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## OSHA Memorandum Announces Initiative to Increase Enforcement Activity with Respect to Temporary Workers

By Vincent T. Norwillo

Staffing firms and their client employers can expect increased scrutiny from inspectors with the Occupational Safety and Health and Administration ("OSHA"). On April 29, 2013, the Deputy Assistant Secretary of OSHA, Richard Fairfax, issued a memorandum to the Agency's Regional Administrators, entitled "[Protecting the Safety and Health of Temporary Workers.](#)" Citing recent reports of work-related fatalities involving contingent workers, Mr. Fairfax expressed the agency's concern about the consistency and adequacy of job site specific safety training provided to temporary workers. According to Mr. Fairfax, these safety training concerns rendered temporary workers vulnerable to workplace hazards and contributed to their work-related injuries.

The memorandum outlines new measures that combine enforcement, outreach, and training initiatives intended to ensure that contingent employees are provided work environments compliant with all applicable OSHA safety standards. The initiatives, announced through the memorandum and accompanying press release, direct field inspectors to assess whether staffing firms and the "host employers" who use temporary workers are complying with their responsibilities under the Occupational Safety and Health Act of 1970.

The memorandum instructs compliance officers to investigate potential temporary worker issues during their inspections. Specifically, the inspectors are directed to determine whether any employees at the

inspection site are furnished by a staffing firm. Then, with respect to any identified temporary employees, the inspectors are to assess the host employer's satisfaction of its obligation to provide a safe workplace by determining whether any temporary workers are exposed to potential hazards. The memorandum advises inspectors to look for "temporary workers [who] have not been trained" and who may be exposed to "serious workplace hazards due to lack of personal protective equipment when working with hazardous chemicals and lack of lockout/tagout protections, among others."

The memorandum also instructs compliance officers to examine temporary workers' knowledge about and use of personal protective equipment ("PPE") and other safety protocols. They are to collect documents and conduct employee interviews to determine whether temporary workers have received required safety training in a language and vocabulary they understand. In all cases, the inspectors are directed to document the name of the temporary workers' staffing-firm employer, the staffing firm's location, and the supervising structure under which the temporary workers are reporting - specifically focusing on the extent to which the temporary workers are being supervised on a day-to-day basis either by the host employer or other staffing firm personnel.

To evaluate the goal of reducing injuries to temporary workers, the agency also announced the addition of a new OSHA Information System ("OIS") code for temporary workers. OSHA created this new code to track when a person exposed to a workplace hazard is a temporary worker.

The memorandum suggests that the agency's temporary worker safety initiative will not focus solely upon staffing firms or even be restricted to those industries that traditionally employ a regular complement of temporary workers (e.g., construction, manufacturing, and health care service providers). Rather, it appears that any employer already subject to an OSHA inspection can expect additional questioning by compliance officers regarding the existence of temporary workers provided through a staffing firm.

Accordingly, the American Staffing Association ("ASA") has already begun working with OSHA as well as staffing firms and employers that use temporary workers to design and promote best practices ensuring that temporary workers are protected from job hazards. The ASA and staffing firm leaders recognize that the ability to provide a safe, productive, contingent workforce has been the key to the sustained growth of the staffing industry - since June 2009, the staffing and recruiting industry has created more jobs than any other single industry in America, adding more than 786,000 jobs to their payrolls, according to the U.S. Bureau of Labor Statistics.

In addition, all staffing firms, as well as host employers utilizing temporary workers, should take proactive measures. Federal OSHA inspectors, as well as inspectors in state-plan jurisdictions, will certainly be

monitoring contingent labor safety training, PPE, and other compliance issues with increased emphasis. Staffing firms and their host employer partners and employers should be auditing their staffing relationship to safeguard temporary worker safety and ensure that workers are aware of and properly protected from workplace hazards.

At a minimum, the respective allocation of training, PPE, record keeping, and other safety-related duties and responsibilities should be clearly articulated in the service agreements between staffing firms and their client companies. Critically, these contracts should also specifically address host employer responsibility for the day-to-day supervision of furnished workers. In doing so, the contract should distinguish between "specifying the output, product or result to be accomplished by the person's work" and actual direction and control over the "details, means, methods and processes by which the work is to be accomplished." As noted in the memorandum, and discussed in a recent Standard Interpretation, these aspects of the staffing relationship will be scrutinized by OSHA inspectors and will determine the responsible employer for training, record keeping, and other regulatory compliance obligations. (See, [OSHA Interpretation Letter, Clarification of OSHA safety requirements between a temporary staffing agency and its client\[1910.1200;1904.31\]](#)). Therefore, staffing agencies and their client employers should review their staffing services agreements with legal counsel to ensure that their workplace dynamics are consistent with their contractual intent for OSHA purposes.

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