Enforcement Guidance : Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms

U.S. Equal Employment Opportunity Commission

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Introduction

This Guidance addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, i.e., "contingent workers." The term "contingent workers"generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment.

This guidance focuses on a large subgroup of the contingent work force—those who are hired and paid by a "staffing firm," such as a temporary employment agency or contract firm, but whose working conditions are controlled in whole or in part by the clients to whom they are assigned.

Recent statistics compiled by the National Association of Temporary and Staffing Services (NATSS) show that the temporary help industry currently employs more than 2.3 million individuals.[1] That number represents a 100% increase since 1991, when 1.15 million individuals were employed in temporary help jobs. NATSS statistics also show that the professional segment of the temporary help industry (including occupations in accounting, law, sales, and management) has risen significantly.

A 1995 survey by the Bureau of Labor Statistics (BLS)showed that workers paid by temporary employment agencies were more likely to be female and African American than workers in traditional job arrangements,[2] while workers provided by contract firms were disproportionately male.[3] BLS found that workers paid by temporary help agencies were heavily concentrated in administrative support and laborer occupations and earned 60 percent of the traditional worker wage.[4] The largest

proportion of contract workers was employed in the services industry, and female contract workers earned slightly less than traditional workers while male contract workers earned more. BLS also found that contract and temporary workers had lower rates of health insurance and pension coverage than traditional workers, and that the majority of temporary workers would have preferred traditional work arrangements.

Staffing firms may assume that they are not responsible for any discrimination or harassment that their workers confront at the clients' work sites. Similarly, some clients of staffing firms may assume that they are not the employers of temporary or contract workers assigned to them, and that they therefore have no EEO obligations toward these workers. However, as this guidance explains, both staffing firms and their clients share EEO responsibilities toward these workers.

The Commission has addressed in previous guidance several of the coverage issues discussed in this document.[5] However, because use of contingent workers is increasing, it is important to set out an updated and unified policy that more specifically explains how the anti-discrimination laws apply to this segment of the workforce.

This document provides guidance concerning the following issues:

- coverage under the EEO laws, including coverage of workers assigned to federal agencies;
- liability of staffing firms and/or clients for discriminatory hiring, assignment, or wage practices;
- liability of staffing firms and/or clients for unlawful discrimination or harassment at the assigned work site; and
- allocation of damages where both the staffing firm and its client violate EEO laws.

Staffing Service Work Arrangements

The activities of the following types of staffing firms are addressed in this guidance[6]:

Temporary Employment Agencies

Unlike a standard employment agency, a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites. The agency recruits, screens, hires, and sometimes trains its employees. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. The agency bills the client for the services performed.

While the worker is on a temporary job assignment, the client typically controls the individual's working conditions, supervises the individual, and determines the length of the assignment.

Contract Firms

Under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. Examples of contract firm services include security, landscaping, janitorial,data processing, and cafeteria services.

Like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage.

The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site.

Other Types of Staffing Firms

There are many variants on the staffing firm/client model. For example, "facilities staffing" is an arrangement in which a staffing firm provides one or more workers to staff a particular client operation on an ongoing basis, but does not manage the operation.

Under another model, a client of a staffing firm puts its workers on the firm's payroll, and the firm leases the workers back to the client. The purpose of this arrangement is to transfer responsibility for administering payroll and benefits from the client to the staffing firm. A staffing firm that offers this service does not recruit, screen, or train the workers.

The term "staffing firm" is used in this document to describe generically these types of firms, although more specific terms are used where necessary for purposes of clarity.

Coverage Issues

This section sets forth criteria for determining whether a staffing firm worker qualifies as an "employee" within the meaning of the anti-discrimination statutes or an independent contractor; whether the staffing firm and/or its client qualifies as the worker's employer(s); and whether the staffing firm or its client can be liable for discriminating against the worker even if it does not qualify as the worker's employer. This section also discusses coverage of staffing firm workers assigned to jobs in the Federal Government and coverage of workers assigned to jobs in connection with welfare programs. Finally, this section explains the method for counting workers of a staffing firm or its client to determine whether either entity has the minimum number of employees to be covered under the applicable anti-discrimination statute.

1. Are staffing firm workers "employees" within the meaning of the federal employment discrimination laws?

Yes, in the great majority of circumstances.[7] The threshold question is whether a staffing firm worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself. The label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the firm and the firm's client.[8] As the Supreme Court has emphasized, there is "no shorthand formula or magic phrase that can be applied to find the answer, . . . all incidents of the relationship must be assessed with no one factor being decisive."[9] Factors that indicate that the worker is a covered employee include:[10]

a) the firm or the client has the right to control when, where, and how the worker performs the job;

b) the work does not require a high level of skill or expertise;

c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;

d) the work is performed on the premises of the firm or the client;

e) there is a continuing relationship between the worker and the firm or the client;

f) the firm or the client has the right to assign additional projects to the worker;

g) the firm or the client sets the hours of work and the duration of the job;

h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;

i) the worker has no role in hiring and paying assistants;

j) the work performed by the worker is part of the regular business of the firm or the client;

k) the firm or the client is itself in business;

l) the worker is not engaged in his or her own distinct occupation or business;

m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;

n) the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);

o) the firm or the client can discharge the worker; and

p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee."

2. Is a staffing firm worker who is assigned to a client an employee of the firm, its client, or both?

Once it is determined that a staffing firm worker is an "employee," the second question is who is the worker's employer. The staffing firm and/or its client will qualify as the worker's employer(s) if, under

the factors described in Question 1, one or both businesses have the right to exercise control over the worker's employment. As noted above, no one factor is decisive, and it is not necessary even to satisfy a majority of factors. The determination of who qualifies as an employer of the worker cannot be based on simply counting the number of factors. Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer. If either entity qualifies as the worker's employer, and if that entity has the statutory minimum number of employees (see Question6), then it can be held liable for unlawful discriminatory conduct against the worker. If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as "joint employers."[11]

a. Staffing Firm:

The relationship between a staffing firm and each of its workers generally qualifies as an employer-employee relationship because the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage,and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm. Furthermore,the intent of the parties typically is to establish an employer-employee relationship.[12] In limited circumstances, a staffing firm might not qualify as an employer of the workers that it assigns to a client. For example, in some circumstances, a client puts its employees on the staffing firm's payroll solely in order to transfer the responsibility of administering wages and insurance benefits. This is often referred to as employee leasing. If the firm does not have the right to exercise any control over these workers, it would not be considered their "employer."[13]

b. Client:

A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.[14]

Example 2: Under the facts of Example 1, above, the temporary employment agency and its client qualify as joint employers of the worker because both have the right to exercise control over the worker's employment.

Example 3: A staffing firm hires charging party (CP) and sends her to perform a long term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client's premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies,and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm. The firm pays her and bills the client for the time worked. It reviews her work based on reports by the client and has the right to terminate her if she is failing to perform the requested services. The staffing firm will replace her with another worker if her work is unacceptable to the client.

In these circumstances, despite the statement in the contract that she is an independent contractor, both the staffing firm and the client are joint employers of CP.[15]

Clients of contract firms and other types of staffing firms also qualify as employers of the workers assigned to them if the clients have sufficient control over the workers, under the standards set forth in Question 1, above.[16] For example, the client is an employer of the worker if it supplies the work

space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship. On the other hand, the client wouldn't qualify as an employer if the staffing firm furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make or change assignments, and to terminate the workers.

Example 4: A staffing firm provides janitorial services for its clients. It hires the workers and places them on each client's premises under the supervision of the contract firm's own managerial employees. The firm's manager sets the work schedules, assigns tasks to the janitors, provides the equipment they need to do the job, and supervises their work performance. The client has no role in controlling the details of the work, making assignments, or setting the hours or duration of the work. Nor does the client have authority to discharge the worker. In these circumstances, the staffing firm is the worker's exclusive employer; its client is not a joint employer.

Example 5: A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the misrepresents. Client A reserves the right to direct the staffing firm workers to perform particular tasks at particular times or in a specified manner, although it does not generally exercise that authority. Client A evaluates the quality of the workers' performance and regularly reports its findings to the firm. It can require the firm to remove the worker from the job assignment if it is dissatisfied. The firm and the Client A are joint employers.

3. Can a staffing firm or its client be liable for unlawfully discriminating against a staffing firm worker even if it does not qualify as the worker's employer?

An entity that has enough employees to qualify as an employer under the applicable EEO statute can beheld liable for discriminating against an individual who is not its employee. The anti-discrimination statutes not only prohibit an employer from discriminating against its own employees, but also prohibit an employer from interfering with an individual's employment opportunities with another employer.[17] Thus, a staffing firm that discriminates against its client's employee or a client that discriminates against a staffing firm's employee is liable for unlawfully interfering in the individual's employment opportunities.[18]

Example 6: A staffing firm assigned one of its employees to maintain and repair a client's computers. The firm supplied all the tools and direction for the repairs. The technician was on the client's premises. only sporadically over a three to four week period and worked independently while there. The client did not report to the firm about the number of hours worked or about the quality of the work. The client had no authority to make assignments or require work to be done at particular times. After a few visits, the client asked the contract firm to assign someone else, stating that it was not satisfied with the worker's computer repair skills. However, the worker believes that the true reason for the client's action was racial bias.

The client does not qualify as a joint employer of the worker because it had no ongoing relationship with the worker, did not pay the worker or firm based on the hours worked, and had no authority over hours,assignments, or other aspects of the means or manner by which the work was achieved. However, if the client's request to replace the worker was due to racial bias, and if the client had fifteen or more employees, it would be liable for interfering in the worker's employment opportunities

with the staffing firm.

Example 7: A company puts its employees on the payroll of a staffing firm solely in order to transfer the responsibility of administering wages and insurance benefits for the company's workers. The staffing firm administers a health insurance policy for its client's workers that does not cover Aids-related illness. Two workers file ADA charges against the staffing firm and the client. The staffing firm claims that it is not an employer of the workers and therefore falls outside ADA coverage.

The staffing firm does not qualify as a joint employer of the workers because it does not have the requisite degree of control—it did not hire the workers; establish their wage rates or hours; control the conditions of work; manage personnel disputes; or have the right to fire the workers. Nevertheless, the firm shares liability with its client for the discriminatory health insurance plan if it has fifteen or more employees of its own to fall under the coverage of the ADA.[19] This is because the firm's administration of the insurance plan interferes in the workers' access to employment opportunities or benefits.[20]

4. Do the same coverage principles apply when a staffing firm assigns a worker to a federal agency?

The principles regarding joint employer coverage are the same. Thus, a federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker, as discussed in Questions 1 and 2. If so, and if the agency discriminates against the individual, it is liable whether or not the individual is on the federal payroll.[21]

In contrast to private employers, a federal agency that does not qualify as a joint employer of the worker assigned to it cannot be found liable for discrimination under a "third party interference" theory. This is because Title VII, the ADEA, and Section 501 of the Rehabilitation Act only permit claims against the federal government by "employees or applicants for employment."[22]

5. Are workers participating in work-related activities in connection with welfare programs protected by the federal employment discrimination laws? If so, who is the employer of such a worker? What types of claims might arise?

a. Employee Status

Welfare recipients participating in work-related activities[23] are protected by the federal anti-discrimination statutes if they are "employees" within the meaning of the federal employment discrimination laws.[24] See Question 1. The simple fact of participation in one of these activities is not dispositive of the question of whether the federal employment discrimination laws apply. Rather, the same analysis applies which is used to determine whether any other worker is covered byte federal employment discrimination laws. Under the criteria that have been set out, welfare recipients would likely be considered employees inmost of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs.[25] On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered.[26]

b. Employer Status

While some workers participating in these programs will have a single employer, others may have joint employers. For example, a state or local welfare agency may function as a staffing firm and the "direct" employer may function as the client. In some cases, a state or local welfare agency may contract with a temporary employment agency to place the welfare recipients in job assignments. The determination of whether any or all of these entities are employers of the worker is based on the same criteria set forth in answer to Questions1 and 2 that apply to any other employment situation. The fact that an entity does not pay the worker a salary does not, by itself, defeat a finding of an employment relationship. Moreover, even if an entity is not the worker's employer, it can be found liable under the employment discrimination laws based on the interference theory explained in the answer to Question 3.

c. Types of Claims

Types of claims which may arise include, for example, harassment, discriminatory assignments, discriminatory termination, failure to provide reasonable accommodation to persons covered under the Americans with Disabilities Act, and retaliation.

6. Which workers are counted when determining whether a staffing firm or its client is covered under Title VII, the ADEA, or the ADA?

The staffing firm and the client each must count every worker with whom it has an employment relationship.[27] Although a worker assigned by a staffing firm to a client may not appear on the client's payroll, (s)he must be counted as an employee of both entities if they qualify as joint employers.[28] Questions 1 and 2, above, set forth the legal standards for determining whether a worker has an employment relationship with either the staffing firm or its client, or both.

The Supreme Court has made clear that a respondent must count each employee from the day that the employment relationship begins until the day that it ends, regardless of whether the employee is present at work or on leave on each working day during that period.[29] Thus, a client of a staffing firm must count each worker assigned to it from the first day of the job assignment until the last day. The staffing firm also must count the worker as its employee during every period in which the worker is sent on a job assignment.

Staffing firms are typically covered under the anti-discrimination statutes, because their permanent staff plus the workers that they send to clients generally exceeds the minimum statutory threshold. Clients may or may not be covered, depending on their size. In cases where questions are raised regarding coverage, the investigator should ask the respondent to name and provide records regarding every individual who performed work for it,including all individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. If the investigator has questions about the documents produced and cannot otherwise obtain the necessary information, he or she may consider deposing the respondent. The investigator should then determine which of the named individuals qualified as employees of the respondent rather than independent contractors,according to the standards set forth in Questions1 and 2, above.

Discriminatory Assignment Practices

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner.[30] It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner. The staffing firm's client is liable if it sets discriminatory criteria for the assignment of workers. The following question and answer explore these issues in detail.

7. If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, is the staffing firm liable? Is the client?

a. Staffing Firm

The staffing firm is liable for its discriminatory assignment decisions. Liability can be found on any of the following bases: 1) as an employer of the workers assigned to clients (for discriminatory job assignments); 2) as a third party interferer (for discriminatory interference in the workers' employment opportunities with the firm's client);and/or 3) as an employment agency for(discriminatory job referrals).[31]

The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense. Thus, a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).

b. Client

A client that rejects workers for discriminatory reasons is liable either as a joint employer or third party interferer if it has the requisite number of employees to be covered under the applicable antidiscrimination statute.

Example 8: A staffing firm that provides job placements for nurses receives a job order from an individual client for a white nurse to provide her with home-based nursing care. The firm agrees to refer only white nurses for the job. The firm is violating Title VII, both as an employment agency for its discriminatory referral practice and as an employer for the discriminatory job assignment. The client is not covered by Title VII because she does not have fifteen or more employees.

Example 9: A temporary employment agency receives a job order for temporary receptionist. The client requires that the individual assigned to it speak English fluently because a large part of the job entails communication with English-speaking persons who call the client or who come to the client's work place. The agency assigns an Asian American individual who speaks English fluently, but with an accent. The client insists that the agency replace her with someone who can speak unaccented English. The agency complies with that request and sends an individual who speaks English fluently with no accent.

The Asian American individual files a charge with the EEOC. The investigator determines that English fluency was necessary for the job. However, he further determines that CP's accent does not

interfere wither ability to communicate and that she has effectively performed similar jobs. The investigator properly concludes that both the client and the staffing firm reliable for terminating CP on the basis of her national origin.

Example 10: A staffing firm provides machine operators to its clients. One of its clients requires that all workers assigned to it pass a certain paper and pencil test. The firm administers the test to its available workers and refers only those who pass the test. An African American individual who is denied an assignment with the client files charges against both the staffing firm and its client, alleging that administration of the test results in the disproportionate exclusion of African Americans. An investigation shows that the test does have an adverse impact on African Americans and does not accurately measure the skills that are necessary for job performance. Therefore, both the staffing firm and its client are in violation of Title VII.

Discrimination at Work Site

A client of a staffing firm is obligated to treat the workers assigned to it in a nondiscriminatory manner. Where the client fails to fulfill this obligation, and the staffing firm knows or should know of the client's discrimination, the firm must take corrective action within its control.[32] The following questions and answers explore these issues in detail.

8. If a client discriminates against a worker assigned by a staffing firm, who is liable?

Client: If the client qualifies as an employer of the worker (see Questions 1 and 2), it is liable for discriminating against the worker on the same basis that it would be liable for discriminating against any of its other employees.

Even if the client does not qualify as an employer of the worker, it is liable for discriminating against that individual if the client's misconduct interferes with the worker's employment opportunities with the staffing firm, and if the client has the minimum number of employees to be covered under the applicable discrimination statute. See Question 3.

Staffing Firm: The firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.33

The adequacy of corrective measures taken by a staffing firm depends on the particular facts. Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm's commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be undertaken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay. The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm will be liable along with the client if a worker later assigned to that client is subjected to similar misconduct.[34]

Example 11: A temporary receptionist placed by a temporary employment agency is subjected to severe and pervasive unwelcome sexual comments and advances by her supervisor at the assigned work site. She complains to the agency, and the agency informs its client of the allegation. The client refuses to investigate the matter, and instead asks the agency to replace the worker with one who is not a "troublemaker." The agency tells the worker that it cannot force the client to take corrective action,finds the worker a different job assignment, and sends another worker to complete the original job assignment.

The client is liable as an employer of the worker for harassment and for retaliatory discharge.

The temporary employment agency also is liable for the harassment and retaliatory discharge because it knew of the misconduct and failed to undertake adequate corrective action. Informing the client of the harassment complaint was not sufficient—the agency should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign any other workers until the client undertook the necessary corrective and preventive measures. The agency unlawfully participated in its client's discriminatory misconduct when it acceded to the client's request to replace the worker with one who was not a "troublemaker." If the replacement worker is subjected to similar harassment, the agency and the client will be subject to additional liability.

Example 12: A staffing firm provides computer services for a company that has more than 15employees. The staffing firm assigns an individual to work on-site for that client. When the client discovers that the worker has AIDS, it tells the staffing firm to replace him because the client's employees fear infection. The staffing firm alerts the client that they are both prohibited from discriminating against the worker, and that such a discharge would violate the ADA. The client nevertheless continues to insist that the firm remove the worker from the work assignment and replace him with someone else. The staffing firm has no choice but to remove the worker. However, it declines to replace him with another worker to complete the assignment because to do so would constitute acquiescence in the discrimination. Furthermore,the firm offers the worker a different job assignment at the same rate of pay. The client is liable for the discriminatory discharge,either as an employer or third party interferer. The staffing firm is not liable because it took immediate and appropriate corrective action within its control.

9. If a staffing firm sends its employee on a job assignment with a federal agency and the individual is subjected to discrimination while on the assignment, is the federal agency liable? Is the staffing firm? What procedures should the individual follow in filing a complaint?

The federal agency is liable for discriminating against the worker if it qualifies as an employer of the worker. If the federal agency does not qualify as an employer of the staffing firm worker under the criteria in Questions 1 and 2, it will not be liable for discriminating against that worker under the statutes enforced by the EEOC. A federal agency is liable for employment discrimination under these statutes only where it has sufficient control to be deemed an employer of the worker. See Question 4.

The staffing firm is liable if it participated in the federal agency's discrimination or if it knew or should have known of the discrimination and failed to intervene, under the principles discussed in Question 8, above.

If the staffing firm worker seeks to pursue a complaint against the federal agency as his or her employer, (s)he should contact an EEO Counselor at the federal agency within 45 days of the date of the alleged discrimination. If the individual also seeks to pursue a claim against the staffing firm,(s)he should file a separate charge with an EEOC field office. In such circumstances, the EEOC investigator should alert the individual as to the different time frames and procedures in the federal and private sectors.[35] The investigator should also contact the EEO office of the federal agency once the individual files the federal sector complaint in order to coordinate the federal and private sector investigations.[36]

Discriminatory Wage Practices

A staffing firm may not discriminate in the payment of wages on the basis of race, sex, religion, national origin, age, or disability. Its clients share that obligation.

10. If a staffing firm assigns a male and female to a client to perform substantially equal work, and the female is paid a lower wage than the male, would the firm and/or the client be subject to Equal Pay Act or Title VII liability?

Under the EPA, men and women must receive equal pay for equal work.[37] The jobs need not be identical,but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, a sex-based wage disparity violates the EPA if the jobs are in the same establishment, require substantially equal skill, effort, and responsibility, are performed under similar working conditions, and if no statutory defense applies. Wage differences that are not based on sex, but on bona fide distinctions between temporary and permanent workers, can be justified under the EPA as based on a "factor other than sex."[38] Both the staffing firm and its client are liable for a violation of the Equal Pay Act if they both qualify as "employers" of the worker bringing the complaint.[39]

A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.[40] Furthermore, a sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination.41 Moreover, an entity with fifteen or more employees is liable under Title VII for wage discrimination even if it does not qualify as an employer of the worker. assigned to it, if the wage discrimination interferes in the worker's employment opportunities.

Example 13: A temporary employment agency assigned CP (female) to temporary job as a hospital aide. CP discovered that the agency had also assigned a male to a temporary job as an "orderly" at the same hospital at a higher wage. CP files charges against the agency and the hospital, alleging that her job and that of the male orderly were substantially equal, and that the wage disparity violated the Equal Pay Act and Title VII. CP's charge against the hospital also challenges a disparity between her wages and those of permanent male aides and orderlies at the hospital.

The investigator determines that the temporary employment agency and the hospital were joint employers of CP and that both entities had control over the rates of pay for the hospital aide and orderly jobs. The investigator also determines that the temporary aide and orderly jobs were substantially equal under EPA standards, and that no defense applies. Therefore, he finds that the agency and the

hospital are both liable under the EPA and Title VII on the claim that the temporary aide and orderly should have received the same wage. The investigator further determines that the wage differential between the temporary and permanent aide and orderly jobs was based on a factor other than sex, since the hospital paid all its temporary workers less than permanent workers filling the same jobs, regardless of sex. Therefore, "no cause" is found on this latter claim.

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Notes

1 June 18, 1997 News Release of the National Association of Temporary and Staffing Services.

2 Seasonal and temporary foreign employees performing work for companies in this country form another category of the contingent workforce. The Commission intends to address at a future date particular issues regarding coverage of these workers.

3 Bureau of Labor Statistics, U.S. Dept. of Labor, Report 900, Contingent and Alternative Employment Arrangements (August 1995).

4 For a discussion of wage data for contingent workers, see Steven Hipple and Jay Stewart, Earnings and benefits of workers in alternative work arrangements, Monthly Labor Review 46 (October 1996).

5 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87); Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87); Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix H (BNA) 605:0105 (9/4/87); and Policy Statement: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act, Compliance Manual(BNA) N:3935 (9/20/91).

The above-referenced policy documents set forth some general principles regarding coverage under the anti-discrimination statutes, and they remain in effect. The current guidance explains more specifically how the coverage principles apply to workers who are hired by staffing firms and placed in job assignments with the firms' clients.

6 For a detailed explanation of the various types of staffing service work arrangements, see Edward A. Lenz, Co-Employment - A Review of Customer Liability Issues in the Staffing Services Industry, 10 The Labor Lawyer195, 196-99 (1994).

7 See, infra, cases cited in notes 12, 14, and 15.

8 The coverage principles set forth here apply not only to workers who are hired by staffing firms and assigned to the firms' clients, but also to temporary, seasonal, part-time, and other contingent workers who are hired directly by employers.

9 Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 324 (1992)(quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968))(emphasis added).

10 The listed factors are drawn from Darden, 503 U.S. at 323-324 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752(1989)); Rev Ruling 87-41, 1987-1 Cum. Bull. 296 (cited in

Darden, 503U.S. at 325); and Restatement (Second) of Agency § 220(2) (1958) (cited in Darden, 503 U.S. at 325). The Court in Darden held that the "common law" test governs who qualifies as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). That test, as described by the Court, is indistinguishable from the "hybrid test" for determining an employment relationship adopted by the EEOC in the Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605,Appendix G (BNA) 605:0105 (9/4/87). Although the Supreme Court has not had occasion to address the standards that govern who is an "employee" under Title VII, the ADEA, and the ADA, the rationale in Darden should apply. This is because the ERISA definition of "employee" that the Court interpreted in Darden is identical to the definition of "employee" in Title VII, the ADEA, and the ADA.

Courts have stated that the definition of "employee" is broader under the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, than under the other EEO statutes. However, there is no significant functional difference between the tests. Under the FLSA, employees are those who, as a matter of economic reality, are dependent upon the business to which they render service. See 29 C.F.R. § 1620.8 (1996);Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235 (5th Cir.)(under FLSA's "economic realities" test, fruit and vegetable company qualified as joint employer of harvest workers supplied by crew leaders), reh'g denied, 472 F.2d 1405 (5th Cir.), cert. denied, 414 U.S. 819(1973). All three tests (common law, hybrid, and economic realities)consider similar factors and often result in the same conclusions as to "employee" status.

11 For additional guidance on criteria for determining whether two or more entities are joint employers of a charging party, see EEOC's Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87).

12 For cases holding that a staffing firm is an "employer" of the workers it sends on job assignments, see Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 508 (E.D. Va. 1992) (personnel firm that provided employees to clients pursuant to service contracts and the worker that it assigned to one of its clients "clearly had the type of direct employer-employee relationship that is typically the subject of Title VII lawsuits"), aff'd mem., 40 F.3d 1244 (4th Cir. 1994); Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344, 349 (D.C.N.Y. 1984)(worker paid by "Mature Temps" employment agency and assigned to Merrill Lynch for temporary job assignment was employee of both Mature Temps and Merrill Lynch during period of assignment), aff'd mem., 770 F.2d 157 (2dCir. 1985). Cf. NLRB v. Western Temporary Services, Inc., 821 F.2d 1258,1266-67 (7th Cir. 1987) (NLRB correctly determined that temporary employment service and its client were joint employers of temporary worker); Maynard v. Kenova Chemical Company, 626 F.2d 359, 362 (4th Cir.1980) (temporary employee injured while working on defendant's premises could not sue defendant in tort because he was employee of both defendant and temp agency, and workers' compensation provided sole remedy).

The Commission disagrees with the rulings of the District Court of Delaware in Williams v. Caruso, 966 F. Supp. 287 (D. Del. 1997), and Kellam v. Snelling Personnel Services, 866 F. Supp. 812 (D. Del. 1994),aff'd mem., 65 F.3d 162 (3d Cir. 1996). In Williams, the court ruled that a temporary employment agency was not a Title VII employer of a temporary worker whom it hired and placed in a job assignment. The court followed its earlier reasoning in Kellam, in which it declined to count the workers assigned by a temporary employment agency as its employees on the ground that the agency did not supervise the workers on a day-to-day basis. In the Commission's view, the court in both cases placed undue emphasis on daily supervision of job tasks and underestimated the significance of other factors indicating an employment relationship.

13 See, e.g., Astrowsky v. First Portland Mortgage Corp., 887 F. Supp. 332(D. Me. 1995) (holding that employee leasing firm was not a joint employer of workers that it leased back to original employer; firm only processed pay checks and made tax withholdings but did not exercise any control over employees; original employer remained exclusive employer of the workers for purposes of EEO coverage).

14 See Reynolds v. CSX Transportation, Inc., 115 F.3d 860 (11th Cir. 1997)(finding that temporary employment agency's client qualified as employer of worker assigned to it and upholding jury award for retaliation by client); King v. Booz-Allen & Hamilton, Inc., No. 83 Civ. 7420 (MJL), 1987WL 11546, n.3 (S.D.N.Y. May 21, 1987) (finding that plaintiff who was paid by temporary employment agency and assigned to work at Booz-Allen was an employee of Booz- Allen); Amarnare, 611 F. Supp. at 349 (finding that temporary employment agency's client qualified as joint employer of worker assigned to it).

15 See Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99, cited in Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318, 324 (1992) (concluding on above facts that the staffing firm was the individual's employer, button addressing the status of the client vis-a-vis the worker).

16 For examples of cases finding that a client of a staffing firm can qualify as a joint employer of the worker assigned to it, see Poff v. Prudential Insurance Co. of America, 882 F. Supp. 1534 (E.D. Pa. 1995)(where plaintiff was hired by computer services contractor and assigned to work on-site at insurance company, issue of fact existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff's work was accomplished to qualify as employer);Magnuson, 808 F. Supp. at 508-10 (where car company contracted with staffing firm for plaintiff's services and assigned her to work at its car dealership, genuine issue of fact was raised as to whether car company, dealership, and staffing firm all qualified as her joint employers);Guerra v. Tishman East Realty, 52 Fair Empl. Prac. Cas. (BNA) 286(S.D.N.Y. 1989) (security guard employed by management firm who worked in building owned by insurance company could seek to prove that insurance company exercised sufficient control over him to qualify as his "employer"); EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981)(building management company that contracted with cleaning company for services of building lobby attendant qualified as joint employer of lobby attendant; contractor carried lobby attendant on its payroll but management company supervised her day-to-day work).

For examples of cases finding that the client did not qualify as a joint employer of the contract worker because the client did not have sufficient control over the worker, see Rivas v. Federacion de Asociaciones Pecuarias, 929 F.2d 814 (1st Cir. 1991) (client of shipping services contractor was not a joint employer of workers who unloaded ships; although client set time for ship unloading, had some disciplinary authority over foremen, and directed order of unloading, contractor selected, scheduled, and supervised the workers and handled disciplinary matters); King v. Dalton, 895 F. Supp. 831 (E.D. Va. 1995) (Navy was not joint employer of worker assigned by contract firm to work on project due to insufficient direct supervisory control over the daily details of the plaintiff's work).

17 See 42 U.S.C. § 2000e-2(a) (Title VII), 29 U.S.C. § 623(a) (ADEA), and42 U.S.C. § 12112(a) (ADA), which do not limit their protections to a covered employer's own employees, but rather protect an "individual" from discrimination. Section 503 of the ADA, 42 U.S.C. § 12203(b),additionally makes it unlawful to "interfere with any individual in the exercise or enjoyment of ... any right granted or protected by this chapter." The EPA, 29 U.S.C. § 206, limits its protections to an employer's own employees, and therefore third party interference theory does not apply.

For cases allowing staffing firm workers to bring claims against the firms' clients as third party interferers, see King v. Chrysler Corp., 812F. Supp. 151 (E.D. Mo. 1993) (cashier employed by company

that operated cafeteria on automobile company's premises could sue automobile company for failing to take sufficient corrective action to remedy sexually hostile work environment; Title VII does not specify that employer committing an unlawful employment practice must employ the injured individual); Fairman v. Saks Fifth Avenue, 1988 U.S. Dist. LEXIS 13087(W.D. Mo. 1988) (plaintiff who was employed by cleaning contractor to perform cleaning duties at store and who was allegedly discharged due to her race could proceed with Title VII action against store; store claimed that it was not plaintiff's employer because it did not pay her wages, supervise her or terminate her; however, even if the store was not plaintiff's employer, it could be sued for improperly interfering with her employment opportunities with the cleaning contractor); Amarnare, 611 F.Supp. at 349 (temporary employee assigned by "Mature Temps" to work for Merrill Lynch could challenge discrimination by Merrill Lynch either on basis that Merrill Lynch was her joint employer or that Merrill Lynch interfered with her employment opportunities with Mature Temps).

18 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87).

19 While Title I of the ADA only applies to entities with fifteen or more employees, the Commission has not yet addressed the scope of the interference provision in Section 503, which applies to all titles of the ADA and does not contain a specific coverage limitation. See n.17.

20 See Carparts Distribution. Ctr. v. Automotive Wholesalers, 37 F.3d 12,17-18 (1st Cir. 1994) (trade association and its administering trust for health benefit plan provided by plaintiff's employer was sued under Title I for limiting coverage of AIDS; court held that defendants were covered under Title I if they functioned as plaintiff's employer with respect to his health care coverage or if they affected plaintiff's access to employment opportunities); Spirt v. Teachers Insurance and Annuity Ass'n,691 F.2d 1054, 1063 (2d Cir. 1982) (association that managed retirement plans for college and university employees could be found liable for using sex-based mortality tables to calculate benefits; although association was not plaintiff's "employer" in any commonly understood sense, the term "employer" under Title VII encompasses any party who significantly affects worker's access to employment opportunities), vacated and remanded sub nom Long Island University v. Spirt, 463 U.S. 1223 (1983), reinstated on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 883 (1984).

21 See Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985) (in determining whether individual is a federal employee for purposes of Title VII coverage, key issue is extent to which government exercises control over that individual). For guidance on procedures in handling joint federal sector/private sector complaints, see Question 9.

22 42 U.S.C. § 20003-16(a) (Title VII); 29 U.S.C. § 633(a) (ADEA); 29U.S.C. § 794a (Rehabilitation Act, incorporating remedies, procedures and rights set forth in 42 U.S.C. § 2000e-16). See King v. Dalton, 895 F.Supp. at 836 n.7 (plain terms of § 2000e-16 require a plaintiff to be an employee of the defendant agency); Spirides v. Reinhardt, 613 F.2d 826,829 (D.C. Cir. 1979) (§ 2000e-16 "cover[s] only those individuals in a direct employment relationship with a government employer").

23 A variety of work and work-related activities may be required as condition of receipt of welfare, food stamps, or other benefits. [* * *]

24 The Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997),requires each state that receives a grant from the Secretary of Labor as a "welfare-to-work state" to establish a procedure for handling complaints by participants in work activities who allege certain violations, including gender discrimination. The Act does not preempt application of Title VII, the ADEA, the ADA, or the EPA. See

Morton v. Mancari, 417,U.S. 535, 550 (1973). Therefore, welfare recipients who perform work activities and qualify as "employees" are covered under the anti-discrimination statutes enforced by the EEOC.

25 Title VII specifically makes it unlawful to discriminate in admission to or employment in any program established to provide apprenticeship or other training. 42 U.S.C. § 2000e- 2(d). The ADA and the ADEA also prohibit discrimination in job training and apprenticeship programs. 42U.S.C. § 12112(a); 29 C.F.R. § 1625.21.

26 The Commission notes that other federal statutes prohibit discrimination in federally-assisted education and training programs. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C.§ 2000d, et seq.; Title IX of the Education Amendments of 1972, 42 U.S.C.§ 1681, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.Complaints about discrimination in education or other non-employment programs should be referred to the Offices for Civil Rights in the federal agencies that fund such programs.

27 Title VII and the ADA apply to any employer who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The ADEA applies to any employer who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). Counting issues do not arise in EPA claims because that Act applies to any employer who has more than one employee engaged in commerce or in the production of goods for commerce,unless an exception applies. 29 C.F.R. § 1620.1 - 1620.7.

28 Cf. 29 C.F.R. § 825.106(d) (1996) (under the Family and Medical Leave Act, employees jointly employed by two employers must be counted by both employers, whether or not they are maintained on both employers' payrolls,in determining employer coverage and employee eligibility).

29 EEOC & Walters v. Metropolitan Educ. Enterprises, 117 S. Ct. 660(1997). For guidance on how to count employees when determining whether a respondent satisfies the jurisdictional prerequisite for coverage, see Enforcement Guidance on Equal Employment Opportunity Commission & Walters v. Metropolitan Educational Enterprises, 117 S. Ct. 660 (1997), Compliance Manual (BNA) N:2351 (5/2/97).

30 Staffing firms and their clients are subject to the same record preservation requirements as other employers that are covered by the anti-discrimination statutes. They therefore must preserve all personnel records that they have made relating to job assignments or any other aspect of a staffing firm worker's employment for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. Personnel records relevant to a discrimination charge or an action brought by the EEOC or the U.S. Attorney General must be preserved until final disposition of the charge or action. 29 C.F.R. §§ 1602.14, 1627.3(b). The Commission can pursue an enforcement action where the respondent fails to keep records pertaining to all its contingent and non-contingent employees and applicants for employment.

31 Section 701(c) of Title VII defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." For further guidance, see Policy Guidance: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated,and what remedies can be obtained for employment agency violations of the Act?, Compliance Manual (BNA) N:3935 (9/29/91).

32 The questions and answers in this section assume that the staffing firm is an "employer" of the

worker.

33 See EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(3)(1996) (an employer is liable for harassment of its employee by anon-employee if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action within its control).See also Caldwell v. Service Master Corp. and Norrell Temporary Services,966 F. Supp. 33 (D.D.C. 1997) (joint employer temporary agency is liable for discrimination against temporary worker by agency's client if agency knew or should have known of the discrimination and failed to take corrective measures within its control); Magnuson v. Peak Technical Servs., 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (where plaintiff was subjected to sexual harassment by her supervisor during a job assignment,three entities could be found liable: staffing firm that paid her salary and benefits, automobile company that contracted for her services, and retail car dealership to which she was assigned; staffing firm and automobile company were held to standard for harassment by non-employees, under which an entity is liable if it had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control); EEOC v. Sage Realty, 507 F. Supp. 599,612-613 (S.D.N.Y. 1981) (cleaning contractor and joint employer building management company found jointly liable for sex discrimination against lobby attendant on contractor's payroll where management company required attendant to wear revealing costume that subjected her to harassment by passersby, and where plaintiff was discharged for refusing to continue wearing outfit; court rejected contractor's argument that management company was exclusively liable because it had set the costume requirement;contractor knew of plaintiff's complaints of harassment and there was no evidence that it was powerless to remedy the situation); cf. Capitol EMI Music, Inc., 311 N.L.R.B. No. 103, 143 L.R.R.M. (BNA) 1331 (May 28, 1993)(in joint employer relationships in which one employer supplies employees to the other, National Labor Relations Board holds both joint employers liable for unlawful employee termination or other discriminatory discipline if the non- acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it).

34 Cf. Paroline v. Unisys Corp., 879 F.2d 100, 107 (4th Cir. 1989)(employer is liable where it anticipated or reasonably should have anticipated that plaintiff would be subjected to sexual harassment yet failed to take action reasonably calculated to prevent it; "[a]n employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"),vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990).

35 If the federal agency refuses to accept the complaint based on a belief that the staffing firm worker is not its employee, the worker can file an appeal with the Commission's Office of Federal Operations.

36 If the federal agency does not wish to coordinate the investigations,then the EEOC office should proceed independently. If the federal agency refuses to provide documents or testimony requested by the EEOC investigator, the Commission can issue a subpoena to compel production of the evidence.

37 The EPA applies to any employer that has more than one employee engaged in commerce or in the production of goods for commerce, unless a statutory exception applies. 29 U.S.C. § 203(s).

38 See Compliance Manual Section 708.5(3) (BNA) 708:0023. As that subsection explains, in determining whether a wage differential between temporary and permanent employees is based on a factor other than sex, the following issues should be considered: 1) whether the wage differential misapplied

uniformly to males and females; 2) whether the differential conforms with the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment.

39 See 29 C.F.R. § 1620.8 (1996) (two or more employers may be jointly or severally responsible for compliance with EPA requirements applicable to employment of a particular employee). For guidance on elements of an EPA claim, see Compliance Manual Sections 704 and 708 (BNA) 704:001 and708:001, et seq. Cf., 29 C.F.R. § 791.2 (1996) (regulations issued by Wage and Hour Division, Department of Labor, on Joint Employment Relationship under FLSA) (joint employers are individually and jointly responsible for compliance with FLSA, including overtime requirements).

The EPA, unlike Title VII, the ADA, and the ADEA, only permits claims by employees against their employers, not against third party interferers.

40 If the EEOC determines that the client had no involvement in or control over the wages paid to the worker, it may decline to pursue relief against the client.

41 For guidance on wage discrimination claims under Title VII, see Compliance Manual Section 633 (BNA) 633:001, et seq. Title VII prohibits wage discrimination on the basis of race, national origin, and religion,as well as sex.

[* * *]