

Understanding the New DOL IC & Gig Economy Guidance

October 18, 2022

Littler[®]

Compliance **HR**

Today's Webinar Host

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Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:

Deliver expert guidance in a fraction of time and cost as traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



Navigator Onboarding

Assemble and produce legally compliant onboarding documents

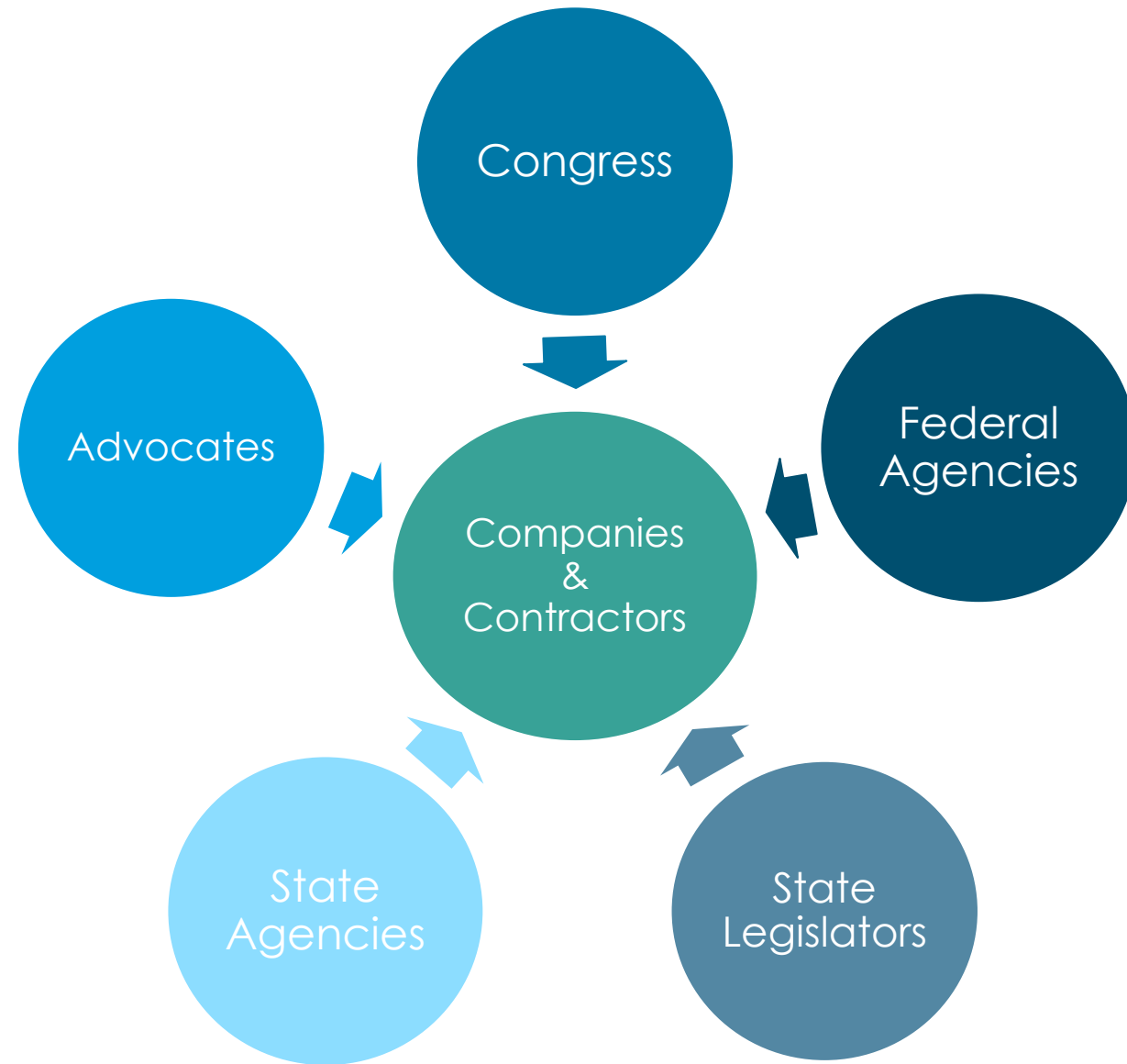


Navigator Leave

Reduce the risk and administrative burden of leave management

Pressure From All Sides

Congress, state legislators, federal agencies, state agencies, unions, plaintiffs' attorneys and other employee advocates – all remain focused on **regulating independent contracting**





Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of **1,900 reported court decisions** and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers

The image displays two overlapping screenshots of the Navigator Independent Contractor tool. The background screenshot is titled "RISK BY JURISDICTION" and provides a risk assessment for Nicole Smith LLC. It compares Federal and Indiana laws, using a color-coded scale from green (low risk) to red (high risk). The Federal result is "moderately likely" (yellow-orange), while the Indiana result is "highly likely" (yellow). The foreground screenshot shows the "Your Questionnaire" interface, which includes instructions and a section for "Agreement Details" with dropdown menus for selecting the correct legal classification.

RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

Federal

Under the facts provided, it is **moderately likely** that Nicole Smith LLC will be found to be an employee.

Indiana

Under the facts provided, it is **highly likely** that Nicole Smith LLC will be found to be an employee.

You have indicated that Nicole Smith LLC will be working in Indiana. At least one factor is "ABC" or similar test, rather than a multi-factor balancing test. Under a tri-factor test, the result would be "moderately likely".

Your Questionnaire

Please complete the questionnaire below as requested by Joe Panza. This questionnaire relates to Abc Inc.'s relationship with Nicole Smith.

Your answers are saved automatically as you proceed. You can return to your questionnaire later by using the button on your dashboard.

Agreement Details

Is Nicole Smith LLC required to personally perform the work?

No, Nicole Smith LLC can hire employees or subcontractors

What applies to Nicole Smith LLC's employees or subcontractors?

Select all that apply

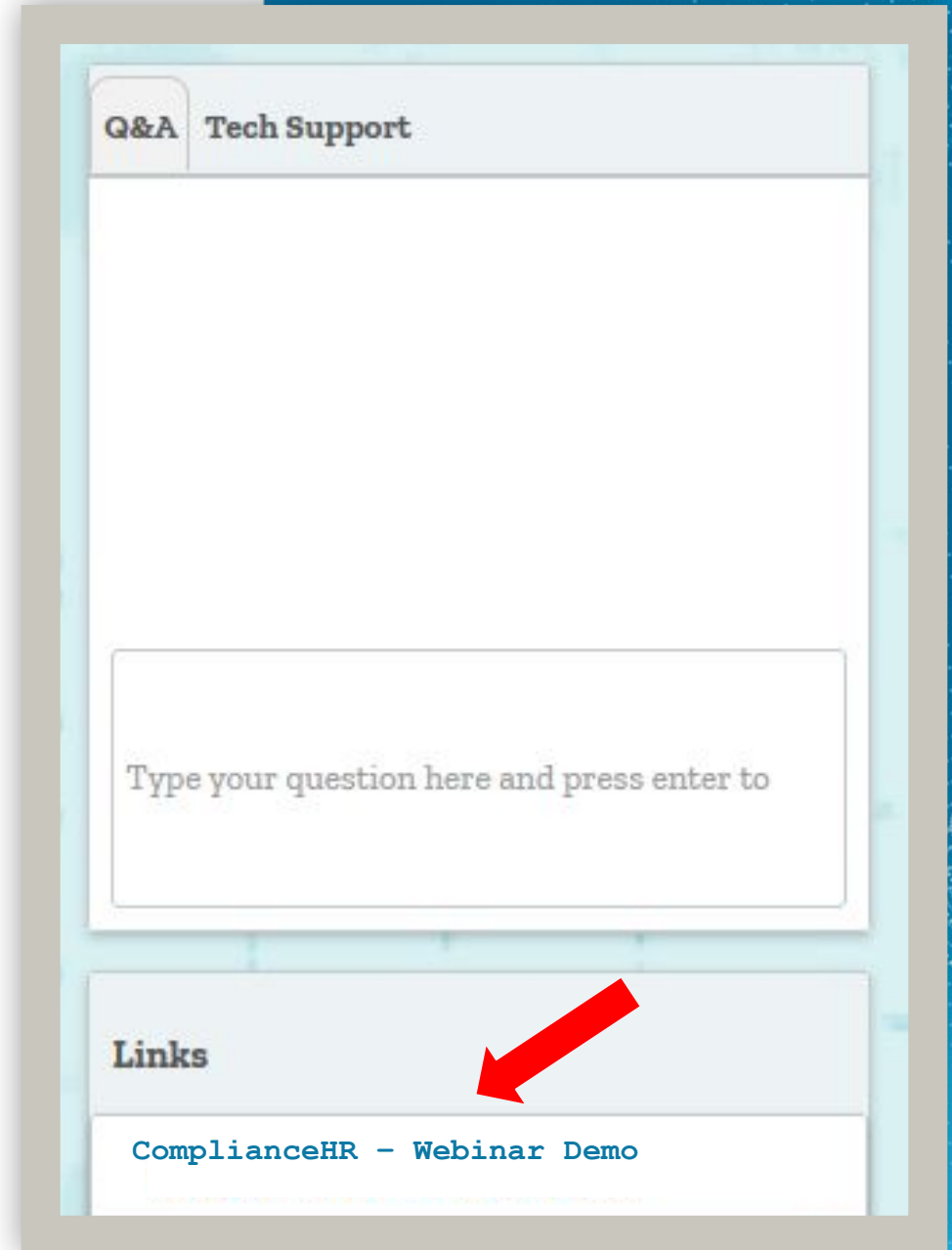
None of the Above

Will Abc Inc. provide Nicole Smith LLC, it's employees or it's subcontractor's employees

Register for a Navigator Suite Demonstration

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



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Shareholder



Agenda

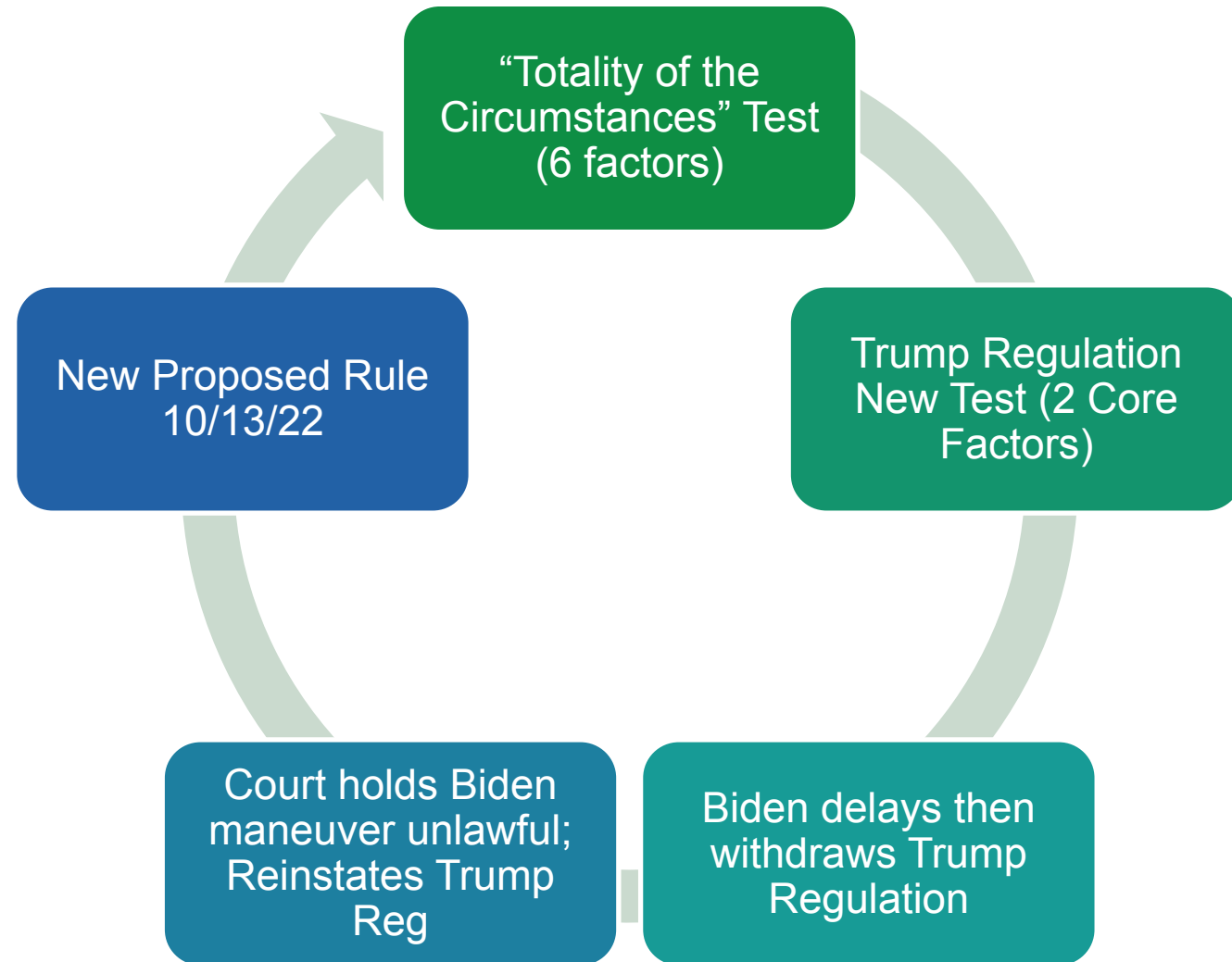
- **New DOL Guidance**
- **The Big Picture:**
 - The U.S. Labor Shortage
 - Types of Contingent Workers
 - Common Misclassification and Joint Employment Claims
 - Risk Mitigation Strategies



New DOL Guidance

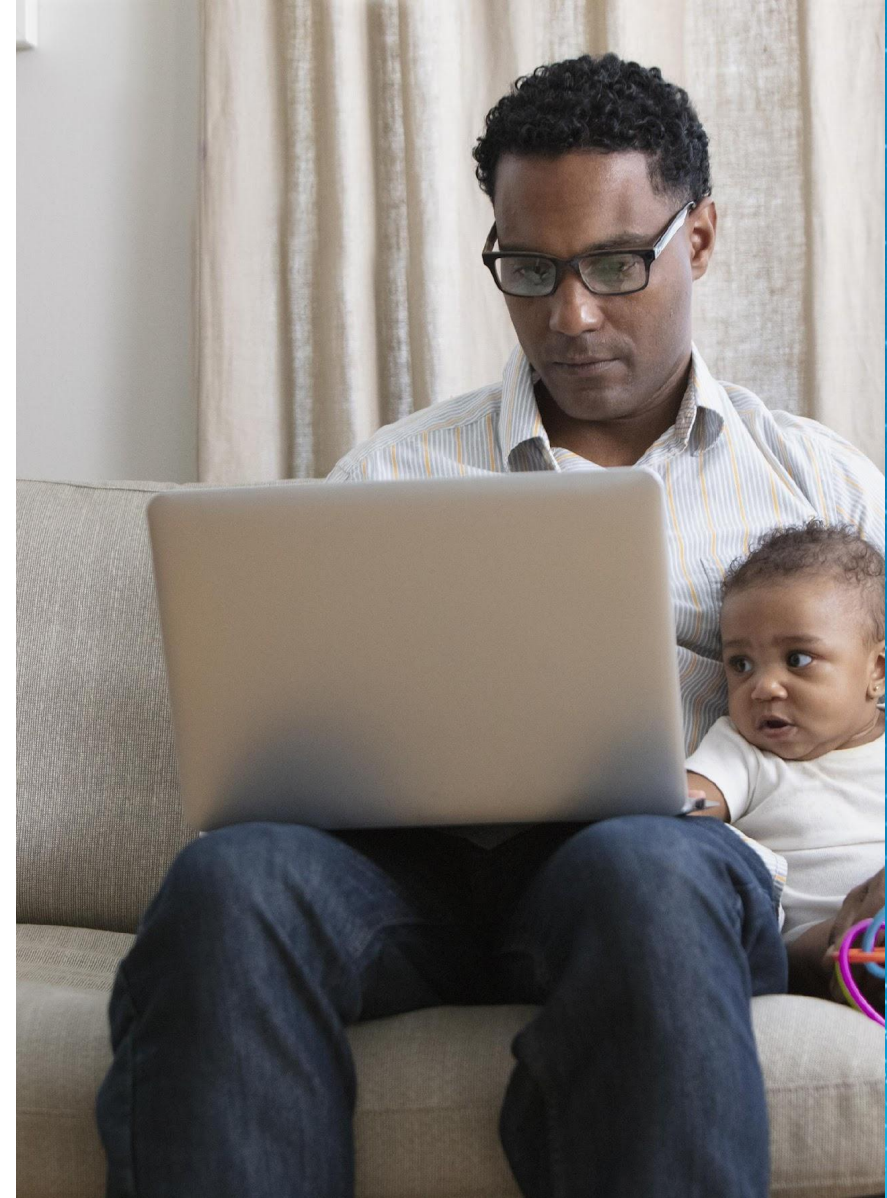


How Did We Get Here?



Proposed Rule

- **Broad definition of employee:**
“suffers, permits, or otherwise employs to work.”
- **“economically dependent** on an employer for work.”
- **“in business for themselves.”**



Proposed Rule

10/13/22: DOL issues Proposed Rule

- Return to “Totality of the Circumstances”
6-Factor Economic Realities Test

45-day comment period ends 11/28/22

- Littler WPI actively working on comments

Proposed Rule

Opportunity
for profit or
loss

Investment

Permanence

Control

Integral to
business

Skill

Factor 1: Opportunity for profit or loss depending on managerial skill.

Whether the worker exercises managerial skill that affects the workers' economic success or failure.

- Negotiate pay;
- Accepts or declines jobs;
- Determines order and time in which jobs performed;
- Engages in marketing, advertising, and other efforts to secure work;
- Makes decisions to hire others, purchase materials and equipment, and rent space.

Factor 2: Investment by the worker and the employer.

Whether a worker's investment is “capital or entrepreneurial in nature.”

- Investment should be considered on a relative basis with the employer's investment.

Factor 3: Degree of permanence of the work relationship.

- Employee: indefinite or continuous
- IC: definite in duration, non-exclusive, project-based, or sporadic.

Factor 4: Nature and degree of control.

- Includes actual and reserved control
- Control over performance and pay/pricing
- Scheduling
- Supervision and discipline
 - “whether the employer uses technological means of supervision (such as by means of a device or electronically)”
- Limiting ability to work for others
- Marketing services or products provided by worker
- “Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control.”

Factor 5: Whether work performed is an “integral” part of the employer’s business.

- Similar to core business factor seen in ABC test.
- Not focused on whether individual is integral, but on whether the function they perform is integral.
- “Critical, necessary, or central to the employer’s principal business.”

Factor 6: Skill and initiative.

- Specialized skill
- Use of skill in business-like initiative
- Whether worker needs training from employer

Proposed Rule



A modern office interior with a large glass wall and a round table with chairs. The office is bright and airy, with a high ceiling and large windows. The floor is made of light-colored wood. The glass wall reflects the office interior and the sky outside. The text "The Big Picture" is overlaid on the image in a large, white, sans-serif font.

The Big Picture

The Big Picture

The background is a solid blue gradient. Overlaid on this are several sets of white dotted lines that form a series of concentric, overlapping arcs or waves. These lines originate from the bottom left and curve upwards and to the right, creating a sense of motion and depth. The density of the dots is higher in some areas, making the lines more prominent.

The U.S. Labor Shortage



Management attempting
to retain staff



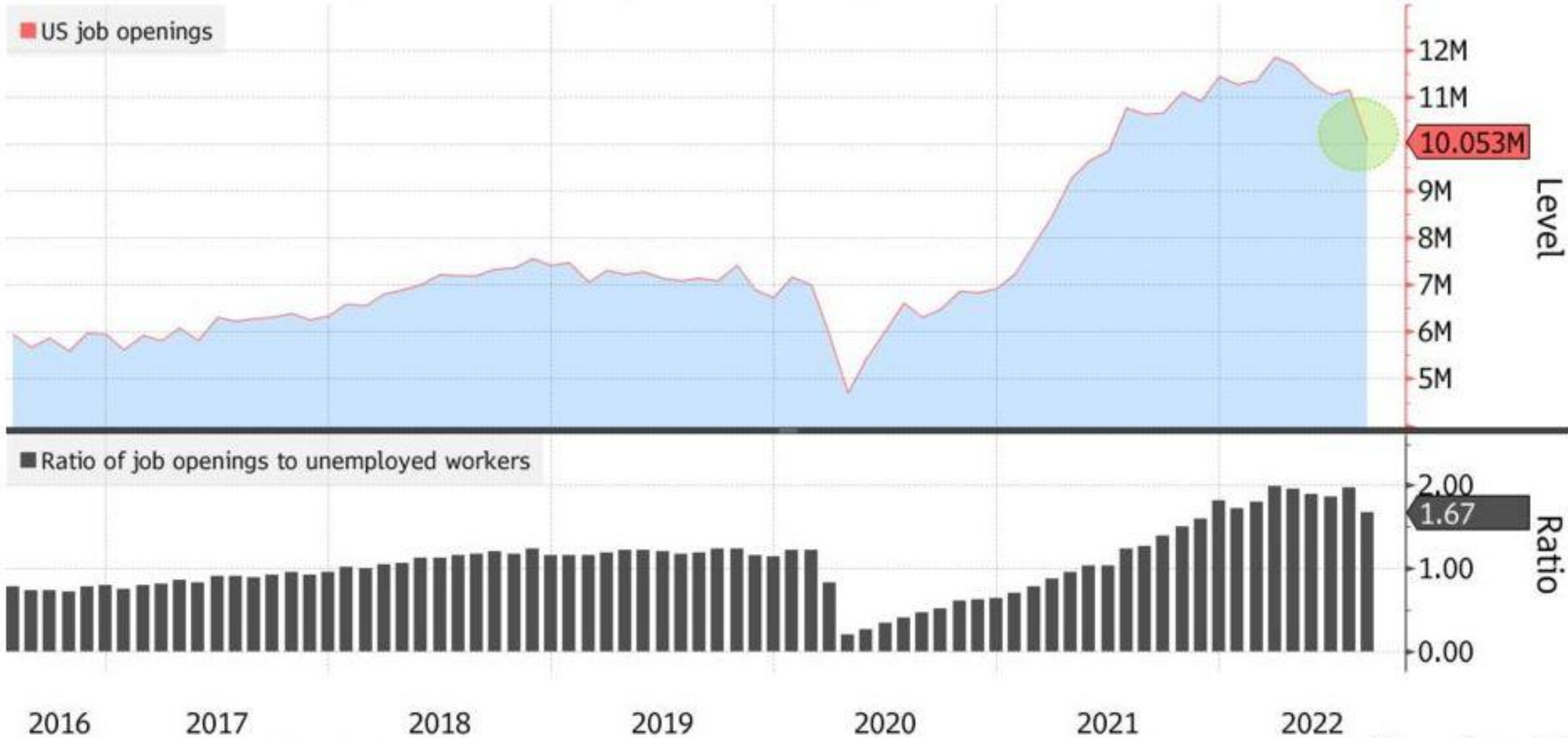
The Age of Disruption

- Worker Dislocation
- Great Resignation
- Supply Chain Disruption
- Soaring Inflation
- Rapidly changing, unpredictable work environment
- Seismic shift in how employers operate
- Digital transformation accelerated
- Evolving workplace policies



Job Openings Drop

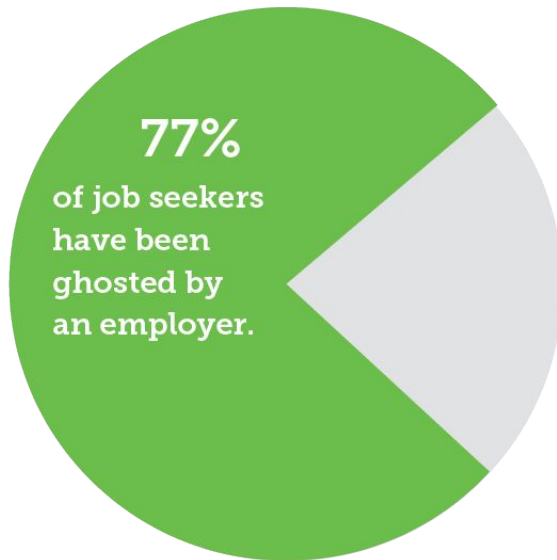
US vacancies fell by more than expected in August to lowest since June 2021



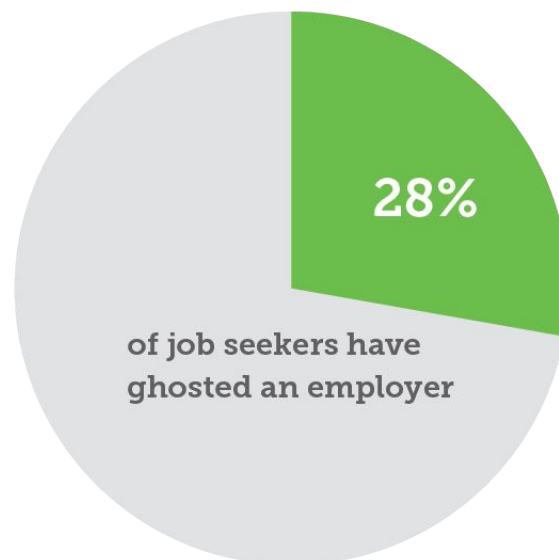
Source: Bureau of Labor Statistics

The Ghosting Trend

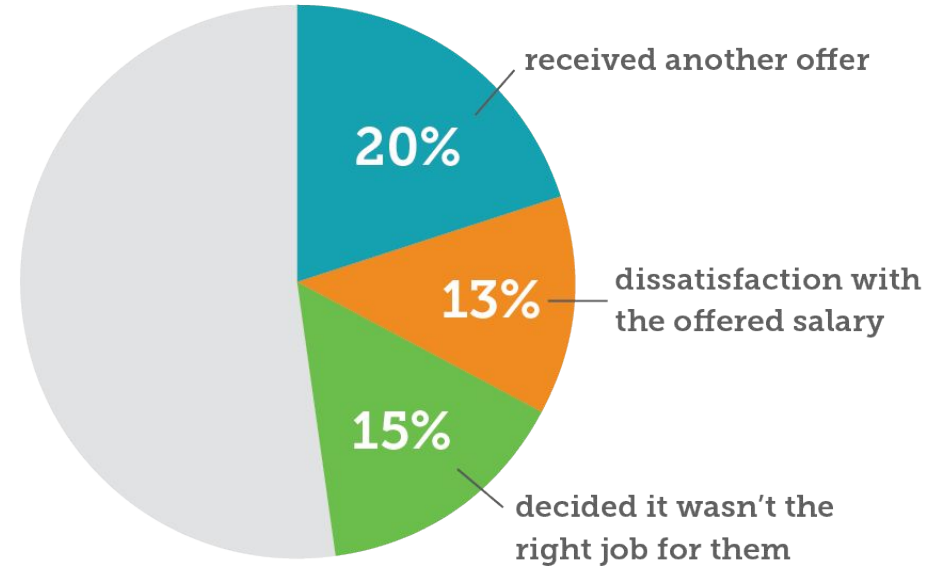
Ghosted by Employer



Ghosted by Job Seeker



Reason for Ghosting



More professionals are considering freelance work in the future: 56% of non-freelancers say they are likely to freelance in the days ahead.



Edelman Intelligence, Freelancing in America: 2021

*“They’re looking at these platforms not really as a labor replacement but as a way to **scale up and down** that otherwise in the current condition would be very difficult.”*

*“The scheduling flexibility helps as well in terms of **navigating labor availability** when and where you need it....”*

*“[T]he **labor force shrunk** . . . The demand that we’re seeing for outsourced work, meaning gig work, is **easily 10 times** what it was pre-Covid across household-name companies.”*

“Inside any major retailer today, meaning food, drug, mass retailer or home centers, there is gig work being executed fairly continually.”

*“Companies are a lot more **flexible** than they used to be”*

Types of Contingent Workers



Common Types of Contingent Workers and Related Services

- **Staffing Firm:** Staffing Firm typically W2s workers
- **Independent Contractor/Freelancer:** 1099
- **Employer of Record (EOR):** you source and EOR payrolls
- **Professional Employer Organization (PEO):** put all of your workforce on PEO payroll
- **Master Service Provider (MSP):** manages your staffing and IC providers

Common Misclassification and Joint Employment Claims



Common Sources of Liability



Workers' Comp & Unemployment

- Defense of “that’s not my employee” may trigger audit



Wage & Hour

- FLSA
- State Labor Codes – meal and rest breaks, expenses



Other Federal

- IRS – unpaid taxes
- EEOC
- OSHA
- NLRA



Benefits

- ACA
- 401(k)
- Stock purchase plans
- Pension plans

Example State Penalties

- **CA:** meal and rest, daily OT, paystubs, sick leave; fines up to \$25,000.
- **NY:** Freelance Isn't Free Act; fines up to \$50,000; six year SOL W&H; paid sick leave fines up to \$15,000; meal & rest breaks depend on time of shifts and carry penalties up to \$3,000 per violation per employee.
- **WA:** IC agreements must include “right to report” language or face fine of \$12,000 per IC.
- **Generally**, penalties for unpaid tax liability can exceed 40% of pay.



Mitigating Risk



Mitigating Risk



Step 1: Get the classification right

- Contingent Worker Business Review or Audit
- Contingent Worker Policy and Best Practices
- Eliminate high risk engagements

Step 2: Stack protections to reduce damages

- Standardize Contracts
- W-2 responsibilities
- Indemnity
- Insurance
- Worker Acknowledgments w/ arbitration agreement & class action waiver

Red Flags re IC Classification

1. Control manner and means of completing the work
2. Scheduling
3. Exclusivity or first and only client
4. Duration
5. Engaged as both an IC and EE – 1099 and W2 in same year
6. IC doing same work as an employee
7. Training
8. Equipment
9. Reimbursement
10. No business formalities such as LLC, taxpayer ID, insurance, business license



Staffing Firm Agreements

- Staffing Firm must W-2 the workers
- HR functions
- Notify and cooperate
- Indemnification
- Insurance
- IP ownership (beware “work for hire” clause)
- Worker Acknowledgment
- Arbitration with Class Action Waiver



Contingent Worker Policies

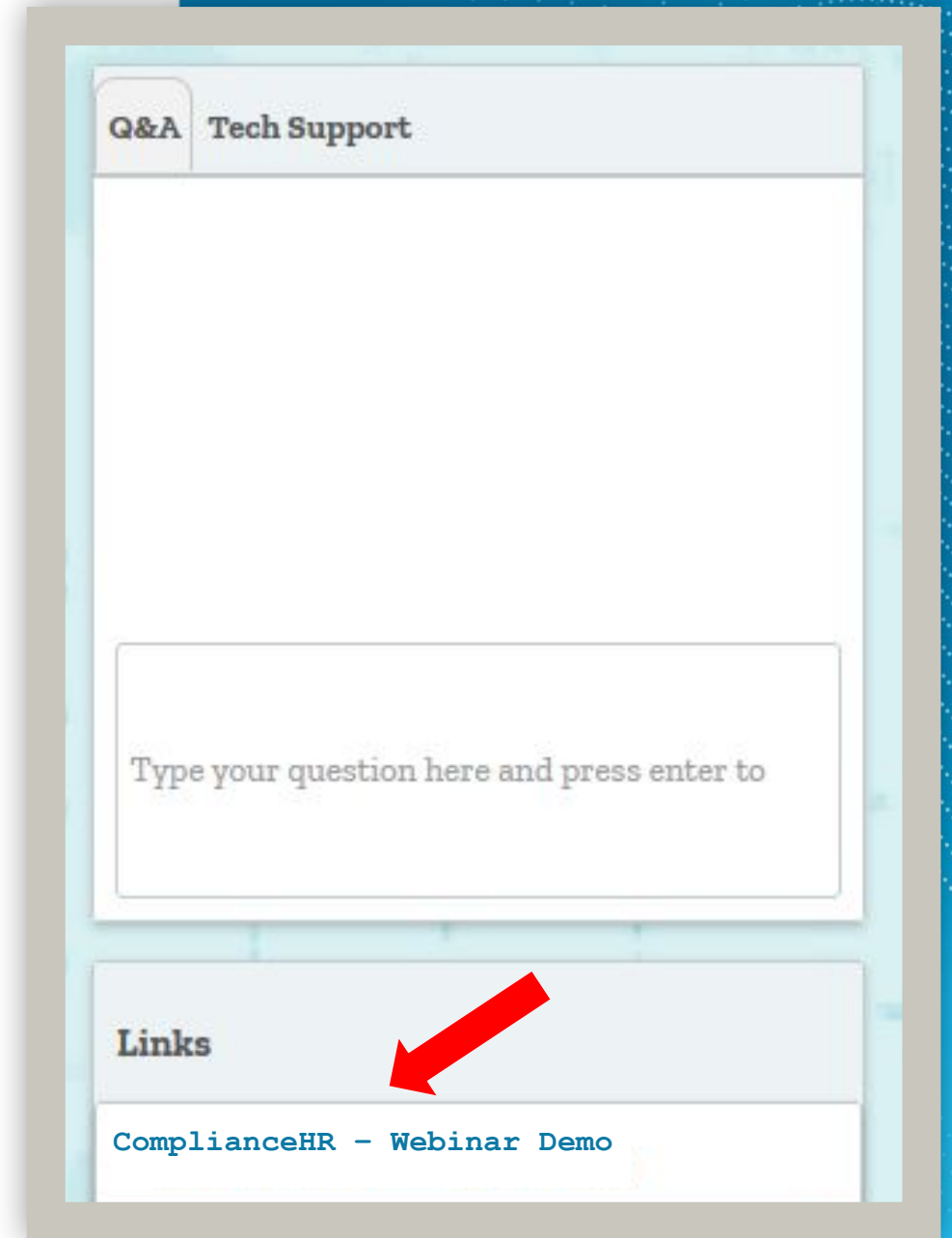
- ✓ Definitions
- ✓ Request, Approve, and End
- ✓ Term limits and extensions
- ✓ Waiting period, re-engagement
- ✓ Guidelines for managers



Last Chance to Register

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Questions?

Please add any additional questions to the Q&A box

Thank you!

To register for a demonstration of the Navigator Suite, please email demo@compliancehr.com or submit the form on our website: [Compliancehr.com/webinar-demo](https://compliancehr.com/webinar-demo)