

From the Provider Perspective: Updates on Contingent Workforce Laws

September 19, 2023

Littler[®]

Compliance **HR**

Today's Webinar Presenter

Michael Worth

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Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

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



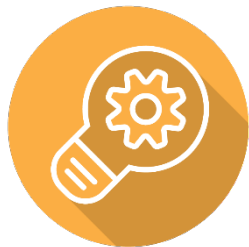
Navigator Independent Contractor

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



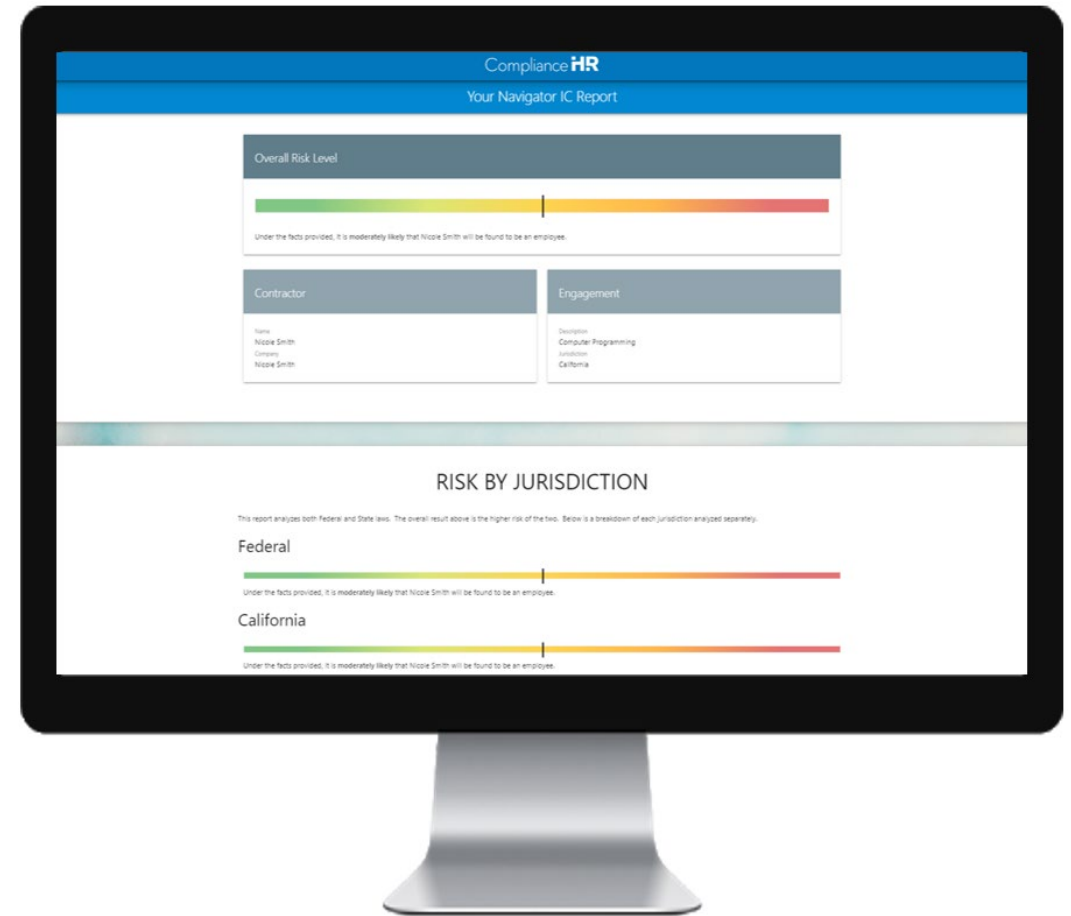
Navigator Leave

Reduce the risk and administrative burden of leave management



Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of 1,900 reported court decisions and DOL opinion letters
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Immediate Expert Guidance

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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

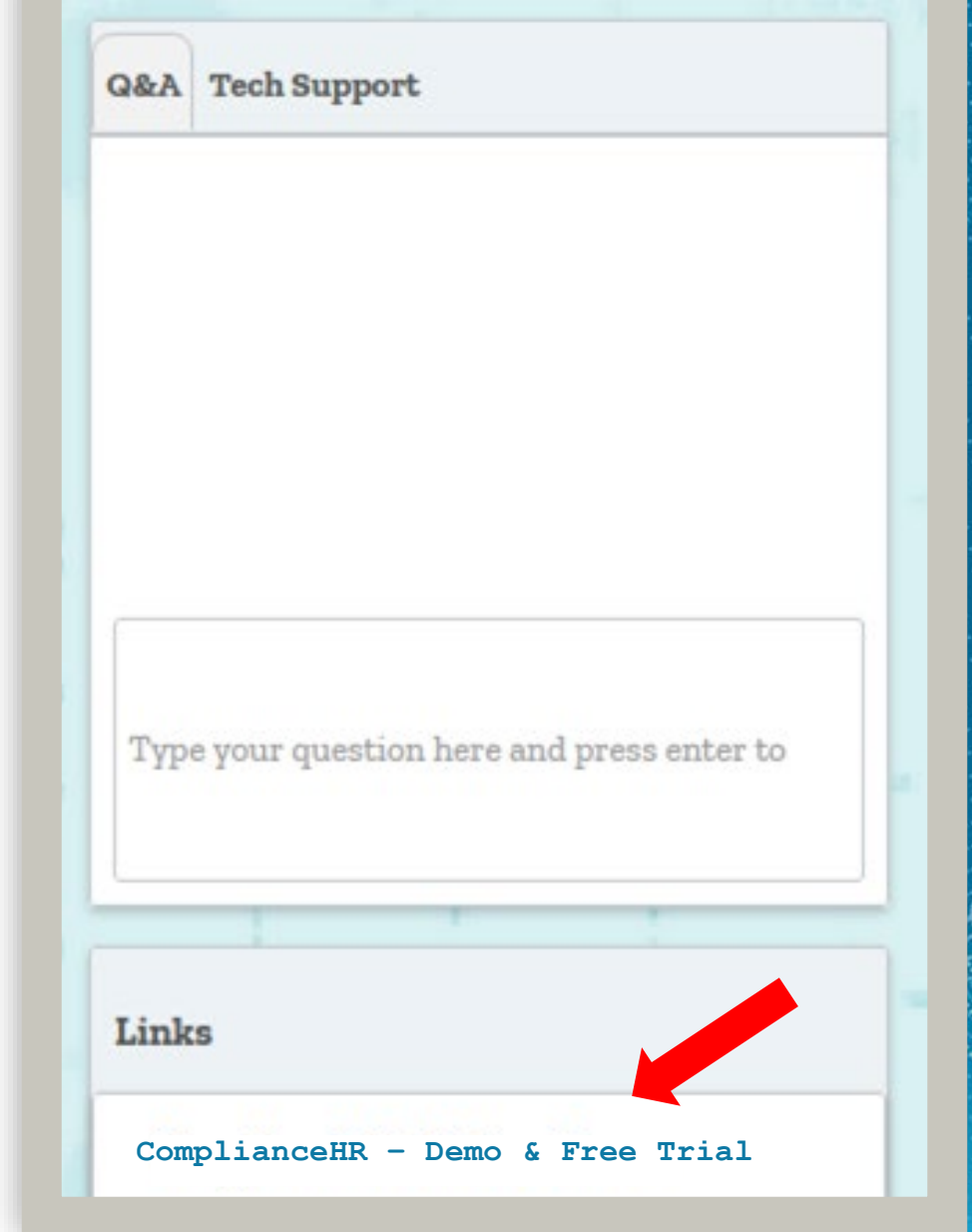
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- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Today's Webinar Presenters



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Agenda

1. Investigations and Reasonable Accommodations
2. Pay Data Reporting
3. NJ and IL Temporary Worker Rights Laws
4. Staffing Agency Registrations Requirements
5. Platform Business Models



Harassment Investigations & Reasonable Accommodations



EEOC Enforcement Focus On Contingent Workers



Sample recent settlements and verdicts

- **\$2.6m** staffing agency (sex)
- **\$675k** staffing agency & client (sex harassment & retaliation)
- **\$550k** staffing agency (race, sex, age, disability – client preference defense failed)
- **\$350k** tech staffing agency & client (sex harassment & retaliation)
- **\$225k** tech company & 3P recruiter (disability)
- **\$137m** jury verdict reduced to \$3.2m; staffing agency and auto/tech company (race)

EEOC Enforcement Focus On Contingent Workers



- EEOC Strategic Enforcement Plan lists area of emphasis:
“temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”
- Incorporate duty to report into contract.
- Incorporate duty to engage in interactive process into contract.
- Best practice re who leads investigation.

Pay Data Reporting Law



California's Pay Data Report

- Prior years
 - All private employers with 100 or more U.S employees and at least 1 employee in California
 - Federal contractors with 50+ employees
 - Only if you file an EEO-1
- Included employees who were included in your EEO-1 filing
- What has Changed
 - All private employers with 100 or more U.S employees and at least 1 employee in California
 - **Now includes all private employers that has 100 or more employees hired through labor contractors
 - Removed the tether to EEO-1

New Disclosures

- Employers must disclose mean and median pay and demographics of all employees in the Employer's Pay Data Report
- Employers must disclose ownership names of all labor contractors and the wages and demographics in their Labor Contractor Employee Report.
- An employer must submit two separate reports if the employer falls under both categories (for employees and contract workers)



Labor Contractor: Special Definition



An individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's ***usual course of business.***

What's the “Usual Course of Business?”

- A client employer’s “usual course of business” means the regular and customary work of the client employer.
 - “Regular and customary work” means work that is performed on a regular or routine basis that is either part of the client employer’s customary business or necessary for its preservation or maintenance.
 - “Regular and customary work” does not include isolated or one-time tasks.
- Example: At a big box store that sells retail goods, is the janitorial service that comes in at night to clean a labor contactor? Is cleaning in not the usual course of business of a retail store?
- Example: Accountants hired to perform an external audit of a fitness company’s financial statements would not be performing work within the client employer’s usual course of business, assuming financial auditing is an isolated occurrence for the company.

Labor Contractor “Employees” Only

- The reporting applies only to labor contractor’s employees, i.e. W-2 employees:
 - “An individual on a labor contractor’s payroll, including a part-time individual, and for whom the labor contractor is required to withhold federal social security taxes from that individual’s wages, and who performs labor for a client employer within the client employer’s usual course of business.”
- If staff are 1099, they are not included in the reporting.
- Note: This is different than how you pay your labor contractor. Even if you pay your labor contractor and issue them a 1099, the law still applies. The analysis pertains to the labor contractor's employees.

Labor contractors need to supply the following:

- Name or Employee ID of worker
- Role/Job Title
- EEO-1 Job Category
- Race/Gender
- Wage information
- If contract worker worked for you and other companies during the reporting year, the Labor Contractor should provide you the W2 Box 5 wages for only the time spent with you.
- For example, Worker A made \$100,000 during 2022. They worked 50% of the year for you and 50% for another company. You should be provided with a W2 Amount of \$50,000 and you should then place them in the pay band for the \$50,000 amount



Labor contractors need to supply the following:



- Hours paid for the time spent working for your company
- Location to where worker was assigned or reported
- Legal entity to which worker was assigned or reported
- Name of Labor Contractor

Common Issues

- They ignored our letter!
- They disagree with our letter!
- We have no information or incomplete information. Now what?
- Do we have to report on all contract workers, including those in other states?
- What if we have 98 employees in our snapshot period? Do we still have to file?
- We didn't file this year.



Illinois and NJ: New Temporary Employee Bill of Rights



Recent State Contingent Workforce Developments

- Temporary Worker Rights: New Jersey & Illinois
- New laws require equal pay for temporary workers under certain circumstances
- Safety and training focus as well
- Notice requirements



Recent State Developments: New Jersey

- Early in 2023, New Jersey enacted the Temporary Workers' Bill of Rights.
 - Requires, among other things, that staffing firms pay temporary workers the same average rate of pay and equivalent benefits as a permanent employee of client performing the same or similar work.
 - Prohibits certain fees charged to temporary workers
 - Prohibits certain other deductions



Recent State Developments: Illinois

- In August 2023, Illinois amended the IL Day and Temporary Labor Services Act.
 - Excludes “professional or clerical.” Likely means white collar.
 - Includes an equal pay provision for temporary workers after 90 days at a client
 - Requires both pay and benefits (or cash equivalent) be paid equal to the lowest-paid client employee performing comparable work (not specific to job title)
 - Additional safety requirements (training)
 - Expands private right of action
 - Right to refuse work due to labor dispute



Recent State Developments: Illinois (con't)

- On August 4, 2023, the IL Department of Labor issued Emergency Rules, effective immediately, that clarified some aspects of the Act amendments.
 - “90 calendar day” assignment period is for any 12-month period (could be intermittent), and appears to include non-working days (a three-month Mon.-Fri. assignment even though only 65 working days)
 - Defined equal “benefits” broadly to include “health care, vision, dental, life insurance, retirement, leave (paid and unpaid), other similar employee benefits, and other employee benefits as required by State and federal law.” Additional safety requirements (training)
 - Burden is on staffing agency client to maintain records used to determine pay and benefits.
 - Safety training must be delivered on the clock.



Recent State Developments: New Jersey & Illinois

- Most of the requirements of these laws are placed on the staffing agency:
 - They pay the employees
 - They have licensing and recordkeeping requirements
- **BUT**, third party clients have informational requirements too, particularly as to safety hazards.
- Potential liability as joint employers
- Agencies and clients must work closely together and understand respective obligations



Staffing Firm Registration



Staffing Firm Registration Requirements

- Registration rules are **state-specific**.
- Pay attention to statutory definitions (e.g., “employment agency,” “employment services agency,” and “placement agency”) and exceptions.
 - Employer-paid arrangements often exempted from licensing rules.
- Note, there are separate state registration rules for recruiting firms and PEOs.

Platform Business Models



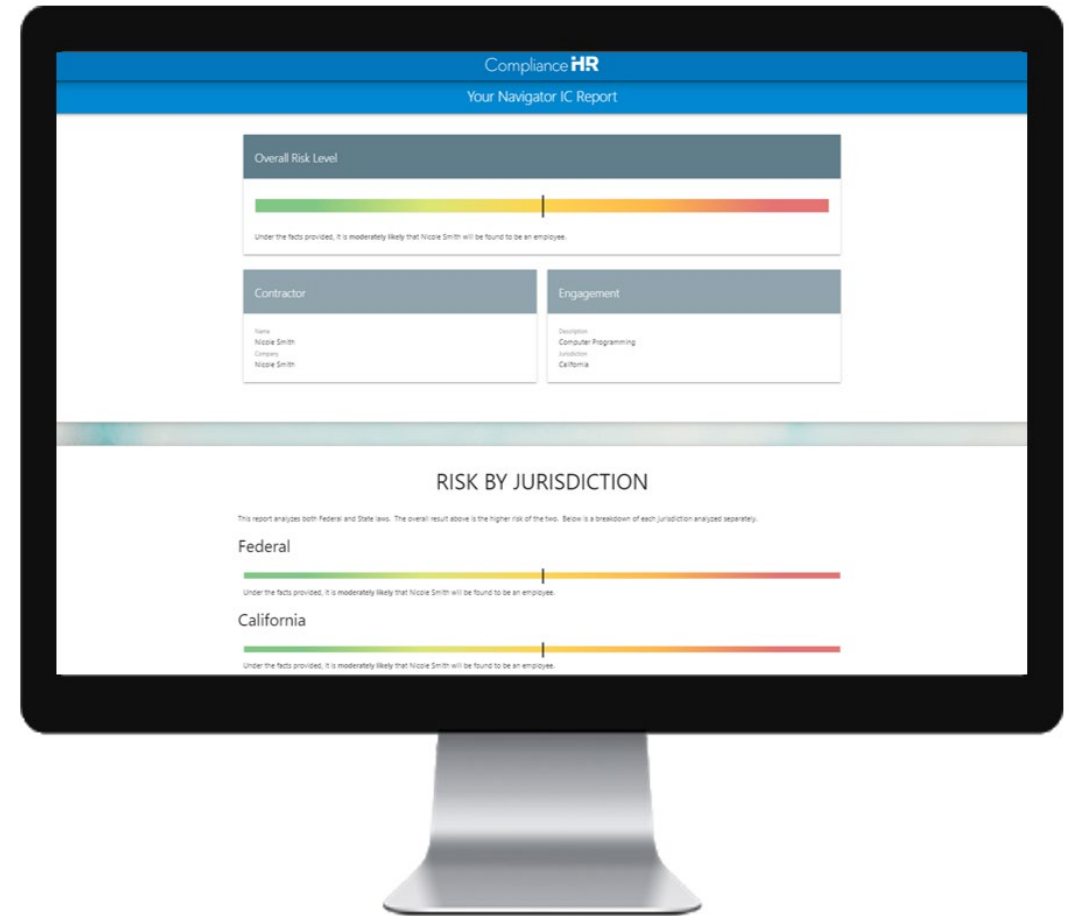
Platform Models

Do's	Don'ts
Lean into facilitator model with statements like: <ul style="list-style-type: none">• Control when, where, and how much you work• Grow your independent business• Access a network of independent professionals• Connect with independent talent	Post on employer job boards. And don't say: "We are hiring" "Join our team" "Full-time" "Competitive salary"
Review your marketing materials	Try before you buy model
Review your User Terms, Provider Agreements, and Client Agreements	Non-competes; exclusivity clauses
Assess expansion into high risk states	Set pay rates
Allow individuals to work as much or little as they choose without penalty	Control schedule; assign manager
Figure out Workers' Comp/Occ Acc insurance	Provide tools, equipment, emails, branding
Arbitration Agreement with Class Action Waiver	Quality control work product; substantive training.



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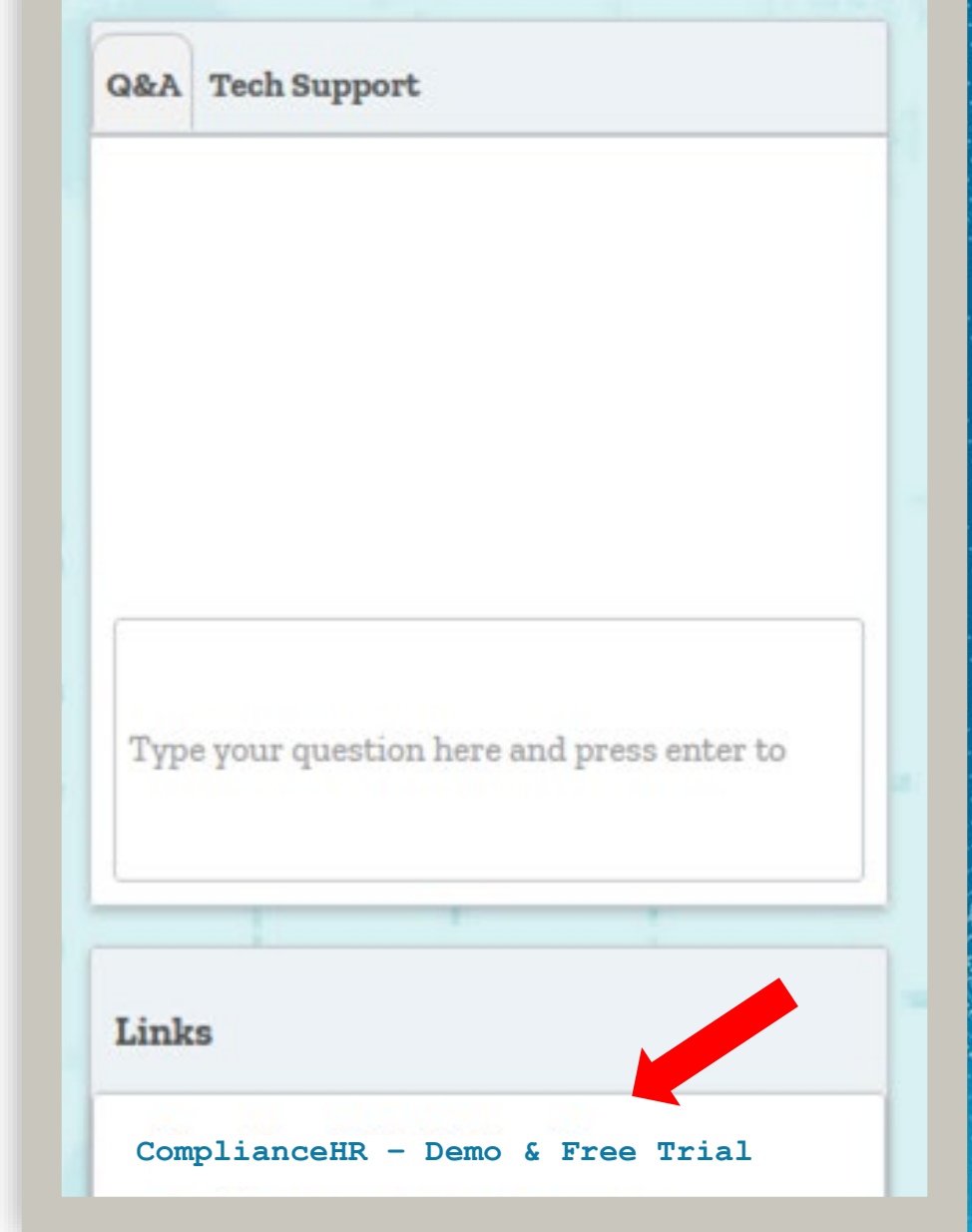
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Questions?

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 composed of many small white dots. These dots are arranged in a series of overlapping, curved lines that create a sense of depth and movement, resembling a stylized wave or a ribbon that curves upwards and to the right.

Did you know...



- 2500+ Federal and state statutes, regulations and cases on exempt/non-exempt
- Attorneys must read every case to identify the job duties performed by the employees discussed in the case, and whether the court found the employee exempt or non-exempt