

The Risks and Rise of Leveraging Contingent Workers

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Littler[®]

Compliance **HR**

Today's Webinar Host

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Presented By The Co-Chairs of Littler's Contingent Workforce Practice Group



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The Rise



Let's Start With Some Polling Questions

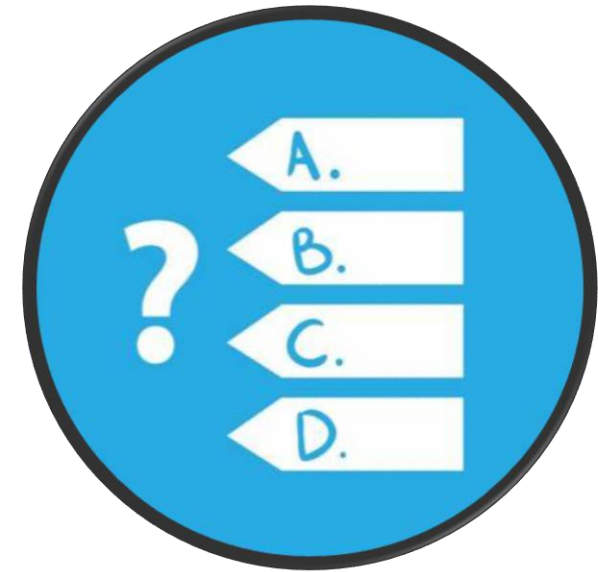


Question 1:

Does your organization rely on staffing platforms or crowdsourcing for its labor needs?

To answer this poll, you may need to exit full-screen mode.

- A. Yes
- B. No

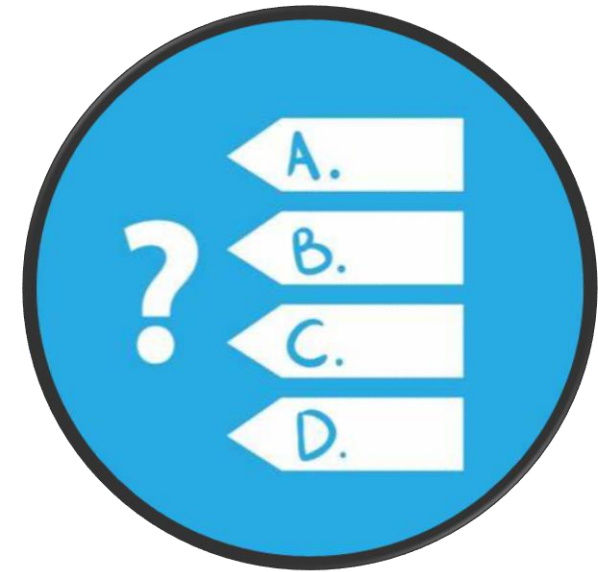


Question 2:

If you have workers in multiple countries, do you rely on a third-party provider to pay or provide benefits to them?

To answer this poll, you may need to exit full-screen mode.

- A. Yes
- B. No

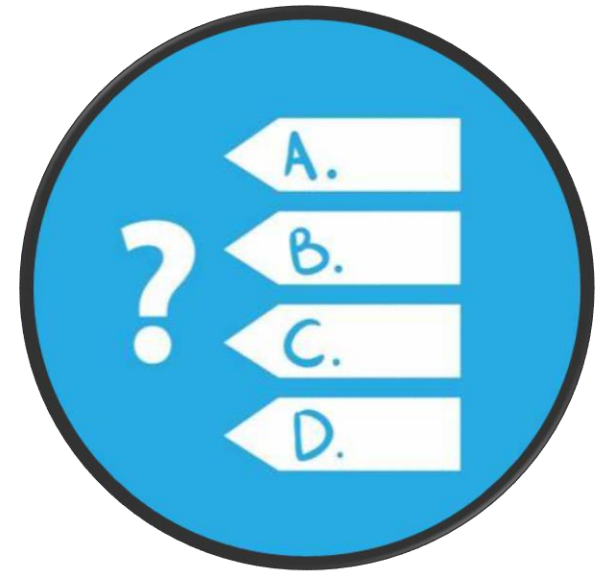


Question 3:

Does your organization utilize PEOs, EORs, staffing firms or other third-party staffing providers?

To answer this poll, you may need to exit full-screen mode.

- A. Yes
- B. No

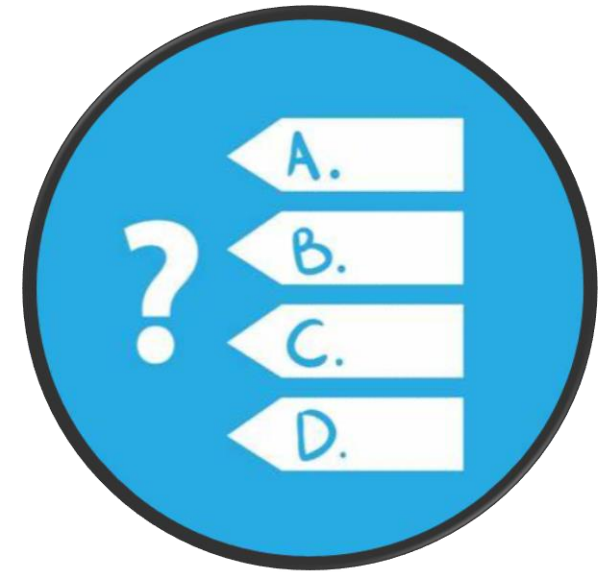


Question 4:

Has your reliance on contingent workers (ICs, staffing firms, EORs, platforms, crowdsourcing, PEOs) increased since 2020?

To answer this poll, you may need to exit full-screen mode.

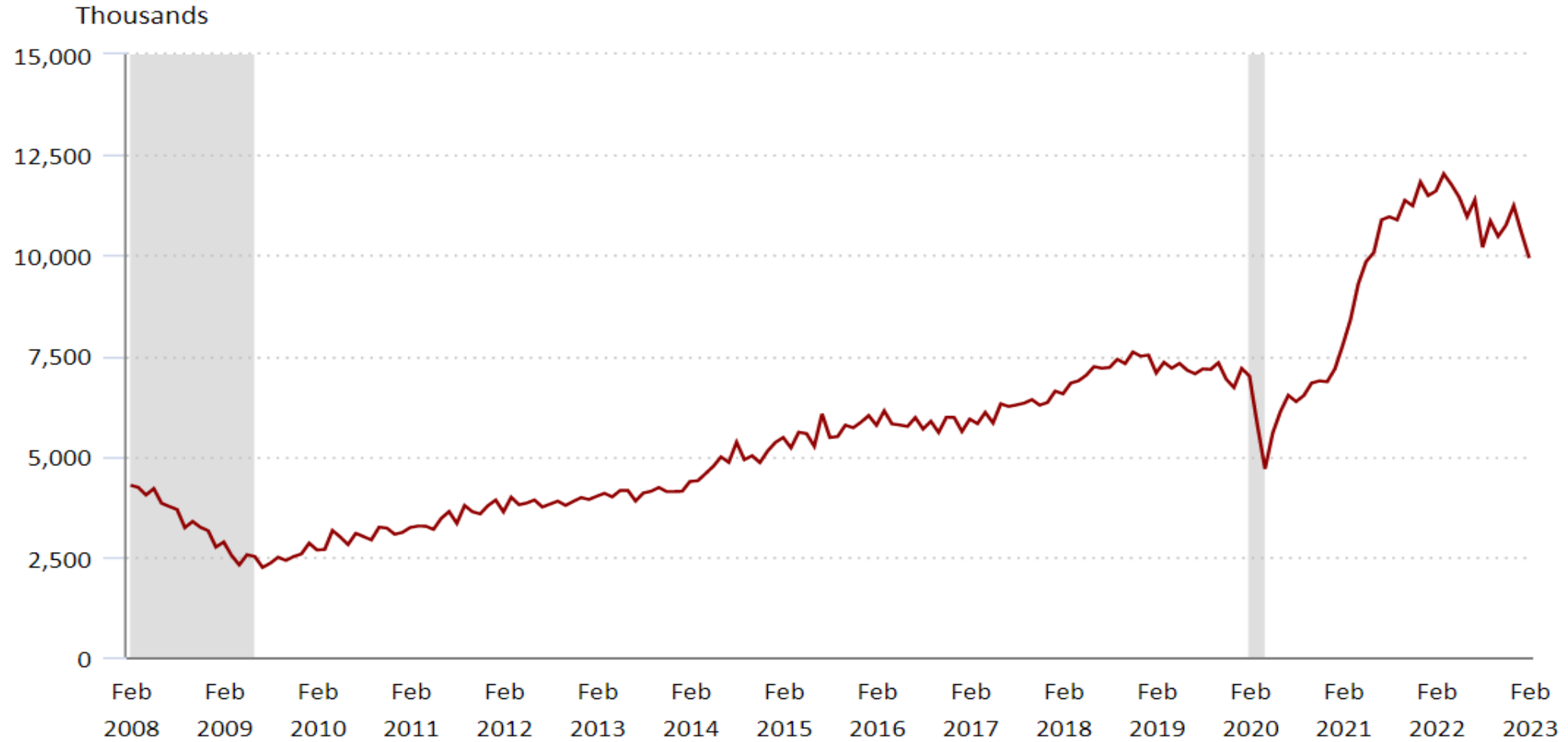
- A. Yes
- B. No



The U.S. Labor Shortage



Total Nonfarm Job Openings

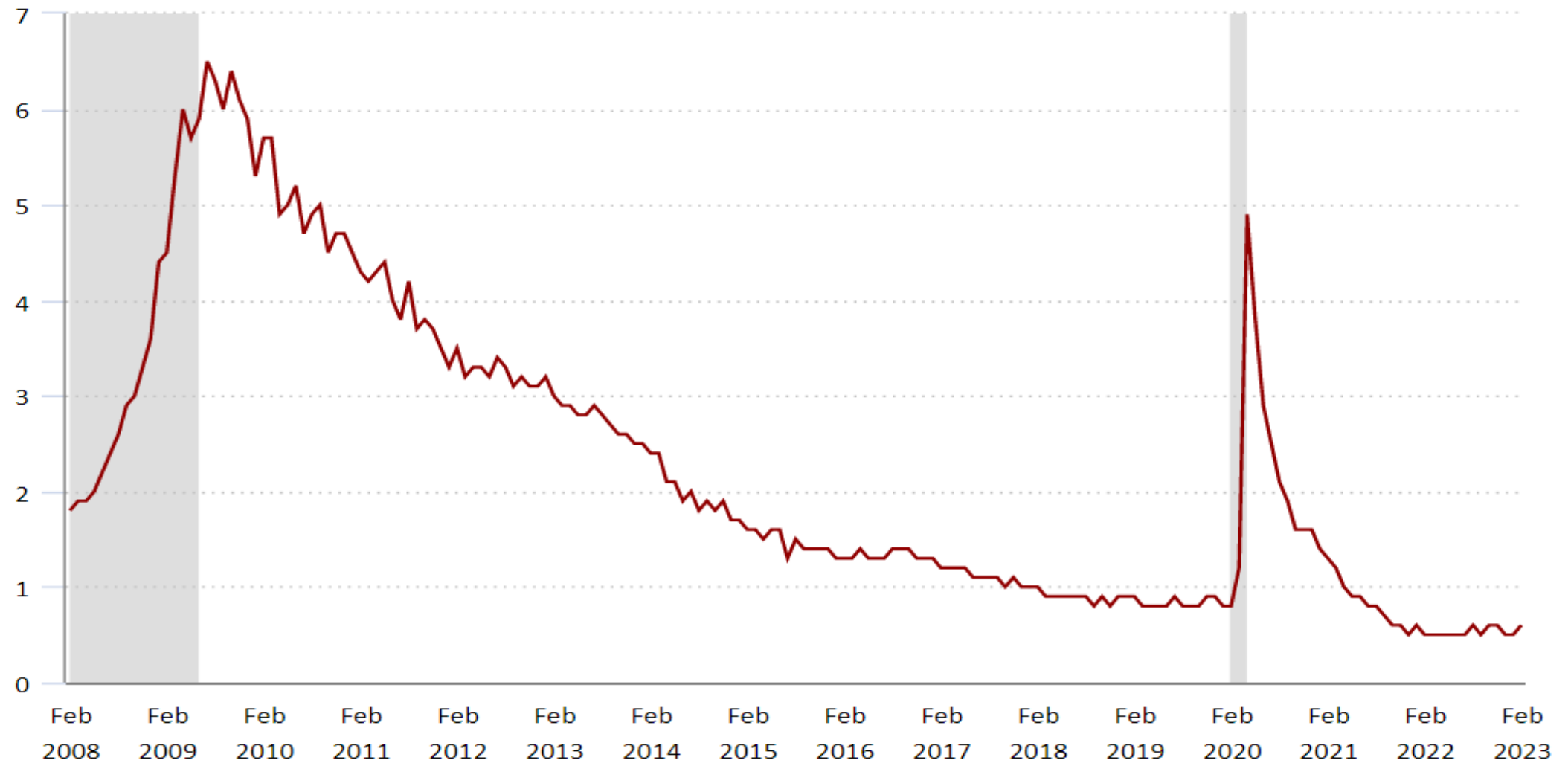


Hover over chart to view data.

Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.

Source: U.S. Bureau of Labor Statistics.

Unemployed Persons Per Job Opening



Hover over chart to view data.

Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.

Source: U.S. Bureau of Labor Statistics.

Ghosting

A 2022 Survey found that “A startling 84% of respondents indicated that they had ghosted an employer or potential employer at least once” during the survey’s 18-month time frame.

- **37%** indicated they had ghosted an employer
- **25%** had ghosted a potential employer
- **21%** had ghosted both an employer and a potential employer

Further, **62%** of respondents said they have been ghosted by an employer or potential employer.

Ghosting

The top reasons for ghosting related to these expectations included:

- Salary levels below expectations **(29%)**
- Other, more attractive job offers **(28%)**
- Inaccurate descriptions of job roles **(27%)**
- Companies with bad reputations and online reviews **(26%)**
- Dislike of perceived workplace culture **(22%)**

International Workers



- **Considerations for using international workers**
 - Country specific requirements to consider
 - Time Zones
 - Local requirements
 - Is a PEO arrangement suitable or allowable in the country
 - Permanent Establishment Issues and Considerations
- **Structuring An Overseas Assignment**
 - Short-term telecommuting
 - Indeterminate-period
 - Country-hopping

The Risks



EEOC Enforcement Focus On Contingent Workers

- Strategic Enforcement Plan lists area of emphasis:
“temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”

EEOC Enforcement Focus On Contingent Workers

- Sample settlements in past 4 years:
 - **\$2.6m** staffing agency (sex discrim.)
 - **\$675k** staffing agency & client (sex harassment & retaliation)
 - **\$550k** staffing agency (race, sex, age, disability discrim. – client preference defense failed)
 - **\$350k** tech staffing agency & client (sex harassment & retaliation)
 - **\$225k** tech company & 3P recruiter (disability discrim.)

EEOC Enforcement Focus On Contingent Workers

- Charges regularly name joint employers as respondents.
 - “If CP is an independent contractor, dismiss the charge for lack of jurisdiction. If CP is an employee, determine who qualifies as his or her employer. It is possible that both the staffing firm and its client qualify as joint employers.”
- Darden test (1992): Multi-factor test, heavily emphasizing right to control when, where, and how the work is performed.

EEOC: Reasonable Accommodations

Staffing Agency:
“We have a qualified candidate, and they need the following accommodation.”

Client:
“Not my problem.”

EEOC: Reasonable Accommodations

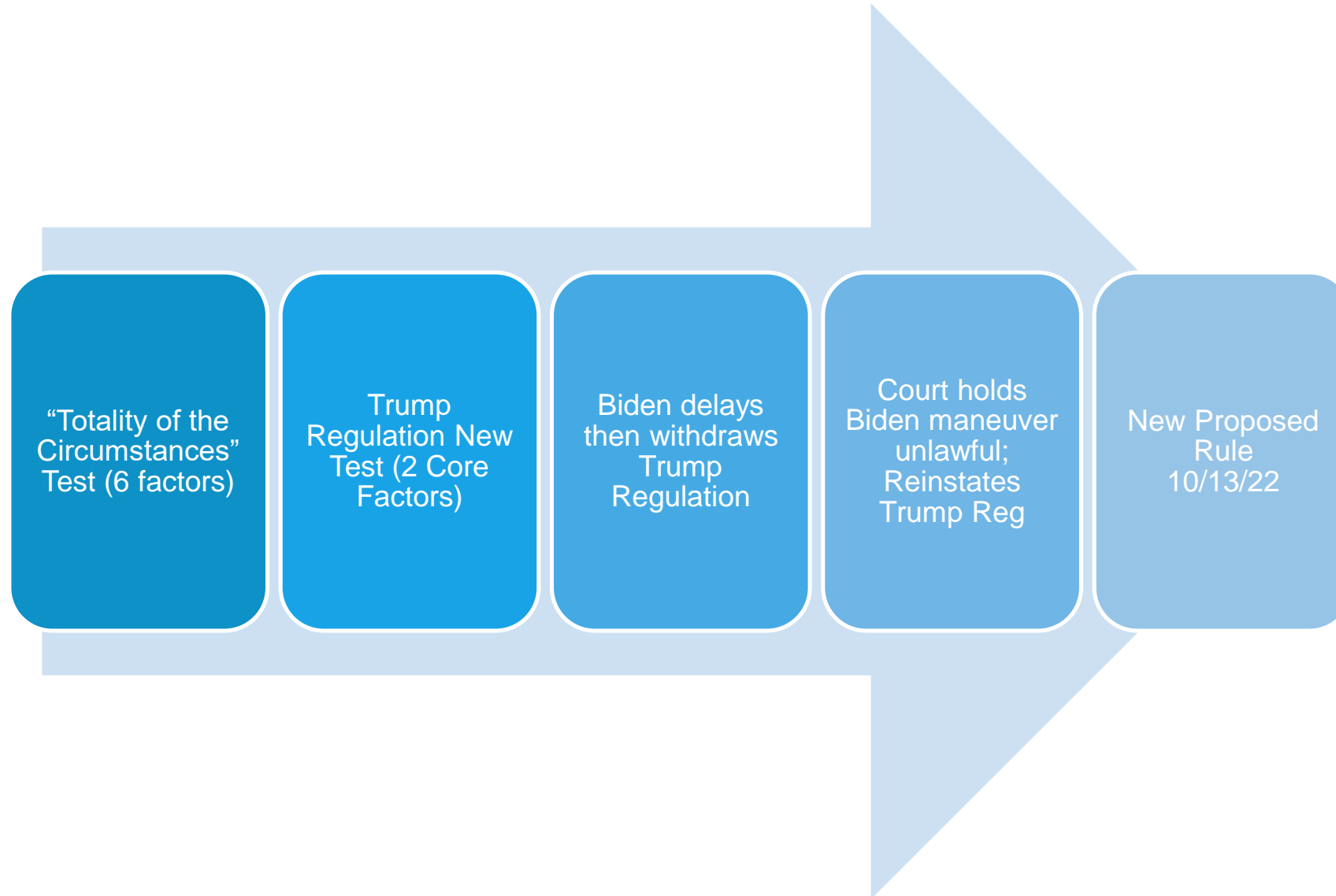
Staffing Agency:
“The Charge
alleges your
manager was the
bad actor.”

Client:
“Your employee
never reported
this.”

New DOL Guidance



Regulatory Tests



Proposed Rule

Opportunity for
Profit or Loss

Investment

Permanence

Control

Integral to
Business

Skill and Initiative

Rise of ABC Test

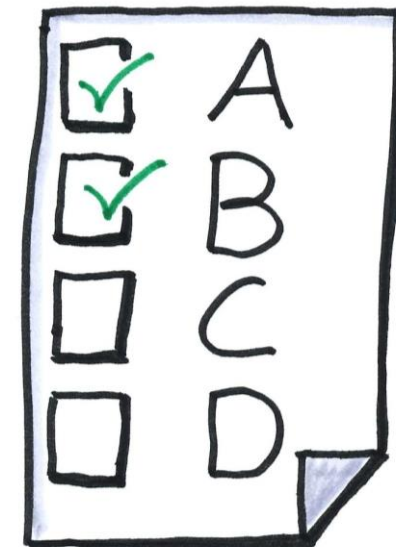


ABC Test States* 2023

- Alaska (Unemployment)
- California**
- Colorado (A&C parts only)
- Connecticut
- Delaware
- Georgia (Unemployment, using A&C)
- Hawaii (Unemployment)
- Idaho (Unemployment, using A&C)
- Illinois
- Indiana** (Unemployment)
- Louisiana (Unemployment)
- Maryland** (Unemployment)
- Massachusetts**
- Montana (A&C parts only)
- Nebraska
- Nevada (Unemployment)
- New Hampshire (Unemployment)
- New Jersey
- New Mexico (Unemployment)
- Pennsylvania (Unemployment, using A&C)
- South Dakota (A&C)
- Utah (Unemployment, using A&C)
- Vermont
- Washington
- Wyoming (Unemployment using A&C & If the individual may substitute another to perform their services)

ABC and Prop 22 Recap

- *Borello* used a difficult multi-factor test.
- 2018 *Dynamex* adopted ABC test for CA wage orders and made it retroactive.
- Jan. 1, 2020 AB5 expanded the ABC test beyond wage orders, now has general application in CA.
- Dec. 16, 2020 Prop 22 carves out TNC and DNC exceptions.



OSHA TWI

Temporary Worker Initiative

Joint & Several Liability

Shared training obligations.

Only one recorded incident, typically by “host employer.”

Antitrust Considerations



Conversion fees



No hire agreements (legality in question)



No poaching agreements



Non-solicitation agreements

Example State Penalties

California

Meal and rest, daily OT, paystubs, sick leave; fines up to \$25,000.

New York

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.

Washington

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

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



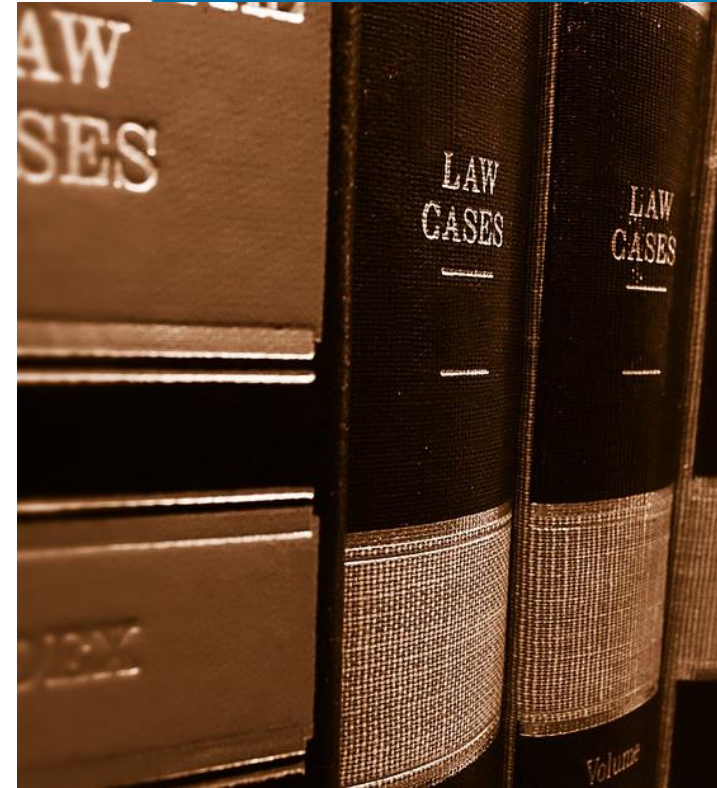
Contingent Worker Policies

- Types of Contingent Workers
- Approval Process
- Term Limits and Extensions
- Terminating Engagements
- Waiting Period, Re-engagement
- Guidelines (onboarding, security, training, tools and equipment)
- Manager do's and don'ts

Mitigating Risk

Staffing Firms:

- Standardize Contracts
- W-2 responsibilities
- Indemnity
- Insurance
- Worker Acknowledgments w/arbitration agreement & class action waiver
- Reporting & Cooperation (investigations, reasonable accommodations)



Red Flags re IC Classification

1. Control manner and means of completing the work
2. Control scheduling
3. They work full time exclusively for you
4. Duration (longer than 12 months raises a flag)
5. Engaged as both an IC and EE – 1099 and W2 in same year

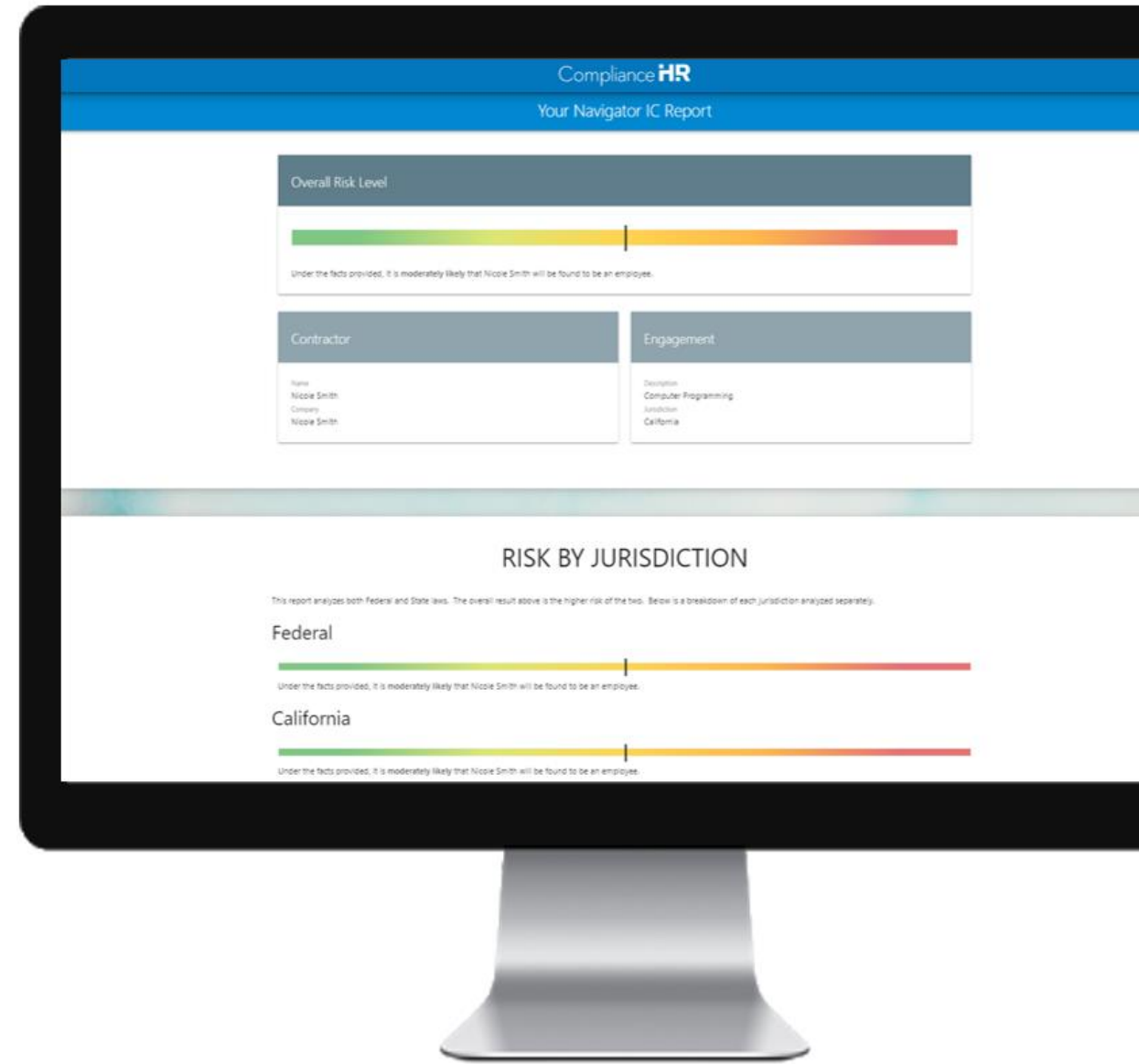
Red Flags re IC Classification

1. Their services are part of your core business
2. IC doing same work as an employee
3. Training and Extensive Onboarding
4. Equipment and Reimbursement (if you provide tools, equipment and reimbursement for business expenses, it raises a flag)
5. No business formalities such as LLC, taxpayer ID, insurance, business license



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



Ask the Right Questions and Collect Accurate Data

Create New Evaluation

Click the following link for information about how Navigator IC handles industry-specific standards.

Engagement Details

Brief Description
Computer Programming

Work State
Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana

Contractor Details

First Name
Nicole

Company Name (Optional)
Nicole Smith

Evaluation Workflow

Who will complete the questionnaire?
 I will Someone else will

Would you also like the prospective contractor to complete a questionnaire?
 Yes No

SUBMIT

Efficient and Consistent

Your Questionnaire

Please complete the questionnaire below as requested by Michael Worth. This questionnaire relates to ComplianceHR Demo'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 required to personally perform the work? Yes No

No, Nicole Smith can hire employees to perform the work.

Contractor Information

What applies to Nicole Smith's employment? None of the Above

Does Nicole Smith do any of the following? None of the Above

Will ComplianceHR Demo provide any of the following? Disability insurance, Paid sick day

Is there a written independent contractor agreement? Yes No

What type of relationship does ComplianceHR Demo have with Nicole Smith? An employer/employee relationship None of the Above

Before the work is completed, when will Nicole Smith be available to perform the work? Only as allowed under the terms of the agreement At any time, without notice or compensation

Which best describes Nicole Smith's relationship with ComplianceHR Demo? ComplianceHR Demo is the client ComplianceHR Demo is the contractor

How many other clients has Nicole Smith worked for? 1-3 4-10 11-20 21-30 31-40 41-50 51-60 61-70 71-80 81-90 91-100 More than 100

Will ComplianceHR Demo reimburse Nicole Smith for any of the following? Yes No

Will ComplianceHR Demo provide any of the following? A computer, cell phone, tablet or other electronic device A vehicle Travel expenses Other

What is the dollar value of this engagement? Under \$100,000 \$100,000 - \$500,000 Over \$500,000

What percentage of Nicole Smith's time will be spent on this engagement? Less than 20% 21% to 30% 31% to 40% 41% to 50% 51% to 60% 61% to 70% 71% to 80% 81% to 90% 91% to 100%

Select the option that best describes the work to be performed by Nicole Smith. Somewhat, although not directly related to ComplianceHR Demo's business Directly related to ComplianceHR Demo's business

Has Nicole Smith ever been a contractor for ComplianceHR Demo? Yes No

Will Nicole Smith's work hours be set by ComplianceHR Demo? Yes No

Under the terms of engagement, how will ComplianceHR Demo provide instructions to Nicole Smith? Some general guidelines on ComplianceHR Demo's website Detailed instructions on how to perform the work

Please indicate the level of instruction ComplianceHR Demo will give Nicole Smith. Minimal Moderate Extensive

Will Nicole Smith be required to correct defective work? Yes No

Are ComplianceHR Demo employees performing the same or similar work that Nicole Smith is being engaged to perform? Yes No

Does the work that Nicole Smith will perform during the engagement require a high-level of expertise or any specialized skills? Yes No

Could the work required under this engagement be performed by unskilled or low skilled workers after a minimum of training? Yes No

Will Nicole Smith have the right to turn down work? Yes No

Financial Details

What is the dollar value of this engagement? Under \$100,000 \$100,000 - \$500,000 Over \$500,000

What percentage of Nicole Smith's time will be spent on this engagement? Less than 20% 21% to 30% 31% to 40% 41% to 50% 51% to 60% 61% to 70% 71% to 80% 81% to 90% 91% to 100%

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Will Nicole Smith have the right to turn down work? Yes No

Relationship

To what degree is the work to be performed by Nicole Smith core to ComplianceHR Demo's business? Somewhat, although not directly related to ComplianceHR Demo's business Directly related to ComplianceHR Demo's business

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Could the work required under this engagement be performed by unskilled or low skilled workers after a minimum of training? Yes No

Will Nicole Smith have the right to turn down work? Yes No

Scheduling & Location

Will Nicole Smith's work hours be set by ComplianceHR Demo? Yes No

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Could the work required under this engagement be performed by unskilled or low skilled workers after a minimum of training? Yes No

Will Nicole Smith have the right to turn down work? Yes No

Training & Guidance

Please indicate the level of instruction ComplianceHR Demo will give Nicole Smith. Minimal Moderate Extensive

Will Nicole Smith be required to correct defective work? Yes No

Are ComplianceHR Demo employees performing the same or similar work that Nicole Smith is being engaged to perform? Yes No

Does the work that Nicole Smith will perform during the engagement require a high-level of expertise or any specialized skills? Yes No

Could the work required under this engagement be performed by unskilled or low skilled workers after a minimum of training? Yes No

Will Nicole Smith have the right to turn down work? Yes No

Work Details

Are ComplianceHR Demo employees performing the same or similar work that Nicole Smith is being engaged to perform? Yes No

Does the work that Nicole Smith will perform during the engagement require a high-level of expertise or any specialized skills? Yes No

Could the work required under this engagement be performed by unskilled or low skilled workers after a minimum of training? Yes No

Will Nicole Smith have the right to turn down work? Yes No

Immediate Expert Guidance

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.

LOWERING YOUR RISK

You may be able to lower your risk score by taking the following steps.

Reimbursement of Business Expenses

Generally, independent contractors are responsible for their own business expenses and are not reimbursed by the engaging company. In contrast, employees do not typically have any significant unreimbursed expenses.

Although reimbursing a contractor for travel costs rarely, by itself, determines employee status, ComplianceHR Demo may be able to reduce its risk score by minimizing the number and types of expenses for which MJ Corp is reimbursed.

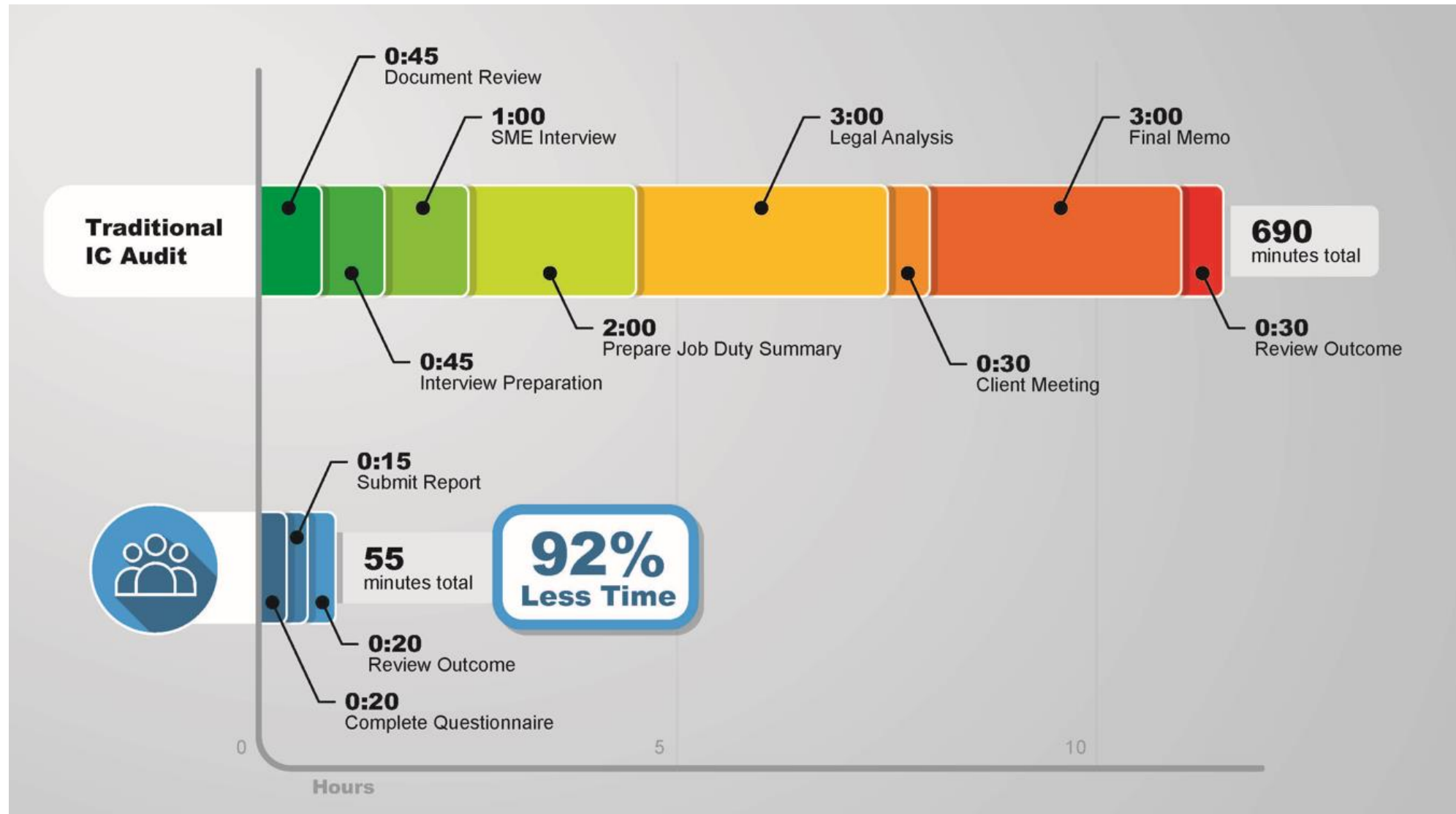
Contractor Economic Dependence on the Company

An independent contractor is not economically dependent on the engaging company; it operates independently of the engaging company. The success of the contractor's business is not dependent on its continued relationship with the company. An independent contractor's business will continue to exist

TRANSCRIPT

Question	Manager Response	Contractor Response	Reconciled Response
Will Nicole Smith's work hours be set by ComplianceHR Demo?	No company will not control contractor work hours	No company will not control contractor work hours	No company will not control contractor work hours
Under the terms of engagement, how much control can ComplianceHR Demo assert over the order of work in which Nicole Smith will perform the work?	Some general guidelines on Company expectations	No control	Some general guidelines on Company expectations
To what degree is the work to be performed by Nicole Smith core to ComplianceHR Demo's business?	Somewhat		
Please indicate the level of instruction ComplianceHR Demo will give Nicole Smith:	Detailed instructions on how to perform only some of the work	Basic instructions on how to perform the work	Detailed instructions on how to perform only some of the work
Has Nicole Smith ever been an employee of ComplianceHR Demo?	No	No	No
Will ComplianceHR Demo control where Nicole Smith can perform the work under this engagement?	Yes the company will require the contractor to work at a customer location	Yes because the work cannot be performed elsewhere	Yes because the work cannot be performed elsewhere
Are ComplianceHR Demo employees performing the same or similar work that Nicole Smith is being engaged to perform?	No		
Is Nicole Smith required to personally perform the work?	Contractor can hire employees or subs	Contractor can find subs or refer work out	Contractor can hire employees or subs

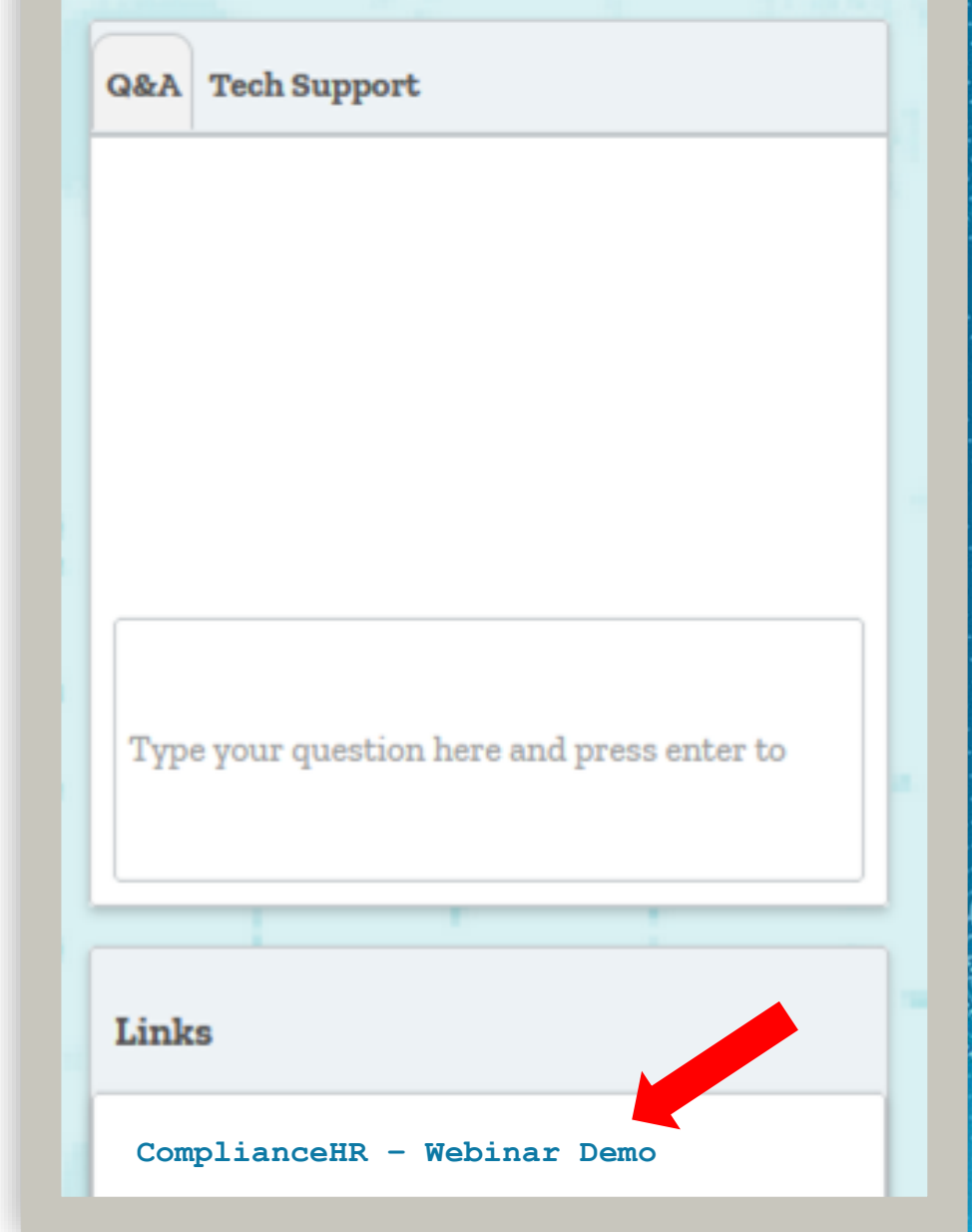
Time Spend Comparison of IC Evaluations



Register for a Navigator Suite Demonstration and Free Trial

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!

The background is a solid blue color. On the right side, there is a decorative graphic consisting of many parallel, slightly curved lines of white dots. These lines are arranged to create a sense of depth and movement, resembling a stylized wave or a ribbon that curves upwards and to the right. The dots are small and evenly spaced, creating a textured, digital effect.