

**Commonwealth of Virginia
Department of Human Resource Management**

Contingent Workforce Risk Management Toolkit

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Purpose

This Toolkit provides guidelines for agency managers and supervisors for mitigating risks associated with the contingent workforce.

The information within this Toolkit is subject to change based on changes to federal and state law as well as agency, state, and federal regulations, policies, and procedures. The local Human Resources office serves as a general point of contact for answering questions on contingent workforce risk management.

Definitions

Agency Employee	Usually, a classified employee according to Department of Human Resource Management Policy 2.20. This is a person hired directly by the agency who is assigned to a position within the occupational families listed in the Commonwealth's Compensation Plan. These employees are covered by the provisions of the Virginia Personnel Act (Title 2.2, §§ 2.2-2900 et seq. of the Code of Virginia). Also includes individuals hired on a wage basis, or hourly employees, also called, "P-14" or "WE-14" employees, and salaried employees outside the classified service, such as "at-will" employees.
Agency Manager	Authorized agency individual who oversees a unit, section, division, or district, program or other recognized organizational unit. This individual is the end user of the contract.
Agency Supervisor	Authorized agency individual who directly supervises contingent workers such as those provided by a temporary staffing agency.
Co-employment (also known as 'joint employment')	An employment relationship in which a contingent worker is viewed as working as a common law employee for an agency as well as an employee of the contractor.
Common law employee	A person who performs services for an agency may be considered an employee if the agency can control what will be done and how it will be done. This is true even if the agency gives the employee freedom of action. What matters is that the agency has the right to control the details of how the services are performed. May be mitigated through well-articulated contracts.
Contingent Worker	Any person employed through an agency contract. The worker may provide services directly through the contract or be employed by the contractor or subcontractor. This term includes, but is not limited to, temporary ('temp') or leased workers and independent contractors. [Other forms of "contingent" employment may occur, but this publication discusses only employment through agency contracts.]
Contract Administrator	Individual responsible for ensuring that the agency's interests, as outlined in the provisions of the contract, are met.

Contract Officer (Buyer)	Authorized purchasing agent. Individual responsible for facilitating the solicitation process, and awarding the contract between the agency and the contractor. This individual has the authority to cancel, change/modify the contract.
Contractor	Private entity or person (a.k.a. 'independent contractor'), company, corporation, or other business that engages in a contractual relationship with the agency resulting from a process conducted under the Virginia Public Procurement Act (§2.2-4300 of the Code of Virginia) to obtain specific goods or services. Includes temporary service agencies and consulting companies. Such private contractors are not employees of an agency. They perform services under the provisions of the state's procurement policies. An agency does not withhold income taxes from its payments to contractors, nor does it provide employment benefits to the contractor. Specific terms and conditions will apply, depending on the contract.
Temporary Worker	Employment agencies may be used to secure temporary workers in cases where hiring hourly employees is not practicable. The requirement to obtain workers through those employment agencies may arise when a large number of employees are required or when there is a limited amount of time for recruitment. These workers are not state employees. They are hired and compensated by the temporary employment agency that assigned them to state agencies.
Third Party Interference	A category of liability applicable if an agency manager were to interfere with a contingent worker's employment opportunities with a contractor on a discriminatory basis.

Background

Agencies may engage in a variety of contracts with outside organizations, vendors, and consultants to fulfill organizational needs. One risk involved with a contingent workforce is co-employment. Co-employment occurs when a contingent worker is considered an agency employee for the purposes of employment law and/or taxation.

Another risk involved with a contingent workforce is third party interference. Third party interference occurs when an agency acts to limit a contingent worker's employment opportunities with a contractor on a basis that could be construed as discriminatory.

Managers and supervisors are not alone in managing this risk. Human Resources and Procurement Offices should partner with one another and management to mitigate risks associated with co-employment.

While co-employment is a relatively new concept, Federal case law provides examples that indicate the possible risks.

National Examples

- **Microsoft**

Between 1989 and 1990, Microsoft Corporation was audited by the Internal Revenue Service (IRS) for intentionally misclassifying independent contractors. The IRS found that the workers in question should have been considered employees for FICA, FUTA and other withholdings and payroll taxes. Microsoft admitted to wrongly classifying the workers and paid back taxes and overtime.

The story does not end there. The misclassified workers then sued Microsoft for back benefits including 401(k), discount stock purchase, and other benefits provided to Microsoft employees. The Ninth Circuit Court of Appeals upheld a decision in favor of the workers (*Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996)). In addition to a \$97 million settlement, the U.S. District Court for the Western District of Washington (Seattle) upheld the award of \$27 million in attorneys' fees in this class action case.

- **Baystate Alternative Staffing**

Another important milestone in the history of co-employment is a landmark decision in December, 2001 by the 1st Circuit Court of Appeals. In this decision, the court upheld the Labor Department's policy in the case of *Baystate Alternative Staffing v. Herman*. The Court ruled in favor of temporary employees seeking overtime pay under the Federal Fair Labor Standards Act (FLSA) after

the temporary agency that had placed them refused to pay them overtime pay for hours worked over the 40-hour week.

The Court rejected the agency's arguments that the workers were independent contractors of the staffing agency because they had signed contractor agreements stating that they were independent contractors. The court also ruled that the business client was the employer, not the staffing agency.

It is important to note that the Court held that ***temporary employment agencies are employers of the people they recruited and placed for work at client businesses and both the staffing agency and its business client were co-employers under the FLSA.***

This means that even though it was the responsibility of the contractor to pay its workers overtime, the client company would be held responsible and penalized under federal law since it was a co-employer.

Virginia Examples

- A state agency engaged a contractor to remove snow. The contractor employed only three workers and was not required to carry workers' compensation insurance. One of the contractor's employees was injured while removing snow for the state agency and named the agency as an employer on his workers' compensation claim form. The Workers' Compensation Commission found the state agency liable for the worker's injuries.
- A state agency hired an office worker through a temporary staffing firm for over a year. The state agency subsequently hired the employee directly. Three months later the employee sought leave to care for a family member under the Family and Medical Leave Act (FMLA). The agency initially denied the request on the grounds that the person had not been an agency employee for one year, but then learned that the period of employment through the temp firm was deemed co-employment under the FMLA and the agency was obligated to grant eligibility for the leave.

The above examples show the need for managers and supervisors to be aware of possible risks associated with managing contingent workers. Managers and supervisors need to be aware that some risks can be avoided, others can be mitigated, and still others must be accommodated.

Contracts

A well-articulated contract is the fundamental tool in mitigating the risks involved with contingent employment. All agency staff involved in formulating contracts involving contingent workers should be aware that a well-articulated contract clearly spells out the agency's role and the contractor's role in relationship to the contingent worker.

Agency managers should be aware of how the contract articulates employment law requirements so that they have a working knowledge of what is expected of the contractor as well as what is expected of the agency. Well-articulated contracts usually clarify the following employment related issues:

- issuing paychecks
- withholding taxes
- providing required insurance
- interviewing
- assigning and reassigning work
- setting pay rates and benefits
- complying with FLSA regulations
- recognizing accomplishments
- negotiating nature of work (duration of assignments, work environment conditions)
- maintaining supervisory responsibilities (how work is going, receiving complaints, disciplining)
- evaluating staff performance
- training and development
- providing workers' compensation insurance
- making accommodations under the ADAA
- returning workers following FMLA leave
- ensuring and documenting eligibility of contingent workers to work in the United States in accordance with immigration regulations.

Well articulated contracts will address responsibility for a variety of employment-related laws, including the Occupational Safety and Health Act (OSHA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Immigration Reform and Control Act (IRCA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act, the Americans with Disabilities Act, Amended (ADAA), and other laws treating issues such as discrimination, harassment, and drugs and violence in the workplace.

Family and Medical Leave Act (FMLA)

Under Family and Medical Leave Act (FMLA) regulations, contractors are generally considered "primary" employers to the contingent worker. The agency contracting for

the service is considered a “secondary” employer to the contingent worker. Primary employers are responsible for approving FMLA leave and giving FMLA notice to eligible contingent workers, and maintaining their health benefits as well as restoring the employee to his/her job following the leave under FMLA requirements.

As the “secondary employer”, the contracting agency is responsible for accepting the contingent worker back after the family medical leave (as long as the agency continues to use the services of a contingent worker provided by that contractor). This responsibility holds even if it means bumping another contingent worker who replaced the employee on FMLA leave.

The FMLA prohibits an agency from interfering with the contingent worker’s rights under the FMLA. If such interference does occur, the agency could be held liable for violating FMLA under federal regulations (29 CFR 825.106; 825.220.).

Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act (FLSA) sets standards for the basic minimum wage and overtime pay, affecting most private and public employment. It requires employers to pay covered employees (who are not otherwise exempt) at least the federal minimum wage. The FLSA also requires overtime payment at time and a half (1½) to covered employees who work more than 40 productive hours in a designated seven-calendar day workweek.

The FLSA also restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. The Act is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor.

The contractor is responsible for paying the contingent worker’s overtime wages as well as abiding by other FLSA requirements. Agency managers, however, should remain aware of when contingent workers are required to work overtime hours and should contact the agency’s contract administrator handling the contract if he or she becomes aware of situations where overtime has not been paid. Agency managers should also contact the agency’s contract administrator if he or she becomes aware of situations where children under 18 are being employed by contractors.

Employment Eligibility

Immigration laws require all employers to complete and maintain a properly executed I-9 form to show that the employer has verified that its employees are authorized to work in the United States. Proper documentation establishes both that the employee is authorized to work in the U.S. and that the employee who presents the employment authorization document is the person to whom it was issued.

For the contingent worker, this responsibility rests with the contractor. The contractor should supply to the contingent worker the official list of acceptable documents for establishing identity and work eligibility. A contractor should not continue to employ a contingent worker who cannot present documentation that meets these requirements.

Immigration Acts

The General Assembly has given explicit guidance that state agencies will require their contractors to conform to federal immigration law. The Code section is:

§ 2.2-4311.1. Compliance with federal, state, and local laws and federal immigration law; required contract provisions.

All public bodies shall provide in every written contract that the contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986. (2008, cc. 598, 702.)

An agency manager who doubts that contract employees are eligible to work in the U.S. should follow agency protocol for consulting the Office of the Attorney General for guidance.

Americans With Disabilities Act (ADA)

Notify the Contract Administrator and Human Resources if accommodations are requested by a contingent worker under the ADA (e.g. special equipment, exceptions to the work schedule for medical/disability reasons, interpreters).

Generally, the contractor should handle such requests. Agency Human Resources will wish to assess potential liabilities associated with the request. If agency property is involved in the potential accommodation and/or accessibility issues, the Contract Administrator will wish to determine if contract provisions cover this eventuality or if the situation needs to be addressed from a shared cost standpoint.

Discrimination and Harassment

An agency must treat the contingent worker assigned to it in a non-discriminatory manner. Executive Order Number 1 (2006) encourages equal opportunity in all facets of state government. This includes maintaining a workplace free of harassment or discrimination based on race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities. The Code of Virginia (§ 2.2-3901) also outlines unlawful discriminatory practices.

Federal laws that also prohibit employment discrimination include:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Equal Pay Act of 1963 (EPA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA)
- Civil Rights Act of 1991

The Federal Equal Employment Opportunity Commission (EEOC) administers regulations which incorporate and apply co-employment liability when contingent workers bring discrimination claims under the above laws. According to EEOC guidance, a contracting agency must hire and make job assignments in a non-discriminatory manner.

Agency Managers should also avoid becoming third-party interferers by taking actions which could be construed as discriminatory interference in the worker's employment opportunities with the contractor. Agency Managers should consult their Human Resource office to address responsibilities and roles related to contingent workers in relation to anti-discrimination law. Agency Managers should promptly report issues of discrimination to their Human Resource office.

Agency employees should also be encouraged to report any discriminatory incidents that they encounter with contingent workers to their supervisor. Agency employees may also contact their Human Resource office directly.

Best Practices

There are a number of best practices that can mitigate the day-to-day risks involved with contingent employment.

Generally, managers should establish an 'arms-length' relationship between the agency and contingent workers. For example, a contingent worker who applies for a state position should be treated the same as any other applicant. They should complete a state application on the Recruitment Management System (RMS) and go through the normal selection process, being interviewed, and completing a new I-9 form. The contingent worker, in other words, should not be treated as if he or she had been working for the agency all along. Other best practices involve Contingent Worker Selection, Training, Pay Raises and Recognition, as well as discontinuing the use of a contingent worker.

Recruitment and Selection

Agency managers should rely on the contractor to recruit contingent workers. Whenever possible, the period of time the contingent worker is needed should be specified to the worker at the time of selection. This should be communicated to the worker by the contractor.

Additionally, in order to avoid mistaking contingent workers for agency employees, they should not serve on interview panels for the selection of classified agency employees, nor should they directly supervise subordinate agency employees.

Training

Contingent workers provided by the contractor should have sufficient skill and experience to properly perform the work assigned to them. Workers engaged in special or skilled work should have sufficient experience in the work and in the operation of equipment required to perform effectively.

To avoid potential co-employment risk, the agency should only fund contingent worker training and development when the training relates to agency-specific systems, processes, or methods or is required by Federal guidelines or other laws.

Other training needed by a contingent worker, unless agreed upon within the framework of the contract, should be provided by the contractor.

Safety If a contingent worker who is supervised by an agency supervisor or manager is injured, the agency is required by OSHA to record that injury on the agency's OSHA 300 log, just as it would for an agency employee. Contractors, however, are still required to abide by all applicable workers' compensation laws; and contingent workers injured on the job should use established procedures for reporting accidents to their employer, the contractor.

Workplace Violence An agency should clearly inform contractors of its standards of zero tolerance for acts or threats of violence against employees while they are at work. Any threat or act of violence will be taken seriously, handled expeditiously, and dealt with appropriately. Agency Managers should coordinate with the contractor, appropriate agency staff, and state police, as appropriate, in handling such matters. When investigations are deemed necessary, the contractor should be allowed to conduct its own investigation into situations that involve only contingent workers and handle those situations as it deems appropriate.

Investigations When situations arise between contingent workers, and it is clear the situations do not involve the agency or there could be no perception that the agency is involved, the contractor should be allowed to conduct its own investigation. This applies to situations that involve only contingent workers.

When situations involving contingent workers arise where the contingent workers could be perceived as agency employees or the agency could be impacted by the actions of the workers, the agency should consult with its Office of the Inspector General (or equivalent) or the Office of the Attorney General to determine who should conduct the investigation.

In all situations where fraud, waste, or abuse are alleged or suspected, the matter should be referred to the agency's internal audit staff or to the State Internal Auditor in the Department of Accounts.

**Pay Raises
and
Recognition**

It is the responsibility of the contractor to determine its workers' pay rates and when their pay raises are appropriate. An agency may provide input, if requested by the contractor, or if a recommendation is part of the contract award process.

Managers and supervisors should avoid communicating directly with specific contingent workers regarding pay raises or recognition in order to minimize the risk of co-employment.

Contract employees/contingent workers do not qualify for monetary or non-monetary awards funded by the agency. Managers should instead find opportunities for recognizing contingent workers through the contractor. For example, when a contingent worker has done something that an agency manager believes deserves formal recognition, the agency manager should ask a representative from the contractor to present an appropriate recognition award. The final decision regarding the recognition award should be determined by the contractor rather than the agency.

**Performance
and Discipline**

The agency should hold the contractor responsible for failure to address performance problems that impact contract performance. However, ***contingent workers are employees of the contractor. The agency does not have responsibility for addressing performance deficiencies or for disciplining specific workers.*** If a situation does arise where a specific contingent worker is not performing the essential functions of the job or if there is some other behavioral problem, the agency manager or supervisor should address those specific concerns within the terms of the contract. Generally, contractors should determine whether particular employees should be re-assigned or take whatever steps they feel are necessary to address a problem reported by a client agency. Incidents that involve both contingent workers and agency employees should be reported to an agency HR officer.

Discontinuation

Unless there is an immediate safety concern, managers should rely on the contractor to communicate the end of a work assignment to a contingent worker. The agency manager should not ask that specific employees be discontinued without first consulting with Human Resources regarding the reasonableness of the request and to assure that there is a non-discriminatory reason for asking that a specific contingent worker be removed.

Once a contingent worker is no longer assigned to work performed for the agency, agency managers should not provide reference information regarding the individual's performance. Inquiries of that nature should be addressed to the contractor.

**References
and
Background
Checks**

Employment references, financial references, and other types of background checks on a contingent worker should not be addressed by the agency. Instead, reference and similar types of information should be provided by the contractor. [Of course, agencies that are the holders of background data, such as State Police for criminal records, Motor Vehicles for driving records, and Taxation for tax records, will necessarily be involved in the background checks of their contingent employees.]

Contracts should clearly articulate expectations for compliance with agency standards and requirements for reference/background checks. Contracts should require that the contractor certify that workers involved in agency assignments have successfully passed background/reference checks.

Risk Management

Agency managers and supervisors who have contingent workers in their units should have a basic understanding of the provisions of the contract in relation to their roles, and they should also know how to contact the contract administrator.

To address risk most effectively, it should be determined if the risk arises from the provisions of the contract, such as missing elements of a contract that do not clarify the roles and responsibilities of the parties relative to the contingent workers, or if the risk arises from management practices.

If a risk should arise as a result of the provisions of the contract, agency managers should work with procurement staff to determine if the provisions of the contract can be amended or otherwise altered so that the risk is sufficiently mitigated.

If a risk should arise as a result of management practices, agency managers should work through their chain of command, in consultation with Human Resources, to address those practices which may be contributing to risks associated with the contingent workforce.

In summary, it is advised that agency managers and supervisors:

- hold contractors accountable for managing their own workforce
- avoid illegally interfering with the contractor's workers employment opportunities and
- facilitate, to the extent that they can, the enforcement of the terms of the contract.

Those who have questions concerning contingent workforce risk management or the performance or behavior of a contingent worker should direct them to an agency Human Resource Officer. Those who have questions about letting and administering contracts for contingent workers should address them to an agency Procurement Officer.

Contingent Worker HR Management Quick Reference Guide

Do...	Avoid...
Know your facts when asking that a contingent worker be discontinued. Use Human Resources staff to assist in situations when a specific contingent worker is being asked not to return to an agency job site.	Asking the contractor to remove a contingent worker unless there is an immediate threat to safety.
Communicate circumstances where the contractor is not performing to the level outlined in the contract to the administrator handling the contract.	Disciplining a contingent worker directly or singling out an individual contingent worker for discipline unless the worker is involved in an incident that requires immediate agency management intervention.
Communicate with the contractor when you would like to recognize a contingent worker and allow the contractor to choose and deliver the recognition.	Using formal agency recognition programs for contingent workers.
Rely on the contractor to recruit and assign contingent workers to a project or facility.	Interviewing potential contingent workers.
Discontinue use of the contingent workers when their work is no longer needed.	Providing developmental opportunities to contingent workers, unless the training is agency-specific or safety-related and the agency directly supervises the contingent worker.
Refer all reference requests about a former contingent worker to the contractor.	Responding directly to inquiries for a reference on a former contingent worker.
Ensure that the period of time the contingent worker is needed is communicated to the worker by the contractor, if applicable.	Providing written explanations to the contingent workers for their discontinued use.
Ensure that you have read and understand the terms of the contract as it relates to the contingent workers that you oversee.	Assuming that all contracts are alike.
Work through the contractor's representative for matters that relate to the contractor's workers.	Taking unilateral personnel actions on behalf of the contractor.
Focus on job-related attributes when requesting a contingent worker from a temporary staffing agency.	Referring to attributes that are not related to the job, such as race, sex or other physical attributes.

Contingent Worker HR Management Frequently Asked Questions (FAQs)

1. Are inmates considered contingent workers?

No. They are wards of the Commonwealth of Virginia supervised under the Penal code. Federal employment laws do not apply.

2. I am required to report injuries on the OSHA 300 report. The contractor denies anyone has been hurt, but I have proof that is not the case. What is the best way to get this information from the contractor on one of his employees?

Verbally address the issue with the contractor first. If you do not get a reply the next step is a written request reaffirming the contract stipulation to follow contract guidelines. You also have the option of notifying the agency safety office. Generally **the contractor conforms upon receiving the written request** with documentation of the injury.

3. Is it my responsibility to get a signed statement from all contingent workers that they have received all the agency's policies?

Follow the procedures outlined in the contract. Generally, the requirement to inform contingent workers of workplace policies should be the responsibility of the contractor. It is recommended that contractors be required to submit their policies to the contract administrator to ensure that policies, such as those pertaining to EEO, are consistent with agency policy.

Contingent workers should not receive and sign agency forms to acknowledge that they are aware of agency policies. Instead, the contractor should supply and retain appropriate documents and be able to show that contingent workers are aware of agency policies.

4. A contract employee was injured and returned to work a few days later. He is asking other contract employees to pick up items. He tends to move slowly and to respond slowly to danger signals. I asked the contractor if the employee was cleared to return to work by a physician. He told me to mind my own business. This employee is endangering himself and others. What should I do?

Notify the contractor of the danger. Under circumstances where there is a clear, imminent safety concern, agency managers may notify the contract administrator and

contractor that they will have to shut down the work if the injured worker remains on the job and presents a danger.

5. There is a rumor going around that the contractor is using undocumented workers. One of my employees is fluent in their native language and validates that they are illegal. What are my options?

Work through the contract administrator to remind the contractor of obligations under Federal guidelines. Document that the contact has occurred and the resulting actions. If the situation continues, follow agency procedures for consulting the Office of the Attorney General.

6. I am an agency manager. I observe that two temporary service clerical workers routinely work more than 40 hours weekly. One of them applies for a job and I interview him. He tells me he wants to work for the agency because it pays overtime. He tells me he is required to work 50 hours a week for a flat salary and doesn't receive overtime pay. My HR Office just conducted a class and explained the Fair Labor Standards Act (FLSA). I know the contractor is breaking the law. What should I do?

Work through the contract administrator to remind the contractor of their obligations under the FLSA. Document that the contact occurred and its results. If the situation appears to continue, consult Human Resources.

7. An agency Manager wants to know if a wage employee who has reached the 1500 hour limit can work with a contractor for a few months until her wage anniversary date resets her accumulated hours to zero for the next cycle.

Situations of this type should be evaluated by the agency Manager, in consultation with Human Resources, on a case by case basis. In order to fulfill the purpose of the 1500 hour rule, the wage employee should not be brought back to work for the agency as a contingent worker in the same capacity (with the same duties) that she held as a wage worker. The purpose of the 1500 hour rule is to preserve the employee's status as a part-time or partial year employee.

9. Can an agency employee leave and come back to work for the agency as a contingent worker?

Generally, yes. However, state retirees should contact the Virginia Retirement System (VRS) to ensure that their eligibility for retirement benefits will continue after returning to work with a state agency as a contingent employee.

10. Can an agency employee work a second job as a contingent worker assigned to the agency?

This situation should be handled using procedures contained in the agency's policy on outside employment. The risk for the agency is the possible occurrence of overtime costs.