an agile, skilled, and motivated workforce." ■

For more information on topics discussed in this paper, write solutionsinfo@sourceright.com or call 1-800-482-7828.