



906 Managing a Contingent Workforce

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Faculty Biographies

Archangela M. DeSilva

Archangela M. DeSilva is associate general counsel with Duke Energy Corporation. Her responsibilities include all labor and employment law matters for Duke's natural gas operations and other Houston-based business units, including counseling management regarding discrimination complaints, collective bargaining negotiations, arbitrations, and employment-related litigation.

Prior to her employment with Duke Energy, Ms. DeSilva worked as in-house labor and employment counsel for Texaco Inc. and Standard Oil Production Company.

Ms. DeSilva has been actively involved in ACCA since she became a member 13 years ago. She is currently a member of ACCA's Board of Directors and the board's Policy Committee. Previous ACCA leadership positions she has held include chair of the Employment & Employee Benefits Committee of ACCA's Houston Chapter; member of the Board of Directors and president of the Houston Chapter; and chair of ACCA's Labor and Employment Law Committee. Ms. DeSilva is a member of the ABA's Section of Labor and Employment Law. She is also a member of the Labor and Employment Law Section of the State Bar of Texas.

In addition to her bar association activities, Ms. DeSilva is vice president, administration and a member of the Board of Directors of the Greater Houston Women's Foundation. She is a member of the Advisory Board of Texas Accountants and Lawyers for the Arts. In 1996, Ms. DeSilva's volunteer activities were recognized by her employer when she received a Volunteer Excellence Award from PanEnergy Corp.

Ms. DeSilva received a BS from Cornell University and is a graduate of Fordham University School of Law.

C. Kelley Evans

Kelley Evans is an associate counsel with the legal counsel department of Sutter Health, a nonprofit public benefit corporation that operates an integrated healthcare delivery system in Northern California (including 28 acute care hospitals).

Prior to joining Sutter Health, Mr. Evans was an attorney in private practice with Diepenbrock, Wulff, Plant & Hannegan in Sacramento, and Damrell, Nelson, Schrimp, Pallios & Ladine in Modesto, CA.

Mr. Evans is the president of ACCA's Sacramento Chapter and last year completed a two-year term as president of the Board of the Sacramento Court Appointed Special Advocate (CASA) Program, which sponsors volunteers to assist abused and neglected children in Juvenile Court. He represented the Oxford University 1st XV and the Oxfordshire County 1st XV in rugby, and currently coaches his local high school rugby team.

Mr. Evans earned a bachelor's and a master's degree with honors in classical languages, literature, history, and philosophy from Oxford University. He obtained his law degree from the University of

California at Davis, where he also received the BNA Law Student Award and the U.C. Davis Distinguished Scholar Award.

Jane F. Greenman

Jane F. Greenman is vice president and deputy general counsel, human resources at Honeywell International Inc. In this role, she leads a department of over 15 legal professionals responsible for labor and employment law, litigation and compliance, employee benefits and compensation and HR and benefits aspects of corporate transactions.

Ms. Greenman was previously a partner and chair of the employee benefits department in the New York office of Hughes Hubbard & Reed. Ms. Greenman has been on the faculties of New York University School of Law, Brooklyn Law School, and Hofstra Law School, teaching courses in employee benefits, pension rights, and legal writing.

She is a member of the Board of Directors of the ERISA Industry Committee and the American Benefits Council (formerly APPWP). She is chair of the Employee Benefits Committee of the Association of the Bar of the City of New York. She is also an active member of ACCA and ACCA's New Jersey Chapter and the ABA's Tax Section Employee Benefits Committee and Labor and Employment Committee. In 2000, she was elected to be a charter fellow of the American College of Employee Benefits Counsel. She is also a member of the NJ 300 and a board member of the Women's Fund of New Jersey.

She is a graduate of Cornell University (N.Y.S.S.I.L.R.) and New York University School of Law, where she received a JD and LLM in labor law.

Contingent Workforce Issues - Legal Pitfalls and Company Compliance

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Lots of Ground to Cover . . .

- What are Contingent Workers?
 - What are the pitfalls?
 - Business Costs
 - Legal Risks
 - A potential business approach?
 - Managed Program for Subcontract Workers
 - Contingent Worker Guideline
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Staffing Options

Types of Employees

Temporary Employee

Part-time Employee

Full-time Employee

Contingent Workforce

Contract Services

Subcontract Worker

Consultants and Professionals

Outsourcing

Incidental/Nonrecurring Services

Multiple Options for Flexibility

Temporary Employees and Part-Time Employees

- Work for a limited period of time or have a reduced schedule.
- May not be eligible for benefits
- Hired directly by the Company and are Company employees

Consider using employees before using contingent workers.

Four Primary Contingent Worker Categories

Contingent Workers

People working for the Company who are not Company employees

<u>CONTRACT SERVICES</u>	<u>SUBCONTRACT WORKERS</u>	<u>CONSULTANTS & PROFESSIONALS</u>	<u>OUTSOURCED SERVICES</u>
<ul style="list-style-type: none"> • On-site • Ongoing SOW • Non-core work • Co. does not perform the function 	<ul style="list-style-type: none"> • On-site • Limited assignment 	<ul style="list-style-type: none"> • On-site or Off premises • Specific SOW • Special expertise 	<ul style="list-style-type: none"> • Off premises • Specific SOW • Overflow resources • Non-core product/service
<p>Guards Cafeteria</p>	<p>LeaseCo. Managed Program + Secondary Suppliers</p>	<p>Actuaries Accountants Consultants Attorneys</p>	<p>Computer Telephone Systems</p>

Outsourcing*

“Outsourcing” may also refer to arrangements under which the Company contracts with a vendor to buy parts or products previously made at the Company, as well as to provide services. Requires consultant HR/Legal in advance regarding any outsourcing that may impact Company employees.

Business Impacts of “Misusing” Contingent Workers

- **Census Issues**--Inaccurate (sometimes unknown) census impedes management of resources and costs.
 - **Cost**--Need to leverage total Company spend to drive savings.
 - **Business Risk** -- Incomplete/missed background checks, drug screens, nondisclosure and right to inventions agreement, and work eligibility certifications (including export control restrictions).
 - **Unnecessary Legal Risk**--Balance resources and risks appropriately.
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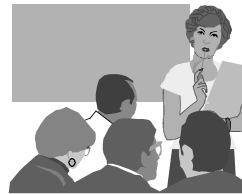
Beware the Drivers of Creative Staffing or “Leakers”

- **Headcount Reduction Efforts**
 - Subcontract Workers under a Managed Program should have HR approval and “count” in census
 - Leakers are retained without HR approval and may not count in census
 - **Time Limits**
 - Subcontract Workers under the Managed Program have enforced time limits
 - Workers hired outside the Managed Program (“Leakers”) often go undetected for long times
 - **Burden**
 - For most business locations, cost of Subcontract Workers is charged appropriately
 - No burden applied to Leakers
 - **Lack of knowledge/awareness/education**
 - Managers need to be made aware of the business and legal ramifications of using contingent workers incorrectly
 - Without a well-known policy and its enforcement, Company practices may drive the wrong behavior
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Legal Issues

Erroneous classification of employee/contingent worker status or unmanaged practices could result in “co-employment liabilities”

- **Benefit Issues** -- healthcare, pensions, Savings Plan, etc.
- **Taxes/Qualified Plan Status**
- **Employment Claims (Title VII, FMLA)**
- **Collective Bargaining Rights**



What's Happening in the Real World?

- Microsoft--Paid \$97 million to settle a class action lawsuit filed by subcontractors [“outsourced employees”] claiming benefits as employees.
- Time Warner--DOL action for “misclassifying” workers as independent contractors and denying them employee benefits.
- National Alliance for Fair Employment (NAFFE)--Nationwide interest group of contingent workers formed to address “inequities” in contingent workforce.
- Sturgis--NLRB decision making it easier for contingent workers to form or join unions, both at their employing agency and their work site.

Co-employment risks are real and can be significant.

Understanding the Legal Framework...

THE IRS's 20-FACTOR TEST EMPLOYEE vs. INDEPENDENT CONTRACTOR

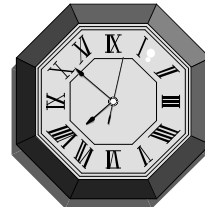
(subcontractor, outsourced employee, consultant)

- Who gives what instructions?
 - Who provides the training?
 - Are the worker's services integrated/allied with the business operations?
 - Are the services to be rendered personally?
 - Who hires, supervises and pays the worker?
-



THE IRS's 20-FACTOR TEST

- Duration of the relationship.
 - Are the hours of work set or loose?
 - Are full-time services required?
 - Is the work done on the Company's or the worker's premises?
 - Is the work to be done in a set sequence?
 - Are regular/written reports filed?
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THE IRS's 20-FACTOR TEST

- Is compensation to be paid hourly, weekly, or monthly?
 - Who pays the worker's travel expenses?
 - Who provides the tools and materials?
 - Does the worker invest in facilities used for the work?
 - Might the worker realize a profit or loss from the venture?
-



THE IRS's 20-FACTOR TEST

- Does the worker perform services for several businesses?
 - Are the worker's services available to the general public?
 - Is the worker subject to discharge at will?
 - Does the worker have the right to end the relationship at will?
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The *Microsoft* Issue



Under what circumstances should workers contracted to Microsoft directly or through a leasing agency be considered to be Microsoft employees for purposes of eligibility for Microsoft's employee stock purchase plan?



The *Microsoft* Court's Decision

The Court (and the IRS) found that Microsoft's subcontract workers (a.k.a. "freelancers") were common law employees of Microsoft for purposes of compensation, tax and benefits.



Employee?



Independent Contractor?

The *Microsoft* Court's "5-Factor Test" . . .

. . . and Potential Compliance Measures



1. Who recruited the workers? The court found that the employee signed with the agency at Microsoft's "command."

Potential Compliance Approach:

- LeaseCo. (directly or through a secondary supplier) recruits personnel against requisitions and decides whom to hire for Company work. (This may also be a significant economic benefit under a "Managed Program," as it outsources the recruiting function for such work.)
 - Company should not recruit or interview Subcontract Worker candidates or dictate the persons to be hired and assigned under a "Managed Program."
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The *Microsoft* Court's "5-Factor Test"

2. How much training did Microsoft give the workers? The court found that the workers received training from Microsoft before signing on with the agency, which never gave them training.

Potential Compliance Approach:

Limit the type of training Company will provide to Subcontract Workers assigned to its sites. (Avoids expending training resources on non-employee personnel on assignments of limited duration.) This limit would apply to all contingent workers (outsourced entities, consultants and contract services).

The *Microsoft* Court's "5-Factor Test"

3. How long were workers assigned to Microsoft? The court found that the assignment to Microsoft "appears to have been indefinite."

Potential Compliance Approach:

- Limit Subcontract Worker assignments. Restrict bringing former employees back as Subcontract Workers--in the *Microsoft* case, the court found that Microsoft's temporary workers were Microsoft employees during the time they were hired directly by Microsoft as "independent contractors," and continued to be Microsoft employees when they returned to Microsoft through a third-party staffing agency.
 - Limit outsourcing to off-site only and scope of work with deliverables
 - Limit contract services to scope of work and work Company no longer performs.
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The *Microsoft* Court's "5-Factor Test"

4. To what extent could Microsoft influence the relationship between the workers and the leasing agency? The court found that the only contact the workers had with the agency was to receive paychecks and W-2 forms.

Potential Compliance Approach:

- A Managed Program keeps LeaseCo. (or a secondary supplier) in control over hiring, firing and terms and conditions of employment for subcontract workers. For example, LeaseCo. sets the worker's actual wage rate. Company does not provide R&R to subcontract employees, but leaves that decision to LeaseCo. Company reserves the right to terminate a Subcontract Worker's assignment to it at any time, but does not decide whether that person remains employed by LeaseCo. for assignment elsewhere.
 - Contract services -- must have supervisor on site and work must be vendor managed with a clear scope of work
 - Outsourced services -- off site, supplier managed
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The *Microsoft* Court's "5-Factor Test"

5. Did Microsoft have the right to assign additional projects to the workers? The court found that the workers worked on various projects while assigned to Microsoft.

Potential Compliance Approach:

Subcontract Workers assigned to the Company for "general" assignments can be moved around (so long as the work remains within the scope described in the requisition), but have shorter time limits (e.g., 9-12 months). Subcontract Workers with special skills assigned to clearly defined projects may have longer assignments, but are limited to the specific project (e.g., 18-24 months).

LeaseCo. Responsibilities

- LeaseCo. is responsible to ensure that all pre-assignment requirements are completed
 - Conducts pre-assignment screening: drug test, criminal background, education verification, FAA/DOT, legally authorized to perform the work, export control (when marked on the requisition), non-disclosure and rights to invention agreement, etc.
 - If former Company employee or subcontract worker, seek HR and/or Legal approval to re-assign (internal reference check)
- LeaseCo. is responsible for assignment management
 - Manages time limits (remind managers that these are Company time limits)
 - Meets employer responsibilities: payroll, records, taxes, etc.

LeaseCo. is the "HR function" for subcontract workers

Have OFFICIA *Managers Guide for Subcontract Workers*

- Managers who have Subcontract Workers working for them, or wish to use them, must comply with Managers' Guide
 - "Soup to nuts" guide on requesting and using Subcontract Workers
 - Make readily available (including on-line)
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Consider Using a Subcontract Worker if:

- Workloads fluctuate or requirements are short term;
 - Subcontract Worker "bill rates" (the rate Company pays through LeaseCo.) are lower than internal pay rates;
 - The assignment requires skill that is not required on an ongoing basis; and/or
 - The work does not require significant training or certification.
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Consider Outsourcing When:

- more cost effective to outsource work than to do internally or through subcontractors
- project can be done off-site (don't need on-site resources or employees to assist with project)
- SOW with deliverables can be developed to be competitively bid

Outsourced employees should not be working side by side with Company employees doing same or similar work

Consider Contract Services When:

- The Company will no longer perform work in any capacity
- work will be performed on-site
- ongoing SOW with deliverables
- service level agreement can be obtained
- is there a Vendor who does this work?

Consider Using Consultant / Professional When:

- very unique or specialized service (e.g. legal, auditing, extremely technical (rarity))
 - Consultant / Professional has company / entity which provides unique service
 - SOW with deliverables
 - short duration or intermittent use
 - Appropriate approvals obtained
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Using Former Employees as Subcontract Workers or Consultants

- Is a terminated employee receiving retirement or severance benefits? How long has employee been out of his or her job?
 - If the former employee is still receiving severance benefits, consider temporary rehire as a regular employee for the assignment; severance payments would be suspended during the assignment and resume when the assignment is completed.
 - If the former employee is receiving severance benefits and the new position is not temporary, the person should be brought back as a regular employee and the severance benefits will cease.
 - If the former employee is receiving retirement benefits, then in no event should the employee should not be hired as a consultant or subcontractor to perform substantially the same job as the person was performing as an employee.
 - Is the former employee qualified for the work?
 - Was not the employee not terminated from the Company for performance or misconduct?
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Frequently Asked Questions

- **Why limit the duration of Subcontract Worker assignments?**

The "duration" of an assignment is a prime legal test used by the IRS and the courts to determine if an employment relationship exists. A "common-law employee" finding may result in a severe tax obligation, penalty, or retroactive eligibility for Company benefits.

- **What other "tests" or risk factors may inadvertently obligate the Company to taxes or retroactive benefits?**

The factors focus on control of the person's work direction and integration, hours, training, performance management and termination. If our managers are found to have this control, the worker may be deemed a Company employee.

- **What are the penalties to the Company if these "tests" are violated?**

The Company may become obligated for penalties, as well as back taxes under FICA or FUTA. Workers may assert they are eligible for retroactive inclusion in our pension, savings, medical or severance plans. Qualified Company plans could be jeopardized, or fail the non-discrimination tests for qualified savings and pension plans.

Keys to Successful Outsourcing and Contract Services

- **Prepare a business case with thorough cost-benefit analysis to assess feasibility**
 - **Draft a well-defined Statement of Work ("SOW")**
 - **Seek review/approvals up the chain of command**
 - **Work with Purchasing to identify process steps, including RFI, RFP (bids), SOW and Purchase Agreement**
 - **Engage Purchasing *before* discussions with potential vendors or suppliers**
 - **Work with HR/Labor attorneys early in any process that might impact current Company employees**
 - **Develop effective employee communications strategy**
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HYPOTHETICAL

Megamerger Corp. is a multinational company with over 50,000 employees at various locations in the United States and around the world. It is primarily engaged in the business of manufacturing and distributing consumer products. Its headquarters are in New York City. In addition to its own regular, full-time employees, Megamerger regularly utilizes the services of temporary employees, who are recruited by both Megamerger and third party agencies to work in temporary assignments of either definite or indefinite duration. These temporary employees are not on the Megamerger payroll, they are on the payroll of the third party agencies. They are not eligible to participate in any benefits offered by Megamerger to its regular employees; their pay rates, benefits and other pay practices are established by the third party agency which pays them.

Sally Short is a white female who works as a temporary clerk typist at Megamerger's headquarters. She has worked at Megamerger in a number of different assignments for the past 2-1/2 years. She gets her paycheck from Selectatemp, a third party agency which is not owned or operated by Megamerger. Selectatemp and Megamerger have a written contract which provides that all individuals provided by Selectatemp are not employees of Megamerger; rather, they are employees of Selectatemp. Sally's hourly rate of pay is set by Selectatemp. Although she does not have a supervisor at Selectatemp, she receives her assignments from a Selectatemp coordinator/recruiter who has an office at Megamerger and is responsible for making all Selectatemp temporary assignments at Megamerger.

About 6 weeks ago, Sally was assigned to Megamerger's marketing group as a temporary clerk typist. The marketing group is composed of a number of men who say they "like to work hard and play harder" and who are famous at Megamerger for their antics both at work and away from it. The assignment is indefinite, as Sally is filling in for a position which became vacant when the previous occupant left for a better position elsewhere. Megamerger is in the middle of a "rightsizing" project and there is a freeze on hiring for regular positions. Before she was offered this assignment, Sally had heard about the members of the marketing group but her Selectatemp counselor, Dorothy

Doright, had told her she thought someone with Sally's personality would be able to "jump right in and make a contribution". Before she accepted the position, Sally interviewed with Sam Salacious and Tom Thumb, the assistant manager and manager, respectively, of Megamerger's marketing group. Sally thought the interview went fine and that she would be able to get along with this group. The work was interesting and something different from what she had done before. Sam and Tom were pleased with Sally's background and knowledge of the company and thought this would be a good fit.

After Sally had been in the marketing group about 3 weeks, she went to see Dorothy and said that she was worried about working in the group. According to Sally, the hours being demanded of her were unreasonable because the men in the group would sit around socializing and gossiping most of the early part of the day and then would begin to think about doing their work in the early afternoon. When she complained about the unanticipated overtime, Tom reminded her that she was told during her interview that quite a bit of overtime was involved. When she asked if the work couldn't be more evenly distributed during the course of the work day, Tom explained that this was the nature of their work group. After some discussion with Dorothy, Sally agreed to stick with it and see if it worked out.

At about the same time, Tom began to think that Sally was not all the Selectatemp people had represented. He thought that the quality and quantity of her work was below what he would have expected for someone with her knowledge and experience with Megamerger. He began documenting her problems and discussed the situation generally with Henry Rogers of Megamerger's Human Resources Department. They agreed to monitor the situation and if there was no improvement, to discuss it with Dorothy.

Shortly thereafter, Sam who considers himself a "ladies man," began to invite Sally out with the marketing group for after-work excursions at local watering holes. Sally politely declined as she was not interested in observing the off-premises antics first hand. Unfortunately, Sam was not a guy who could take no for an answer and he persisted in inviting Sally to after-work gatherings. When she continued to decline, instead of stopping the invitations, he started inviting her to lunch. He was constantly at her desk and Sally was bothered by his behavior. When he finally stopped asking her

out, Sam started calling Sally the "ice queen". Sally considered complaining to Tom about it but decided that the group was small enough and that he must have already been aware of Sam's behavior.

The members of Megamerger's marketing group regularly interact with vendors and customer representatives. On a number of occasions, these people have made rude comments to Sally about her looks and appearance. One of these men even grabbed Sally's leg when she walked past him while he was talking with a couple of Megamerger's marketing employees in the office. Sally told him to "cut it out" but none of the Megamerger employees made any comments. To the best of Sally's knowledge, there was nothing done to stop the behavior. She has avoided any contact with this man since this incident.

Megamerger has a written policy concerning harassment in the workplace which defines harassment and provides that it will not be tolerated. This policy is distributed to all employees and is also posted along with other required employee notices on bulletin boards located on Megamerger's premises. Megamerger regularly conducts employee training sessions about employment-related issues, including training concerning harassment. These training sessions are attended only by Megamerger employees; no temporaries or contractors are permitted to attend. Both Tom and Sam have attended these sessions, along with the other members of the marketing group.

The written agreement between Megamerger and Selectatemp provides that each company shall conduct itself in accordance with the applicable law and shall comply with all applicable regulations. Selectatemp does not conduct any harassment training for any of its employees.

Earlier today, Sally made another visit to Dorothy. She complained about the constant invitations from Sam and the comments and touching behavior. Dorothy promised Sally that she would talk to Henry about these issues and, at the same time, would try to find Sally another position in Megamerger. During this discussion, Dorothy reminded Sally that it would be difficult to find another position at similar pay because the highest-paying non-executive positions at Megamerger are in the marketing group.

At about the same time, Tom decided that Sally was not working out and went to see Henry. Tom explained that Sally did not "fit in" with the rest of the group, that she

kept too much to herself and that she was not producing good quality work. After some discussion, it was decided that Henry would advise Dorothy that Sally was to be removed from the marketing position and that she could not be placed elsewhere. When he met with Henry, Tom did not mention that he knew some of the customers had been making remarks of a sexual nature to Sally and that one of them had touched her.

That evening, Henry advised Dorothy that Sally was to be removed from her position because her performance was not satisfactory to the marketing group. When Dorothy offered to find Sally another position in Megamerger, Henry told her that was not acceptable because Sally was being removed "for cause". Henry also advised Dorothy that she should contact Sally at home and give her this information because Sally's security access to Megamerger had been terminated and Sally would no longer be able to enter the building. Dorothy did not tell Henry about her conversation with Sally earlier in the day because "his mind was made up".

Megamerger has now realized that it has some issues with its current temporary assignment procedures. It has gotten several claims, one from the EEOC on behalf of Sally Short, alleging sexual harassment and another on behalf of Sam Snead, a temporary manufacturing coordinator, who has worked at the same Megamerger plant for 8 years. Sam, who is now 45 years old, recently was in a car accident and has incurred catastrophic hospital and doctor's bills (\$1.5 million so far). He claims that he should be covered under Megamerger's medical plans (which are self-insured) and that he is also entitled to short and long term disability benefits, as well as pension benefits when he reaches 65. Under Megamerger's pension plan, time on long-term disability up to age 65 counts as credited service for purposes of calculating pension benefits.

Most recently, one of Megamerger's manufacturing facilities was visited by the FBI inquiring about one of the temporary employees working in their chemicals manufacturing division. It turns out that this employee is not a U.S. citizen or legal resident and not legally eligible to work here. Moreover, there is a warrant out for his arrest in connection with a theft of guns and explosives from a gun store near his last known place of residence. The FBI advised the HR manager at that division that they believed this individual has used several other identities in recent years to evade law enforcement and immigration officials. Megamerger also realizes that it has 88 agencies

supplying temporary workers with no controls, background checks, common fee structures or time limits. Megamerger has been approached by LeaseCo with a proposal that it will manage all of Megamerger's temporary employee hiring. Megamerger's in-house employment counsel is working on an RFP as a result and needs to identify all the elements it is looking to a vendor to provide, as well as legal risks and corresponding protections it should insist on.