WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Human Rights Commission
Department of Health and Human Resources TITLE NUMBER: 77

CITE AUTHORITY W. Va. Code §5-11-8(h)

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 7

TITLE OF RULE BEING PROPOSED: The Definition of Employee Under the West Virginia Human Rights Act

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Joan E. Ohl

Joan E. Ohl, Secretary

$11.80

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 28, 1998

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Human Rights Commission
Department of Health and Human Resources
State Capitol Complex, Building 3, Room 265, Charleston, WV 25305
Telephone: (304) 558-3223

LEGISLATIVE RULE TITLE: The Definition of Employee Under the West Virginia Human Rights Act, 77CSR7.

1. Authorizing statute(s) citation: WV Code §§ 5-11-8(h) & 29A-3-1 et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

July 1, 1998

b. What other notice, including advertising, did you give of the hearing?

Notice was provided to the WV Employment Law Association and to attorneys who practice before the WV Human Rights Commission.

c. Date of Public Hearing(s) or Public Comment Period ended:

July 31, 1998

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached_____ No comments received__X_____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing (be exact):

August 3, 1998

f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (please type):

Marsha Dadisman, Acting Director, Regulatory Development

Department of Health and Human Resources, Bldg. 3, Rm. 265

Capitol Complex, Charleston, West Virginia 25305

(304) 558-3223 FAX: (304) 558-1130 MDadisman@WVDHHR.ORG

g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule (please type):

Norman Lindell, Acting Executive Director

WV Human Rights Commission

1321 Plaza East, Room 108A

Charleston, WV 25301 558-2616

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place a hearing for the taking of evidence and a general

description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

TITLE 77
LEGISLATIVE RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 7

THE DEFINITION OF EMPLOYEE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Brief Summary of the Proposed Rule

This is a new rule which defines employee in light of the legislature's recent statutory amendment. The rule gives guidance on which employees are to be counted in order to satisfy the new statutory language as to what constitutes an employer under W. Va. Code § 5-11-1 et seq. In accordance with the United States Supreme Court decision in *Walters v. Metropolitan Education Enterprise*, 117 S. Ct. 660 (1997), this rule interprets the Act to include part-time workers and temporary workers.

TITLE 77
LEGISLATIVE RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 7

THE DEFINITION OF EMPLOYEE
UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Statement of Circumstances Which Require the Proposed Rule

The 1998 legislature amended the West Virginia Human Rights Act to make the definition of employee conform to the definition of employee in the federal act, Title VII of the Civil Rights Act of 1964. The language in the federal act has been further interpreted by the EEOC and the United States Supreme Court in Walters v. Metropolitan Education Enterprise, 117 S.Ct. 660 (1997). The language in this rule is taken from that case and from the EEOC Enforcement Guidelines.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: The Definition of Employee Under the West Virginia Human Rights Act

Type of Rule: x **Legislative** ____ **Interpretive** ____ **Procedural**

Agency West Virginia Human Rights Commission

Address 1321 Plaza East, Room 108A

Charleston, WV 25301-1400 Attn: Norman Lindell

(304) 558-2616 Acting Executive Director

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$ 0	$ 0	$ 0	$ 0	$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

The rule will have no fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules:

To interpret and implement the provisions of the West Virginia Human Rights Act, particularly W. Va. Code § 5-11-3(e) related to the definition of employee, and to assist all persons in understanding their rights, obligations and duties under the law.

Rule Title: The Definition of Employee Under the West Virginia Human Rights Act

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: June 30, 1998

Signature of Agency Head or Authorized Reprensentative

By: Virginia Tucker Joan E'DH, Secretary

FILED
J 2 37 PM '98
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

SERIES 7
THE DEFINITION OF EMPLOYEE UNDER
THE WEST VIRGINIA HUMAN RIGHTS ACT

§77-7-1. General.

1.1. Scope. — This legislative rule interprets and implements the provisions of the West Virginia Human Rights Act, particularly W. Va. Code § 5-11-3(e) related to the definition of employee, and is to assist all persons in understanding their rights, obligations and duties under the law.

1.2. Authority. — W. Va. Code § 5-11-8(h).

1.3. Filing Date. —

1.4. Effective Date. —

§77-7-2. Definition.

2.1. "Employee" means an individual employed by an employer, except that the term employee shall not include any individual employed by his or her parent, spouse or child. The term employee includes all persons with whom the employer has an employment relationship, whether or not the employee is receiving compensation from the employer on a particular day. A part-time employee is counted as an employee for each working day after arrival and before departure. Employee also includes individuals placed in job assignments by temporary employment agencies, contract firms and other firms that hire workers and place them in job assignments with the firm's clients.

body of her complaint. Thus, if plaintiff specifically requests compensatory or punitive relief in Count I of her amended complaint, then she will be entitled to a jury trial. Because plaintiff will be filing an amended complaint consistent with this opinion, the motion to strike is denied without prejudice.

CONCLUSION

The Union's motion to dismiss is granted without prejudice as to Count I, and with prejudice as to Counts II and III. The Company's motion to dismiss Count III is granted with prejudice. The motion to strike the jury demand is denied without prejudice. Plaintiff is ordered to file an amended complaint consistent with this opinion on or before the status report set for December 10, 1996.

WALTERS v. METRO. EDUC. ENTERPRISES

Supreme Court of the United States

DARLENE WALTERS, Petitioner v. METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD BIEBER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner v. Same, Nos. 95-259 and 95-779, January 14, 1997

CIVIL RIGHTS ACT OF 1964

Size of employer ▸108.0425

Determining whether employer meets 15-employee threshold for Title VII coverage by looking at whether it has employment relationship with employee on given day, as is most readily demonstrated by his appearance on payroll, represents fair reading of Section 701(b) of Act, which sets as criterion number of employees that employer "has . . . for each working day" in each of 20 or more calendar weeks in current or preceding calendar year; contrary interpretation that focuses on whether employer is compensating employee on day in question is not plausible reading of criterion of whether employer "has" employee.

On writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit (68 FEP Cases 499, 60 F.3d 1225). Reversed and remanded.

See also 65 FEP Cases 1643, 864 F.Supp. 71.

Constantine J. Gekas (Adrianne S. Harvitt, Alenna K. Bolin, and Harvitt & Gekas, Ltd., with him on brief), Chicago, Ill., for petitioner in No. 95-259.

Seth P. Waxman, Deputy Solicitor General (Drew S. Days, III, Solicitor General, Deval L. Patrick, Assistant Attorney General, Paul Bender, Deputy Solicitor General, Beth S. Brinkman, Assistant to the Solicitor General, C. Gregory Stewart, General Counsel, Gwendolyn Y. Reams, Associate General Counsel, Carolyn L. Wheeler, Assistant General Counsel, and Dori K. Bernstein, on brief), for petitioner in No. 95-779.

Patrick J. Falahee, Jr., Chicago, Ill., for respondents.

Jonathan P. Hiatt, Washington, D.C., Marsha S. Berzon, San Francisco, Calif., and Virginia A. Seitz and Laurence Gold, Washington, D.C., filed brief for AFL-CIO, as amicus curiae, urging reversal.

Judith L. Lichtman, Donna R. Lenhoff, and Helen L. Norton, Washington, D.C., filed brief for Women's Legal Defense Fund and 23 other organizations, as amici curiae, urging reversal.

Lawrence J. Latto, Jolynn C. Dellinger, Erika K. Singer, and Jodi L. Short (Shea & Gardner), Washington, D.C., and Herbert J. Hansell, Paul C. Saunders, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, Richard T. Seymour, and Teresa A. Ferrante, Washington, D.C., filed brief for Lawyers' Committee for Civil Rights Under Law, as amicus curiae, urging reversal.

Sharon L. Brown (Anne M. Hawkins, of counsel), Sacramento, Calif., filed brief for Pacific Legal Foundation and National Federation of Independent Business, as amici curiae, urging affirmance.

Donald J. McNeil and Norma W. Zeitler (Keck, Mahin & Cate), Chicago, Ill., and Mona C. Zeiberg, Washington, D.C., filed brief for Illinois State Chamber of Commerce, Chamber of Commerce of the United States of America, and five other organizations, as amici curiae, urging affirmance.

Before REHNQUIST, Chief Justice, and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, Justices.

Full Text of Opinion

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 applies to any employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or pre-

ceding calendar year." 78 Stat. 253, as amended, 42 U.S.C. §2000e(b). These cases present the question whether an employer "has" an employee on any working day on which the employer maintains an employment relationship with the employee, or only on working days on which the employee is actually receiving compensation from the employer.

I

Petitioner Darlene Walters was employed by respondent Metropolitan Educational Enterprises, Inc., a retail distributor of encyclopedias, dictionaries, and other educational materials. In 1990, she filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that Metropolitan had discriminated against her on account of her sex in failing to promote her to the position of credit manager. Soon after that, Metropolitan fired her.

On April 7, 1993, petitioner EEOC filed suit against Metropolitan and its owner, respondent Leonard Bieber (hereinafter collectively Metropolitan), alleging that the firing constituted unlawful retaliation. Walters intervened in the suit. Metropolitan filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the company did not pass the 15-employee threshold for coverage under Title VII.

The District Court granted Metropolitan's motion to dismiss, 864 F.Supp. 71 [65 FEP Cases 1643] (ND Ill. 1994), relying on *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347, 354 [31 FEP Cases 634, 638] (CA7 1983), which affirmed a District Court's decision to count employees toward the 15-employee threshold only on days on which they actually performed work or were being compensated despite their absence. On appeal from the District Court's judgment, the Court of Appeals reaffirmed *Zimmerman*. 60 F.3d 1225 [68 FEP Cases 499] (CA7 1995). We granted certiorari. 516 U.S. —— (1996).

II

Petitioners' suit rests on Title VII's antiretaliation provision, 42 U.S.C. §2000e-3(a), which makes it unlawful for an employer to discriminate against any of its employees for filing complaints of discrimination. Metropolitan was subject to Title VII, however, only if, at the time of the alleged retaliation, it met the statutory definition of "employer," to wit: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. §2000e(b).

Metropolitan's "working days" are Monday through Friday, and the "current" and "preceding" calendar years for purposes of the retaliatory-discharge claim are 1990 and 1989. The parties have stipulated that Metropolitan failed to satisfy the 15-employee threshold in 1989. During most of 1990, Metropolitan had between 15 and 17 employees on its payroll on each working day; but in only nine weeks of the year was it actually compensating 15 or more employees on each working day (including paid leave as compensation). The difference resulted from the fact that Metropolitan had two part-time hourly employees who ordinarily skipped one working day each week.*

A

The parties agree that, on any particular day, all of the individuals with whom an employer has an employment relationship are "employees" of that employer. See 42 U.S.C. §2000e(f) (defining "employee" to mean "an individual employed by an employer"). Thus, individuals who are not receiving compensation from their employer on the day in question nonetheless qualify as "employees" on that day for purposes of §2000e(b)'s definition of "employer." Respondents contend, however, and the Seventh Circuit held here, that an employer "has" an employee for a particular working day within the meaning of §2000e(b) only when he is actually compensating the individual on that day. This position has also been adopted by the Eighth Circuit. See *EEOC* v. *Garden & Associates, Ltd.*, 956 F.2d 842, 843 [58 FEP Cases 136, 137] (1992).

Petitioners contend that the test for when an employer "has" an employee is no different from the test for when an individual *is* an employee: whether the employer has an employment relationship with the individual on the day in question. This test is generally

* Walters (but not the EEOC) alleged that, in addition to violating Title VII's antiretaliation provision, Metropolitan also violated the basic anti discrimination provision, 42 U.S.C. §2000e-2(a), by failing to promote her to credit manager in September 1989. In granting Metropolitan's motion to dismiss, the District Court stated that the relevant years for determining Metropolitan's status as an employer were 1989 and 1990. 864 F.Supp. 71, 72 [65 FEP Cases 1643, 1643] (ND Ill. 1994). For purposes of Walters' *discrimination* claim, however, the relevant years were 1988 and 1989. Because Walters did not mention this issue in her petition for certiorari or her brief on the merits, we treat any objection to the District Court's disposition of the matter as waived.

called the "payroll method," since the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll. The payroll method was approved in dictum by the Fifth Circuit in *Dumas* v. *Mount Vernon*, 612 F.2d 974, 979, n. 7 [22 FEP Cases 319, 323] (1980), and was adopted by the First Circuit in *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 [32 FEP Cases 1511, 1512] (1983), cert. denied, 466 U.S. 904 [34 FEP Cases 544] (1984); see also *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 69-70 [67 FEP Cases 667, 668-669] (CA1 1995) (reaffirming *Thurber*). The payroll method has also been adopted by the EEOC under the Age Discrimination in Employment Act of 1967, which defines "employer" in precisely the way Title VII does. See 29 U.S.C. §630(b); Equal Employment Opportunity Commission Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees Are Employees (Apr. 1990), reprinted in App. to Pet. for Cert. 30a-40a (hereinafter EEOC Policy Guidance). The Department of Labor has likewise adopted the payroll method under the Family and Medical Leave Act of 1993, which defines "employer" as a person who "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." See 29 U.S.C. §2611(4)(A)(i); 29 CFR §§825.105(b)-(d) (1996). In its administration of Title VII, the EEOC has expressed a preference for the payroll method, see EEOC Policy Guidance, but it lacks rulemaking authority over the issue, see 42 U.S.C. §2000e-12(a); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257 [55 FEP Cases 449, 454] (1991).

We think that the payroll method represents the fair reading of the statutory language, which sets as the criterion the number of employees that the employer "has" for each working day. In the absence of an indication to the contrary, words in a statute are assumed to bear their "ordinary, contemporary, common meaning." *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (internal quotation marks and citation omitted). In common parlance, an employer "has" an employee if he maintains an employment relationship with that individual. See 1 The New Shorter Oxford English Dictionary 1198 (1993) (def. 2: defining "have" to mean to "[p]ossess in a certain relationship"); American Heritage Dictionary 828 (3d ed. 1992) (def. 2: defining "have" to mean "to occupy a particular relation to"; giving as an example "had a great many disciples"); Webster's New International Dictionary 1145 (2d ed. 1950) (def. 2: defining "have" to mean "[t]o possess, as something which appertains to, is connected with, or affects, one"; giving as an example "to have an ungrateful son").

Metropolitan contends that if one were asked how many employees he had *for a given working day*, he would give as the answer the number of employees who were actually performing work on that day. That is possibly so. Language is a subtle enough thing that the phrase "have an employee *for* a given *working* day" (as opposed to "have an employee on a given day") may be thought to convey the idea that the employee must actually be working on the day in question. But *no one* before us urges *that* interpretation of the language, which would count even salaried employees only on days that they are actually working. Such a disposition is so improbable and so impossible to administer (few employers keep daily attendance records of all their salaried employees) that Congress should be thought to have prescribed it only if the language could bear no other meaning. Metropolitan's own proposed test does not focus on the question "How many employees did you have at work on a particular working day?" but rather the question "How many employees were you *compensating* on that day?" That question, unlike the other one, simply cannot be derived from any possible reading of the text.

B

The Court of Appeals rejected the straightforward meaning of "has fifteen or more employees" in §2000e(b) because of a different supposed consequence of the added statutory qualification "for each working day." In its view, if only the employment relationship were the intended focus, the statute would simply have required the employer to "ha[ve] fifteen or more employees in each of twenty or more calendar weeks," without the further refinement "for each working day" of each of those weeks. This point would have some force (though it would still not produce the Court of Appeals' focus on the number of employees being *compensated* on a particular day) if indeed the ordinary meaning of "has fifteen or more employees" rendered "for each working day" superfluous. Statutes must be interpreted, if possible, to give each word some operative effect. *United States* v. *Menasche*, 348 U. S. 528, 538-539 (1955). But we do not agree that giving "has fifteen or more employees" its ordinary meaning ren-

ders "for each working day" superfluous. Without that qualification, it would be unclear whether an employee who departed in the middle of a calendar week would count toward the 15-employee minimum for that week: with the qualification, it is clear that he does not. Similarly, the adjective "working" within the phrase "for each working day" eliminates any ambiguity about whether employees who depart after the end of the workweek, but before the end of the calendar week, count toward the 15-employee minimum for that week.

The Court of Appeals thought that the mere exclusion of partweek employees was an improbable purpose of the phrase. "[I]nstances where employees begin work on Wednesdays or depart on Thursdays," it said, "are unlikely to occur with sufficient frequency to merit inclusion in a federal antidiscrimination statute." 60 F.3d, at 1228 [68 FEP Cases, at 501]. But it is not a matter of carving out special treatment for this (supposedly minuscule) class—as would be the case if, without the phrase "for each working day," partweek employees would unquestionably be counted toward the statutory minimum. Without the phrase *one would not be sure* whether to count them or not, and in at least some cases the matter would have to be litigated. (Does a company have 15 employees "in" a week where, on all except the last workday, it has only 14? "In" a week where it hires a new employee on Saturday, a nonworkday, to begin on the next Monday? "In" a week where, in midweek, one of 14 employees quits and is replaced by a different 14th employee?) We are decidedly of the view that the "mere" elimination of evident ambiguity is ample—indeed, admirable—justification for the inclusion of a statutory phrase; and that purpose alone is enough to "merit" enactment of the phrase at issue here. Moreover, the phenomenon of midweek commencement and termination of employment seems to us not as rare as the Court of Appeals believed. For many businesses payday, and hence hiring- and firing-day, is the end of the month rather than the end of the week. Metropolitan itself experienced 10 midweek arrivals or departures from its roughly 15-employee work force during 1990. Brief for Petitioner in No. 95-259, pp. 10-11.

Metropolitan points out that the interpretation we adopt produces some strange consequences with regard to the coverage of Title VII. For example, an employee who works irregular hours, perhaps only a few days a month, will be counted toward the 15-employee minimum for every week in the month. Metropolitan's approach reduces this problem (though it does not eliminate it entirely): The employee will be counted so long as he works one hour each day of the workweek. On the other hand, Metropolitan's approach produces unique peculiarities of its own: A company that has 15 employees working for it on each day of a 5-day workweek is covered, but if it decides to add Saturday to its workweek with only one less than its full complement of employees, it will become exempt from coverage (despite being in fact a "larger" business). Unsalaried employees who work the same number of hours per week are counted or not counted, depending on how their hours are scheduled. A half-time worker who works only mornings is counted; a half-time worker who works alternate days is not. The fact is that neither interpretation of the coverage provision can cause it to be an entirely accurate measure of the size of a business.

In any event, Metropolitan ought to be reluctant to appeal to practical consequences as the basis for deciding the question before us. The approach it suggests would turn the coverage determination into an incredibly complex and expensive factual inquiry. Applying it in the present cases required the parties to spend 10 months poring over Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records to determine, for each working day of a 2-year period, how many employees were at work, how many were being paid on salaries, how many were on paid holiday leave, how many were on paid vacation leave, and how many were on paid sick leave. For an employer with 15 employees and a 5-day workweek, the number of daily working histories for the 2-year period is 7,800. The problems with Metropolitan's compensation-based approach are magnified when employees are "compensated" on days off in ways less clear cut than holiday, vacation, or sick leave. If, for example, employees accumulate seniority rights or entitlements to holiday bonuses on their unpaid days off, it would be necessary to determine (or litigate) whether they are "receiving compensation" on those days for purposes of the coverage determination. Under the interpretation we adopt, by contrast, all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. He is counted as an employee for each working day after arrival and before departure.

III

As we have described, in determining the existence of an employment relationship, petitioners look first and primarily to whether the individual in question appears on the employer's payroll. Metropolitan did not challenge this aspect of petitioners' approach; its objection was the more basic one that existence of an employment relationship was not the criterion. For their part, petitioners emphasize that what is ultimately critical under their method is the existence of an employment relationship, not appearance on the payroll; an individual who appears on the payroll but is not an "employee" under traditional principles of agency law, see, *e.g., Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 323-324 (1992), would not count toward the 15-employee minimum. We agree with petitioners that the ultimate touchstone under §2000e(b) is whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question.

The parties' stipulation concerning the number of weeks in 1990 during which Metropolitan satisfied the 15-employee threshold using the payroll approach does not correspond precisely to the counting method petitioners have advocated here. The stipulation was arrived at by counting the number of employees on the payroll in each week of 1990, without regard to whether these employees were employed on each working day of the week. However, subtracting the nine weeks in which Metropolitan experienced midweek employment changes in 1990 from the 47 weeks of that year in which, according to the parties' stipulation, Metropolitan had employment relationships with 15 or more employees, leaves 38 weeks in which Metropolitan satisfied the 15-employee threshold under the interpretation we adopt. Therefore, Metropolitan was an "employer" within the meaning of §2000e(b) for purposes of petitioners' retaliatory discharge claim.

* * *

The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

EVANS v. TECHNOLOGIES APPLICATIONS

U.S. District Court,
District of Maryland,
Southern Division

CHRISTINE EVANS, Plaintiff v. TECHNOLOGIES APPLICATIONS & SERVICES COMPANY, Defendant. No. AW 94-1767, February 9, 1995

CIVIL RIGHTS ACT OF 1964 AND COUNTY FEP ORDINANCES

1. Evidence ▸108.4164 ▸108.8101

Allegations of female employee, who was not considered for promotion to quality control supervisor, as to her qualifications and those of male employee who was selected and male employee who left position will be stricken from her affidavit, even if her statements are based on personal knowledge, since only employer's perceptions about employees' qualifications are relevant; federal district court will not review employer's promotion decision based on its judgment as to relative qualifications.

2. Evidence ▸106.5801 ▸108.8101

Employee may rely on her prior evaluations in her affidavit, since they may be relevant to determine ultimate question of discrimination, although judicial decisions should not be based on prior good evaluations alone.

3. Evidence ▸108.8101

Employee's statement that "to the best of [her] knowledge [employer] has never implemented a reduction in force" will be stricken from her affidavit, since employer's alleged financial difficulties are not something generally known to lower-level employees, and statement "to the best of [her] knowledge" shows that she does not have personal knowledge of employer's financial affairs.

4. Evidence ▸106.5801 ▸108.4171

Employee's allegation that employer did not post position of quality control supervisor and language of her statement in affidavit that "position did not require the candidate to possess computer software skills. Even if it did . . ." show that she did not have personal knowledge of requirements for that position.

5. Evidence ▸106.5801

Employee's discussion of employer's procedures for posting job vacancies will not be stricken from her affidavit, since employees are often apprised of

EEOC	NOTICE	Number 915.002
		Date 12/3/97

1. SUBJECT: Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms.

2. PURPOSE: This document provides guidance regarding the application of the anti-discrimination statutes to temporary, contract, and other contingent employees.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 605 of Volume II of the Compliance Manual.

12/3/97
Date

Gilbert F. Casellas
Chairman

DISTRIBUT.ON: CM Holders

EXECUTIVE SUMMARY

This Guidance addresses the application of the federal employment discrimination statutes to individuals placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients. The term "staffing firm" is used in this document to refer to these types of firms.

Staffing firm workers are generally covered under the anti-discrimination statutes. This is because they typically qualify as "employees" of the staffing firm, the client to whom they are assigned, or both. Thus, staffing firms and the clients to whom they assign workers may not discriminate against the workers on the basis of race, color, religion, sex, national origin, age, or disability.

The guidance makes clear that a staffing firm must hire and make job assignments in a non-discriminatory manner. It also makes clear that the client must treat the staffing firm worker assigned to it in a non-discriminatory manner, and that the staffing firm must take immediate and appropriate corrective action if it learns that the client has discriminated against one of the staffing firm workers. The document also explains that staffing firms and their clients are responsible for ensuring that the staffing firm workers are paid wages on a non-discriminatory basis. Finally, the guidance describes how remedies are allocated between a staffing firm and its client when the EEOC finds that both have engaged in unlawful discrimination.

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Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms

INTRODUCTION

This Guidance addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, i.e., "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment.

This guidance focuses on a large subgroup of the contingent work force -- those who are hired and paid by a "staffing firm," such as a temporary employment agency or contract firm, but whose working conditions are controlled in whole or in part by the clients to whom they are assigned.

Recent statistics compiled by the National Association of Temporary and Staffing Services (NATSS) show that the temporary help industry currently employs more than 2.3 million individuals.[1] That number represents a 100% increase since 1991, when 1.15 million individuals were employed in temporary help jobs. NATSS statistics also show that the professional segment of the temporary help industry (including occupations in accounting, law, sales, and management) has risen significantly.

A 1995 survey by the Bureau of Labor Statistics (BLS) showed that workers paid by temporary employment agencies were more likely to be female and African American than workers in traditional job arrangements,[2] while workers provided by contract firms were disproportionately male.[3] BLS found that workers paid by temporary help agencies were heavily concentrated in administrative support and laborer occupations and earned 60 percent of the traditional worker

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[1] June 18, 1997 News Release of the National Association of Temporary and Staffing Services.

[2] Seasonal and temporary foreign employees performing work for companies in this country form another category of the contingent workforce. The Commission intends to address at a future date particular issues regarding coverage of these workers.

[3] Bureau of Labor Statistics, U.S. Dept. of Labor, Report 900, Contingent and Alternative Employment Arrangements (August 1995).

wage.[4] The largest proportion of contract workers was employed in the services industry, and female contract workers earned slightly less than traditional workers while male contract workers earned more. BLS also found that contract and temporary workers had lower rates of health insurance and pension coverage than traditional workers, and that the majority of temporary workers would have preferred traditional work arrangements.

Staffing firms may assume that they are not responsible for any discrimination or harassment that their workers confront at the clients' work sites. Similarly, some clients of staffing firms may assume that they are not the employers of temporary or contract workers assigned to them, and that they therefore have no EEO obligations toward these workers. However, as this guidance explains, *both* staffing firms and their clients share EEO responsibilities toward these workers.

The Commission has addressed in previous guidance several of the coverage issues discussed in this document.[5] However, because use of contingent workers is increasing, it is important to set out an updated and unified policy that more specifically explains how the anti-discrimination laws apply to this segment of the workforce.

This document provides guidance concerning the following issues:

- coverage under the EEO laws, including coverage of workers assigned to federal agencies;
- liability of staffing firms and/or clients for discriminatory hiring, assignment, or wage practices;

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[4] For a discussion of wage data for contingent workers, *see* Steven Hipple and Jay Stewart, *Earnings and benefits of workers in alternative work arrangements*, Monthly Labor Review 46 (October 1996).

[5] *See* Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87); Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87); Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix H (BNA) 605:0105 (9/4/87); and Policy Statement: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act, Compliance Manual (BNA) N:3935 (9/20/91).

The above-referenced policy documents set forth some general principles regarding coverage under the anti-discrimination statutes, and they remain in effect. The current guidance explains more specifically how the coverage principles apply to workers who are hired by staffing firms and placed in job assignments with the firms' clients.

- liability of staffing firms and/or clients for unlawful discrimination or harassment at the assigned work site; and

- allocation of damages where both the staffing firm and its client violate EEO laws.

STAFFING SERVICE WORK ARRANGEMENTS

The activities of the following types of staffing firms are addressed in this guidance[6]:

- **Temporary Employment Agencies**

  Unlike a standard employment agency, a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites. The agency recruits, screens, hires, and sometimes trains its employees. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. The agency bills the client for the services performed.

  While the worker is on a temporary job assignment, the client typically controls the individual's working conditions, supervises the individual, and determines the length of the assignment.

- **Contract Firms**

  Under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. Examples of contract firm services include security, landscaping, janitorial, data processing, and cafeteria services.

  Like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage.

  The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site.

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[6] For a detailed explanation of the various types of staffing service work arrangements, *see* Edward A. Lenz, *Co-Employment - A Review of Customer Liability Issues in the Staffing Services Industry*, 10 The Labor Lawyer 195, 196-99 (1994).

- **Other Types of Staffing Firms**

  There are many variants on the staffing firm/ client model. For example, "facilities staffing" is an arrangement in which a staffing firm provides one or more workers to staff a particular client operation on an ongoing basis, but does not manage the operation.

  Under another model, a client of a staffing firm puts its workers on the firm's payroll, and the firm leases the workers back to the client. The purpose of this arrangement is to transfer responsibility for administering payroll and benefits from the client to the staffing firm. A staffing firm that offers this service does not recruit, screen, or train the workers.

The term "staffing firm" is used in this document to describe generically these types of firms, although more specific terms are used where necessary for purposes of clarity.

COVERAGE ISSUES

This section sets forth criteria for determining whether a staffing firm worker qualifies as an "employee" within the meaning of the anti-discrimination statutes or an independent contractor; whether the staffing firm and/or its client qualifies as the worker's employer(s); and whether the staffing firm or its client can be liable for discriminating against the worker even if it does not qualify as the worker's employer. This section also discusses coverage of staffing firm workers assigned to jobs in the Federal Government and coverage of workers assigned to jobs in connection with welfare programs. Finally, this section explains the method for counting workers of a staffing firm or its client to determine whether either entity has the minimum number of employees to be covered under the applicable anti-discrimination statute.

1. **Are staffing firm workers "employees" within the meaning of the federal employment discrimination laws?**

   Yes, in the great majority of circumstances.[7] The threshold question is whether a staffing firm worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself. The label used to describe the worker in the employment contract is *not* determinative. One must consider all aspects of the worker's relationship with the firm and the firm's client.[8] As the Supreme Court has emphasized, there is "'no shorthand formula

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[7] *See*, *infra*, cases cited in notes 12, 14, and 15.

[8] The coverage principles set forth here apply not only to workers who are hired by staffing firms and assigned to the firms' clients, but also to temporary, seasonal, part-time, and other

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or magic phrase that can be applied to find the answer, . . . all incidents of the relationship must be assessed with *no one factor being decisive*.'"[9] Factors that indicate that the worker is a covered employee include:[10]

a) the firm or the client has the right to control when, where, and how the worker performs the job;

b) the work does not require a high level of skill or expertise;

c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;

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[8](...continued)
contingent workers who are hired directly by employers.

[9] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)) (emphasis added).

[10] The listed factors are drawn from *Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)); Rev Ruling 87-41, 1987-1 Cum. Bull. 296 (cited in *Darden*, 503 U.S. at 325); and Restatement (Second) of Agency § 220(2) (1958) (cited in *Darden*, 503 U.S. at 325). The Court in *Darden* held that the "common law" test governs who qualifies as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). That test, as described by the Court, is indistinguishable from the "hybrid test" for determining an employment relationship adopted by the EEOC in the Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix G (BNA) 605:0105 (9/4/87). Although the Supreme Court has not had occasion to address the standards that govern who is an "employee" under Title VII, the ADEA, and the ADA, the rationale in *Darden* should apply. This is because the ERISA definition of "employee" that the Court interpreted in *Darden* is identical to the definition of "employee" in Title VII, the ADEA, and the ADA.

Courts have stated that the definition of "employee" is broader under the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, than under the other EEO statutes. However, there is no significant functional difference between the tests. Under the FLSA, employees are those who, as a matter of economic reality, are dependent upon the business to which they render service. *See* 29 C.F.R. § 1620.8 (1996); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.) (under FLSA's "economic realities" test, fruit and vegetable company qualified as joint employer of harvest workers supplied by crew leaders), *reh'g denied*, 472 F.2d 1405 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973). All three tests (common law, hybrid, and economic realities) consider similar factors and often result in the same conclusions as to "employee" status.

d) the work is performed on the premises of the firm or the client;

e) there is a continuing relationship between the worker and the firm or the client;

f) the firm or the client has the right to assign additional projects to the worker;

g) the firm or the client sets the hours of work and the duration of the job;

h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;

I) the worker has no role in hiring and paying assistants;

j) the work performed by the worker is part of the regular business of the firm or the client;

k) the firm or the client is itself in business;

l) the worker is not engaged in his or her own distinct occupation or business;

m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;

n) the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);

o) the firm or the client can discharge the worker; and

p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The

agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee."

2. Is a staffing firm worker who is assigned to a client an employee of the firm, its client, or both?

Once it is determined that a staffing firm worker is an "employee," the second question is who is the worker's employer. The staffing firm and/or its client will qualify as the worker's employer(s) if, under the factors described in Question 1, one or both businesses have the right to exercise control over the worker's employment. As noted above, no one factor is decisive, and it is not necessary even to satisfy a majority of factors. The determination of who qualifies as an employer of the worker cannot be based on simply counting the number of factors. Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer. If either entity qualifies as the worker's employer, and if that entity has the statutory minimum number of employees (see Question 6), then it can be held liable for unlawful discriminatory conduct against the worker. If *both* the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as "joint employers."[11]

a. Staffing Firm:

The relationship between a staffing firm and each of its workers generally qualifies as an employer-employee relationship because the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm. Furthermore, the intent of the parties typically is to establish an employer-employee relationship.[12]

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[11] For additional guidance on criteria for determining whether two or more entities are joint employers of a charging party, *see* EEOC's Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87).

[12] For cases holding that a staffing firm is an "employer" of the workers it sends on job assignments, *see Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 508 (E.D. Va.

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In limited circumstances, a staffing firm might not qualify as an employer of the workers that it assigns to a client. For example, in some circumstances, a client puts its employees on the staffing firm's payroll solely in order to transfer the responsibility of administering wages and insurance benefits. This is often referred to as employee leasing. If the firm does not have the right to exercise any control over these workers, it would not be considered their "employer."[13]

b. **Client:**

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[12](...continued)
1992) (personnel firm that provided employees to clients pursuant to service contracts and the worker that it assigned to one of its clients "clearly had the type of direct employer-employee relationship that is typically the subject of Title VII lawsuits"), *aff'd mem.*, 40 F.3d 1244 (4th Cir. 1994); *Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith*, 611 F. Supp. 344, 349 (D.C.N.Y. 1984) (worker paid by "Mature Temps" employment agency and assigned to Merrill Lynch for temporary job assignment was employee of both Mature Temps and Merrill Lynch during period of assignment), *aff'd mem.*, 770 F.2d 157 (2d Cir. 1985). *Cf. NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1266-67 (7th Cir. 1987) (NLRB correctly determined that temporary employment service and its client were joint employers of temporary worker); *Maynard v. Kenova Chemical Company*, 626 F.2d 359, 362 (4th Cir. 1980) (temporary employee injured while working on defendant's premises could not sue defendant in tort because he was employee of both defendant and temp agency, and workers' compensation provided sole remedy).

The Commission disagrees with the rulings of the District Court of Delaware in *Williams v. Caruso*, 966 F. Supp. 287 (D. Del. 1997), and *Kellam v. Snelling Personnel Services*, 866 F. Supp. 812 (D. Del. 1994), *aff'd mem.*, 65 F.3d 162 (3d Cir. 1996). In *Williams*, the court ruled that a temporary employment agency was not a Title VII employer of a temporary worker whom it hired and placed in a job assignment. The court followed its earlier reasoning in *Kellam*, in which it declined to count the workers assigned by a temporary employment agency as its employees on the ground that the agency did not supervise the workers on a day-to-day basis. In the Commission's view, the court in both cases placed undue emphasis on daily supervision of job tasks and underestimated the significance of other factors indicating an employment relationship.

[13] *See, e.g., Astrowsky v. First Portland Mortgage Corp.*, 887 F. Supp. 332 (D. Me. 1995) (holding that employee leasing firm was not a joint employer of workers that it leased back to original employer; firm only processed pay checks and made tax withholdings but did not exercise any control over employees; original employer remained exclusive employer of the workers for purposes of EEO coverage).

A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.[14]

> **Example 2:** Under the facts of Example 1, above, the temporary employment agency and its client qualify as joint employers of the worker because both have the right to exercise control over the worker's employment.
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> **Example 3:** A staffing firm hires charging party (CP) and sends her to perform a long term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client's premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm. The firm pays her and bills the client for the time worked. It reviews her work based on reports by the client and has the right to terminate her if she is failing to perform the requested services. The staffing firm will replace her with another worker if her work is unacceptable to the client.
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> In these circumstances, despite the statement in the contract that she is an independent contractor, both the staffing firm and the client are joint employers of CP.[15]

Clients of contract firms and other types of staffing firms also qualify as employers of the workers assigned to them if the clients have sufficient control over the workers, under the

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[14] *See Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860 (11th Cir. 1997) (finding that temporary employment agency's client qualified as employer of worker assigned to it and upholding jury award for retaliation by client); *King v. Booz-Allen & Hamilton, Inc.*, No. 83 Civ. 7420 (MJL), 1987 WL 11546, n.3 (S.D.N.Y. May 21, 1987) (finding that plaintiff who was paid by temporary employment agency and assigned to work at Booz-Allen was an employee of Booz-Allen); *Amarnare*, 611 F. Supp. at 349 (finding that temporary employment agency's client qualified as joint employer of worker assigned to it).

[15] *See* Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99, cited in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 324 (1992) (concluding on above facts that the staffing firm was the individual's employer, but not addressing the status of the client vis-a-vis the worker).

standards set forth in Question 1, above.[16] For example, the client is an employer of the worker if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship. On the other hand, the client would not qualify as an employer if the staffing firm furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make or change assignments, and to terminate the workers.

> **Example 4:** A staffing firm provides janitorial services for its clients. It hires the workers and places them on each client's premises under the supervision of the contract firm's own managerial employees. The firm's manager sets the work schedules, assigns tasks to the janitors, provides the equipment they need to do the job, and supervises their work performance. The client has no role in controlling the details of the work, making assignments, or setting the

[16] For examples of cases finding that a client of a staffing firm can qualify as a joint employer of the worker assigned to it, *see Poff v. Prudential Insurance Co. of America*, 882 F. Supp. 1534 (E.D. Pa. 1995) (where plaintiff was hired by computer services contractor and assigned to work on-site at insurance company, issue of fact existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff's work was accomplished to qualify as employer); *Magnuson*, 808 F. Supp. at 508-10 (where car company contracted with staffing firm for plaintiff's services and assigned her to work at its car dealership, genuine issue of fact was raised as to whether car company, dealership, and staffing firm all qualified as her joint employers); *Guerra v. Tishman East Realty*, 52 Fair Empl. Prac. Cas. (BNA) 286 (S.D.N.Y. 1989) (security guard employed by management firm who worked in building owned by insurance company could seek to prove that insurance company exercised sufficient control over him to qualify as his "employer"); *EEOC v. Sage Realty*, 507 F. Supp. 599 (S.D.N.Y. 1981) (building management company that contracted with cleaning company for services of building lobby attendant qualified as joint employer of lobby attendant; contractor carried lobby attendant on its payroll but management company supervised her day-to-day work).

For examples of cases finding that the client did not qualify as a joint employer of the contract worker because the client did not have sufficient control over the worker, *see Rivas v. Federacion de Asociaciones Pecuarias*, 929 F.2d 814 (1st Cir. 1991) (client of shipping services contractor was not a joint employer of workers who unloaded ships; although client set time for ship unloading had some disciplinary authority over foremen, and directed order of unloading, contractor selected, scheduled, and supervised the workers and handled disciplinary matters); *King v. Dalton*, 895 F. Supp. 831 (E.D. Va. 1995) (Navy was not joint employer of worker assigned by contract firm to work on project due to insufficient direct supervisory control over the daily details of the plaintiff's work).

hours or duration of the work. Nor does the client have authority to discharge the worker. In these circumstances, the staffing firm is the worker's exclusive employer; its client is not a joint employer.

Example 5: A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the clients' premises. Client A reserves the right to direct the staffing firm workers to perform particular tasks at particular times or in a specified manner, although it does not generally exercise that authority. Client A evaluates the quality of the workers' performance and regularly reports its findings to the firm. It can require the firm to remove the worker from the job assignment if it is dissatisfied. The firm and the Client A are joint employers.

3. **Can a staffing firm or its client be liable for unlawfully discriminating against a staffing firm worker even if it does not qualify as the worker's employer?**

An entity that has enough employees to qualify as an employer under the applicable EEO statute can be held liable for discriminating against an individual who is not its employee. The anti-discrimination statutes not only prohibit an employer from discriminating against its own employees, but also prohibit an employer from interfering with an individual's employment opportunities with another employer.[17] Thus, a staffing firm that discriminates

[17] *See* 42 U.S.C. § 2000e-2(a) (Title VII), 29 U.S.C. § 623(a) (ADEA), and 42 U.S.C. § 12112(a) (ADA), which do not limit their protections to a covered employer's own employees, but rather protect an "individual" from discrimination. Section 503 of the ADA, 42 U.S.C. § 12203(b), additionally makes it unlawful to "interfere with any individual in the exercise or enjoyment of ... any right granted or protected by this chapter." The EPA, 29 U.S.C. § 206, limits its protections to an employer's own employees, and therefore third party interference theory does not apply.

For cases allowing staffing firm workers to bring claims against the firms' clients as third party interferers, *see King v. Chrysler Corp.*, 812 F. Supp. 151 (E.D. Mo. 1993) (cashier employed by company that operated cafeteria on automobile company's premises could sue automobile company for failing to take sufficient corrective action to remedy sexually hostile work environment; Title VII does not specify that employer committing an unlawful employment practice must employ the injured individual); *Fairman v. Saks Fifth Avenue*, 1988 U.S. Dist.

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against its client's employee or a client that discriminates against a staffing firm's employee is liable for unlawfully interfering in the individual's employment opportunities.[16]

Example 6: A staffing firm assigned one of its employees to maintain and repair a client's computers. The firm supplied all the tools and direction for the repairs. The technician was on the client's premises only sporadically over a three to four week period and worked independently while there. The client did not report to the firm about the number of hours worked or about the quality of the work. The client had no authority to make assignments or require work to be done at particular times. After a few visits, the client asked the contract firm to assign someone else, stating that it was not satisfied with the worker's computer repair skills. However, the worker believes that the true reason for the client's action was racial bias.

The client does not qualify as a joint employer of the worker because it had no ongoing relationship with the worker, did not pay the worker or firm based on the hours worked, and had no authority over hours, assignments, or other aspects of the means or manner by which the work was achieved. However, if the client's request to replace the worker was due to racial bias, and if the client had fifteen or more employees, it would be liable for interfering in the worker's employment opportunities with the staffing firm.

Example 7: A company puts its employees on the payroll of a staffing firm solely in order to transfer the responsibility of administering wages and insurance benefits for the company's workers. The staffing firm administers a health insurance policy for its client's workers that does not cover AIDS-

[17](...continued)
LEXIS 13087 (W.D. Mo. 1988) (plaintiff who was employed by cleaning contractor to perform cleaning duties at store and who was allegedly discharged due to her race could proceed with Title VII action against store; store claimed that it was not plaintiff's employer because it did not pay her wages, supervise her or terminate her; however, even if the store was not plaintiff's employer, it could be sued for improperly interfering with her employment opportunities with the cleaning contractor); *Amarnare*, 611 F. Supp. at 349 (temporary employee assigned by "Mature Temps" to work for Merrill Lynch could challenge discrimination by Merrill Lynch either on basis that Merrill Lynch was her joint employer or that Merrill Lynch interfered with her employment opportunities with Mature Temps).

[16] *See* Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87).

related illness. Two workers file ADA charges against the staffing firm and the client. The staffing firm claims that it is not an employer of the workers and therefore falls outside ADA coverage.

The staffing firm does not qualify as a joint employer of the workers because it does not have the requisite degree of control -- it did not hire the workers; establish their wage rates or hours; control the conditions of work; manage personnel disputes; or have the right to fire the workers. Nevertheless, the firm shares liability with its client for the discriminatory health insurance plan if it has fifteen or more employees of its own to fall under the coverage of the ADA.[19] This is because the firm's administration of the insurance plan interferes in the workers' access to employment opportunities or benefits.[20]

4. Do the same coverage principles apply when a staffing firm assigns a worker to a federal agency?

The principles regarding joint employer coverage are the same. Thus, a federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker, as discussed in Questions 1 and 2. If so, and if the agency discriminates against the individual, it is liable *whether or not the individual is on the federal payroll.*[21]

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[19] While Title I of the ADA only applies to entities with fifteen or more employees, the Commission has not yet addressed the scope of the interference provision in Section 503, which applies to all titles of the ADA and does not contain a specific coverage limitation. *See* n.17.

[20] *See Carparts Distribution. Ctr. v. Automotive Wholesalers*, 37 F.3d 12, 17-18 (1st Cir. 1994) (trade association and its administering trust for health benefit plan provided by plaintiff's employer was sued under Title I for limiting coverage of AIDS; court held that defendants were covered under Title I if they functioned as plaintiff's employer with respect to his health care coverage or if they affected plaintiff's access to employment opportunities); *Spirt v. Teachers Insurance and Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) (association that managed retirement plans for college and university employees could be found liable for using sex-based mortality tables to calculate benefits; although association was not plaintiff's "employer" in any commonly understood sense, the term "employer" under Title VII encompasses any party who significantly affects worker's access to employment opportunities), *vacated and remanded sub nom Long Island University v. Spirt*, 463 U.S. 1223 (1983), *reinstated on remand,* 735 F.2d 23 (2d Cir.), *cert. denied,* 469 U.S. 883 (1984).

[21] *See Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985) (in determining whether individual is a federal employee for purposes of Title VII coverage, key issue is extent to which government

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In contrast to private employers, a federal agency that does not qualify as a joint employer of the worker assigned to it cannot be found liable for discrimination under a "third party interference" theory. This is because Title VII, the ADEA, and Section 501 of the Rehabilitation Act only permit claims against the federal government by "employees or applicants for employment."[22]

5. **Are workers participating in work-related activities in connection with welfare programs protected by the federal employment discrimination laws? If so, who is the employer of such a worker? What types of claims might arise?**

a. Employee Status

Welfare recipients participating in work-related activities[23] are protected by the federal anti-discrimination statutes if they are "employees" within the meaning of the federal employment discrimination laws.[24] *See* Question 1. The simple fact of participation in one

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[21](...continued)
exercises control over that individual). For guidance on procedures in handling joint federal sector/private sector complaints, *see* Question 9.

[22] 42 U.S.C. § 20003-16(a) (Title VII); 29 U.S.C. § 633(a) (ADEA); 29 U.S.C. § 794a (Rehabilitation Act, incorporating remedies, procedures and rights set forth in 42 U.S.C. § 2000e-16). *See King v. Dalton*, 895 F. Supp. at 836 n.7 (plain terms of § 2000e-16 require a plaintiff to be an employee of the defendant agency); *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979) (§ 2000e-16 "cover[s] only those individuals in a direct employment relationship with a government employer").

[23] A variety of work and work-related activities may be required as a condition of receipt of welfare, food stamps, or other benefits. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, 110 Stat. 2105 (1996), for example, welfare recipients may be required to perform work activities which are defined to include unsubsidized employment, subsidized private or public sector employment, work experience, on-the-job training, job search and job readiness assistance, community service programs, vocational educational or job skills training, educational activities, or child care services. Section 103 of Welfare Reform Act, 110 Stat. 2133, amending Part A of Title IV of Social Security Act, 42 U.S.C. § 601, *et seq*. *See also* Section 824 of Welfare Reform Act, 110 Stat. 2323, amending Section 6 of Food Stamp Act of 1977, 7 U.S.C. § 2015.

[24] The Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), requires each state (continued...)

of these activities is not dispositive of the question of whether the federal employment discrimination laws apply. Rather, the same analysis applies which is used to determine whether any other worker is covered by the federal employment discrimination laws. Under the criteria that have been set out, welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs.[25] On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered.[26]

b. Employer Status

While some workers participating in these programs will have a single employer, others may have joint employers. For example, a state or local welfare agency may function as a staffing firm and the "direct" employer may function as the client. In some cases, a state or local welfare agency may contract with a temporary employment agency to place the welfare recipients in job assignments. The determination of whether any or all of these entities are employers of the worker is based on the same criteria set forth in answer to Questions 1 and 2 that apply to any other employment situation. The fact that an entity does not pay the worker a salary does not, by itself, defeat a finding of an employment relationship. Moreover, even if an entity is not the worker's employer, it can be found liable

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[24](...continued)
that receives a grant from the Secretary of Labor as a "welfare-to-work state" to establish a procedure for handling complaints by participants in work activities who allege certain violations, including gender discrimination. The Act does not preempt application of Title VII, the ADEA, the ADA, or the EPA. *See Morton v. Mancari*, 417, U.S. 535, 550 (1973). Therefore, welfare recipients who perform work activities and qualify as "employees" are covered under the anti-discrimination statutes enforced by the EEOC.

[25] Title VII specifically makes it unlawful to discriminate in admission to or employment in any program established to provide apprenticeship or other training 42 U.S.C. § 2000e-2(d). The ADA and the ADEA also prohibit discrimination in job training and apprenticeship programs. 42 U.S.C. § 12112(a); 29 C.F.R. § 1625.21.

[26] The Commission notes that other federal statutes prohibit discrimination in federally-assisted education and training programs. *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C.§ 2000d, *et seq.*; Title IX of the Education Amendments of 1972, 42 U.S.C.§ 1681, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Complaints about discrimination in education or other non-employment programs should be referred to the Offices for Civil Rights in the federal agencies that fund such programs.

under the employment discrimination laws based on the interference theory explained in the answer to Question 3.

c. **Types of Claims**

Types of claims which may arise include, for example, harassment, discriminatory assignments, discriminatory termination, failure to provide reasonable accommodation to persons covered under the Americans with Disabilities Act, and retaliation.

6. **Which workers are counted when determining whether a staffing firm or its client is covered under Title VII, the ADEA, or the ADA?**

The staffing firm and the client each must count every worker with whom it has an employment relationship.[27] Although a worker assigned by a staffing firm to a client may not appear on the client's payroll, (s)he must be counted as an employee of both entities if they qualify as joint employers.[28] Questions 1 and 2, above, set forth the legal standards for determining whether a worker has an employment relationship with either the staffing firm or its client, or both.

The Supreme Court has made clear that a respondent must count each employee from the day that the employment relationship begins until the day that it ends, regardless of whether the employee is present at work or on leave on each working day during that period.[29] Thus,

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[27] Title VII and the ADA apply to any employer who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The ADEA applies to any employer who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). Counting issues do not arise in EPA claims because that Act applies to any employer who has more than one employee engaged in commerce or in the production of goods for commerce, unless an exception applies. 29 C.F.R. § 1620.1 - 1620.7.

[28] *Cf.* 29 C.F.R. § 825.106(d) (1996) (under the Family and Medical Leave Act, employees jointly employed by two employers must be counted by both employers, whether or not they are maintained on both employers' payrolls, in determining employer coverage and employee eligibility).

[29] *EEOC & Walters v. Metropolitan Educ. Enterprises*, 117 S. Ct. 660 (1997). For guidance on how to count employees when determining whether a respondent satisfies the jurisdictional prerequisite for coverage, *see* Enforcement Guidance on *Equal Employment Opportunity Commission & Walters v. Metropolitan Educational Enterprises*, 117 S. Ct. 660 (1997), (continued...)

a client of a staffing firm must count each worker assigned to it from the first day of the job assignment until the last day. The staffing firm also must count the worker as its employee during every period in which the worker is sent on a job assignment.

Staffing firms are typically covered under the anti-discrimination statutes, because their permanent staff plus the workers that they send to clients generally exceeds the minimum statutory threshold. Clients may or may not be covered, depending on their size.

In cases where questions are raised regarding coverage, the investigator should ask the respondent to name and provide records regarding every individual who performed work for it, including all individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. If the investigator has questions about the documents produced and cannot otherwise obtain the necessary information, he or she may consider deposing the respondent. The investigator should then determine which of the named individuals qualified as employees of the respondent rather than independent contractors, according to the standards set forth in Questions 1 and 2, above.

DISCRIMINATORY ASSIGNMENT PRACTICES

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner.[30] It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner. The staffing firm's client is liable if it sets discriminatory criteria for the assignment of workers. The following question and answer explore these issues in detail.

7. **If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, is the staffing firm liable? Is the client?**

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[29](...continued)
Compliance Manual (BNA) N:2351 (5/2/97).

[30] Staffing firms and their clients are subject to the same record preservation requirements as other employers that are covered by the anti-discrimination statutes. They therefore must preserve all personnel records that they have made relating to job assignments or any other aspect of a staffing firm worker's employment for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. Personnel records relevant to a discrimination charge or an action brought by the EEOC or the U.S. Attorney General must be preserved until final disposition of the charge or action. 29 C.F.R. §§ 1602.14, 1627.3(b). The Commission can pursue an enforcement action where the respondent fails to keep records pertaining to all its contingent and non-contingent employees and applicants for employment.

a. Staffing Firm

The staffing firm is liable for its discriminatory assignment decisions. Liability can be found on any of the following bases: 1) as an employer of the workers assigned to clients (for discriminatory job assignments); 2) as a third party interferer (for discriminatory interference in the workers' employment opportunities with the firm's client); and/or 3) as an employment agency for (discriminatory job referrals).[31]

The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense. Thus, a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).

b. Client

A client that rejects workers for discriminatory reasons is liable either as a joint employer or third party interferer if it has the requisite number of employees to be covered under the applicable anti-discrimination statute.

> **Example 8:** A staffing firm that provides job placements for nurses receives a job order from an individual client for a white nurse to provide her with home-based nursing care. The firm agrees to refer only white nurses for the job. The firm is violating Title VII, both as an employment agency for its discriminatory referral practice and as an employer for the discriminatory job assignment. The client is not covered by Title VII because she does not have fifteen or more employees.

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[31] Section 701(c) of Title VII defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." For further guidance, *see* Policy Guidance: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act?, Compliance Manual (BNA) N:3935 (9/29/91).

Example 9: A temporary employment agency receives a job order for a temporary receptionist. The client requires that the individual assigned to it speak English fluently because a large part of the job entails communication with English-speaking persons who call the client or who come to the client's work place. The agency assigns an Asian American individual who speaks English fluently, but with an accent. The client insists that the agency replace her with someone who can speak unaccented English. The agency complies with that request and sends an individual who speaks English fluently with no accent.

The Asian American individual files a charge with the EEOC. The investigator determines that English fluency was necessary for the job. However, he further determines that CP's accent does not interfere with her ability to communicate and that she has effectively performed similar jobs. The investigator properly concludes that both the client and the staffing firm are liable for terminating CP on the basis of her national origin.

Example 10: A staffing firm provides machine operators to its clients. One of its clients requires that all workers assigned to it pass a certain paper and pencil test. The firm administers the test to its available workers and refers only those who pass the test. An African American individual who is denied an assignment with the client files charges against both the staffing firm and its client, alleging that administration of the test results in the disproportionate exclusion of African Americans. An investigation shows that the test does have an adverse impact on African Americans and does not accurately measure the skills that are necessary for job performance. Therefore, both the staffing firm and its client are in violation of Title VII.

DISCRIMINATION AT WORK SITE

A client of a staffing firm is obligated to treat the workers assigned to it in a nondiscriminatory manner. Where the client fails to fulfill this obligation, and the staffing firm knows or should know of the client's discrimination, the firm must take corrective action within its control.[32] The following questions and answers explore these issues in detail.

8. If a client discriminates against a worker assigned by a staffing firm, who is liable?

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[31] The questions and answers in this section assume that the staffing firm is an "employer" of the worker.

Client: If the client qualifies as an employer of the worker (*see* Questions 1 and 2), it is liable for discriminating against the worker on the same basis that it would be liable for discriminating against any of its other employees.

Even if the client does not qualify as an employer of the worker, it is liable for discriminating against that individual if the client's misconduct interferes with the worker's employment opportunities with the staffing firm, and if the client has the minimum number of employees to be covered under the applicable discrimination statute. *See* Question 3.

Staffing Firm: The firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.[33]

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[33] *See* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(3) (1996) (an employer is liable for harassment of its employee by a non-employee if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action within its control). *See also Caldwell v. ServiceMaster Corp. and Norrell Temporary Services*, 966 F. Supp. 33 (D.D.C. 1997) (joint employer temporary agency is liable for discrimination against temporary worker by agency's client if agency knew or should have known of the discrimination and failed to take corrective measures within its control); *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (where plaintiff was subjected to sexual harassment by her supervisor during a job assignment, three entities could be found liable: staffing firm that paid her salary and benefits, automobile company that contracted for her services, and retail car dealership to which she was assigned; staffing firm and automobile company were held to standard for harassment by non-employees, under which an entity is liable if it had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control); *EEOC v. Sage Realty*, 507 F. Supp. 599, 612-613 (S.D.N.Y. 1981) (cleaning contractor and joint employer building management company found jointly liable for sex discrimination against lobby attendant on contractor's payroll where management company required attendant to wear revealing costume that subjected her to harassment by passersby, and where plaintiff was discharged for refusing to continue wearing outfit; court rejected contractor's argument that management company was exclusively liable because it had set the costume requirement; contractor knew of plaintiff's complaints of harassment and there was no evidence that it was powerless to remedy the situation); *cf. Capitol EMI Music, Inc.*, 311 N.L.R.B. No. 103, 143 L.R.R.M. (BNA) 1331 (May 28, 1993) (in joint employer relationships in which one employer supplies employees to the other, National Labor Relations Board holds both joint

(continued...)

The adequacy of corrective measures taken by a staffing firm depends on the particular facts. Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm's commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be undertaken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay. The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm will be liable along with the client if a worker later assigned to that client is subjected to similar misconduct.[34]

Example 11: A temporary receptionist placed by a temporary employment agency is subjected to severe and pervasive unwelcome sexual comments and advances by her supervisor at the assigned work site. She complains to the agency, and the agency informs its client of the allegation. The client refuses to investigate the matter, and instead asks the agency to replace the worker with one who is not a "troublemaker." The agency tells the worker that it cannot force the client to take corrective action, finds the worker a different job assignment, and sends another worker to complete the original job assignment.

The client is liable as an employer of the worker for harassment and for retaliatory discharge.

The temporary employment agency also is liable for the harassment and retaliatory discharge because it knew of the misconduct and failed to

[33](...continued)
employers liable for unlawful employee termination or other discriminatory discipline if the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it).

[34] *Cf. Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989) (employer is liable where it anticipated or reasonably should have anticipated that plaintiff would be subjected to sexual harassment yet failed to take action reasonably calculated to prevent it; "[a]n employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990).

undertake adequate corrective action. Informing the client of the harassment complaint was not sufficient -- the agency should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign any other workers until the client undertook the necessary corrective and preventive measures. The agency unlawfully participated in its client's discriminatory misconduct when it acceded to the client's request to replace the worker with one who was not a "troublemaker." If the replacement worker is subjected to similar harassment, the agency and the client will be subject to additional liability.

Example 12: A staffing firm provides computer services for a company that has more than 15 employees. The staffing firm assigns an individual to work on-site for that client. When the client discovers that the worker has AIDS, it tells the staffing firm to replace him because the client's employees fear infection. The staffing firm alerts the client that they are both prohibited from discriminating against the worker, and that such a discharge would violate the ADA. The client nevertheless continues to insist that the firm remove the worker from the work assignment and replace him with someone else. The staffing firm has no choice but to remove the worker. However, it declines to replace him with another worker to complete the assignment because to do so would constitute acquiescence in the discrimination. Furthermore, the firm offers the worker a different job assignment at the same rate of pay. The client is liable for the discriminatory discharge, either as an employer or third party interferer. The staffing firm is not liable because it took immediate and appropriate corrective action within its control.

9. If a staffing firm sends its employee on a job assignment with a federal agency and the individual is subjected to discrimination while on the assignment, is the federal agency liable? Is the staffing firm? What procedures should the individual follow in filing a complaint?

The federal agency is liable for discriminating against the worker if it qualifies as an employer of the worker. If the federal agency does not qualify as an employer of the staffing firm worker under the criteria in Questions 1 and 2, it will not be liable for discriminating against that worker under the statutes enforced by the EEOC. A federal agency is liable for employment discrimination under these statutes only where it has sufficient control to be deemed an employer of the worker. *See* Question 4.

The staffing firm is liable if it participated in the federal agency's discrimination or if it knew or should have known of the discrimination and failed to intervene, under the principles discussed in Question 8, above.

If the staffing firm worker seeks to pursue a complaint against the federal agency as his or her employer, (s)he should contact an EEO Counselor at the federal agency within 45 days of the date of the alleged discrimination. If the individual also seeks to pursue a claim against the staffing firm, (s)he should file a separate charge with an EEOC field office. In such circumstances, the EEOC investigator should alert the individual as to the different time frames and procedures in the federal and private sectors.[35] The investigator should also contact the EEO office of the federal agency once the individual files the federal sector complaint in order to coordinate the federal and private sector investigations.[36]

DISCRIMINATORY WAGE PRACTICES

A staffing firm may not discriminate in the payment of wages on the basis of race, sex, religion, national origin, age, or disability. Its clients share that obligation.

10. If a staffing firm assigns a male and female to a client to perform substantially equal work, and the female is paid a lower wage than the male, would the firm and/or the client be subject to Equal Pay Act or Title VII liability?

Under the EPA, men and women must receive equal pay for equal work.[37] The jobs need not be identical, but they must be substantially equal. It is job *content*, not job titles, that determines whether jobs are substantially equal. Specifically, a sex-based wage disparity violates the EPA if the jobs are in the same establishment, require substantially equal skill, effort, and responsibility, are performed under similar working conditions, and if no

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[35] If the federal agency refuses to accept the complaint based on a belief that the staffing firm worker is not its employee, the worker can file an appeal with the Commission's Office of Federal Operations.

[36] If the federal agency does not wish to coordinate the investigations, then the EEOC office should proceed independently. If the federal agency refuses to provide documents or testimony requested by the EEOC investigator, the Commission can issue a subpoena to compel production of the evidence.

[37] The EPA applies to any employer that has more than one employee engaged in commerce or in the production of goods for commerce, unless a statutory exception applies. 29 U.S.C. § 203(s).

statutory defense applies. Wage differences that are not based on sex, but on bona fide distinctions between temporary and permanent workers, can be justified under the EPA as based on a "factor other than sex."[38] Both the staffing firm and its client are liable for a violation of the Equal Pay Act if they both qualify as "employers" of the worker bringing the complaint.[39]

A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.[40] Furthermore, a sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination.[41] Moreover, an entity with fifteen or more employees is liable under Title VII for wage discrimination even if it does not qualify as an employer of the worker assigned to it, if the wage discrimination interferes in the worker's employment opportunities.

Example 13: A temporary employment agency assigned CP (female) to a temporary job as a hospital aide. CP discovered that the agency had also

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[38] *See* Compliance Manual Section 708.5(3) (BNA) 708:0023. As that subsection explains, in determining whether a wage differential between temporary and permanent employees is based on a factor other than sex, the following issues should be considered: 1) whether the wage differential is applied uniformly to males and females; 2) whether the differential conforms with the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment.

[39] *See* 29 C.F.R. § 1620.8 (1996) (two or more employers may be jointly or severally responsible for compliance with EPA requirements applicable to employment of a particular employee). For guidance on elements of an EPA claim, see Compliance Manual Sections 704 and 708 (BNA) 704:001 and 708:001, *et seq.* *Cf.*, 29 C.F.R. § 791.2 (1996) (regulations issued by Wage and Hour Division, Department of Labor, on Joint Employment Relationship under FLSA) (joint employers are individually and jointly responsible for compliance with FLSA, including overtime requirements).

The EPA, unlike Title VII, the ADA, and the ADEA, only permits claims by employees against their employers, not against third party interferers.

[40] If the EEOC determines that the client had no involvement in or control over the wages paid to the worker, it may decline to pursue relief against the client.

[41] For guidance on wage discrimination claims under Title VII, see Compliance Manual Section 633 (BNA) 633:001, *et seq.* Title VII prohibits wage discrimination on the basis of race, national origin, and religion, as well as sex.

assigned a male to a temporary job as an "orderly" at the same hospital at a higher wage. CP files charges against the agency and the hospital, alleging that her job and that of the male orderly were substantially equal, and that the wage disparity violated the Equal Pay Act and Title VII. CP's charge against the hospital also challenges a disparity between her wages and those of permanent male aides and orderlies at the hospital.

The investigator determines that the temporary employment agency and the hospital were joint employers of CP and that both entities had control over the rates of pay for the hospital aide and orderly jobs. The investigator also determines that the temporary aide and orderly jobs were substantially equal under EPA standards, and that no defense applies. Therefore, he finds that the agency and the hospital are both liable under the EPA and Title VII on the claim that the temporary aide and orderly should have received the same wage. The investigator further determines that the wage differential between the temporary and permanent aide and orderly jobs was based on a factor other than sex, since the hospital paid all its temporary workers less than permanent workers filling the same jobs, regardless of sex. Therefore, "no cause" is found on this latter claim.

ALLOCATION OF REMEDIES

11. **If the Commission finds reasonable cause to believe that both a staffing firm and its client have engaged in unlawful discrimination, how are back wages and damages allocated between the respondents?**

Where the combined discriminatory actions of a staffing firm and its client result in harm to the worker, the two respondents are jointly and severally liable for back pay, front pay, and compensatory damages. This means that the complainant can obtain the full amount of back pay, front pay, and compensatory damages from either one of the respondents alone or from both respondents combined.[42] Punitive damages under Title VII and the ADA,[43] and

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[42] However, even where there is joint liability, neither a charging party nor the Commission is obliged to pursue a claim against both entities; nor does one party have a right to bring the other into the proceeding, or a right of contribution from the other. *See Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 91-95 (1981); *EEOC v. Gard Corp. v. Tall Services, Inc.*, 795 F. Supp. 1070, 1071-72 (D. Kan. 1992).

[43] Punitive damages are not available against federal, state, and local government agencies.

liquidated damages under the ADEA,[44] are individually assessed against and borne by each respondent in accordance with its respective degree of malicious or reckless misconduct.[45] This is because punitive damages are designed not to compensate the victim for his or her harm, but to punish the respondent.[46] Of course, no respondent can be required to pay a sum of future pecuniary damages, damages for emotional distress, and punitive damages, in excess of its applicable statutory cap. The investigator should contact the legal unit in his or her office for advice in determining how to allocate damages between the parties.

Computation of Monetary Relief

The first step is to compute lost wages (including back and front pay); compensatory damages for both pecuniary loss and emotional distress; and punitive damages.[47] This computation should be made without regard to the statutory caps on damages,[48] and, except

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[44] Liquidated damages under the ADEA are punitive in nature. *Trans World Airlines v. Thurston*, 469 U.S. 111, 125 (1985). Therefore, each respondent individually bears a liquidated damages award under the ADEA.

[45] *See Hafner v. Brown*, 983 F.2d 570, 573 (4th Cir. 1992) (holding under 42 U.S.C. § 1983 that compensatory damages are joint and several but punitive damages are born by each defendant individually); *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1296 (7th Cir. 1989) (same); *Bosco v. Serhant*, 836 F.2d 271, 280-81 (7th Cir. 1987) (tort principles require joint and several liability for compensatory damages but not punitive damages), *cert. denied*, 108 S. Ct. 2824 (1988); *Hurley v. Atlantic City Police Dept.*, 933 F. Supp. 396, 420-23 (D.N.J. 1996) (reaching same conclusion in a Title VII case).

[46] The respondents are also jointly and severally liable for liquidated damages in EPA claims because such damages are compensatory in nature. *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1096 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985); *Marshall v. Bruner*, 668 F.2d 748, 753 (3d Cir. 1982).

[47] Compensatory and punitive damages are available in Title VII and ADA cases, and in retaliation cases under the ADEA and the EPA. The ADEA and EPA damages, which are not subject to statutory caps, are available pursuant to a 1977 amendment to the Fair Labor Standards Act that authorizes both legal and equitable relief for retaliation claims. 29 U.S.C. § 216(b). *See Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283-84 (7th Cir. 1993) (FLSA amendment allows common law damages where plaintiff is retaliated against for exercising his rights under ADEA); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 551 (7th Cir. 1991) (FLSA amendment authorizes compensatory and punitive damages for retaliation claims under EPA, in addition to lost wages and liquidated damages).

[48] 42 U.S.C. § 1981a(c)(2).

for punitive damages, without regard to either respondent's ability to pay.[48] This initial computation will establish the charging party's total wage and other compensable losses, as well as the full calculation of punitive damages.

Back Pay, Front Pay, and Past Pecuniary Damages

The next step is to determine the allocation between the respondents of back and front pay and past pecuniary damages. The charging party can obtain the full amount of these remedies because they are not subject to the statutory caps. The Commission can pursue the entire amount from either the staffing firm or the client, or from both combined.[50] However, the total amount actually paid cannot exceed the sum of back and front wages and past pecuniary damages owed to the worker.

Application of the Statutory Cap on Damages

The final step is to determine each respondent's liability for compensatory and punitive damages subject to the statutory caps. The total amount paid by a respondent for compensatory damages for emotional distress and future pecuniary harm, and for punitive damages, cannot exceed its statutory cap. Thus, while the initial determination of the appropriate amount of compensatory and/or punitive damages is made without regard to the caps, the caps may affect the allocation of damages between two respondents as well as the total damages paid to the charging party. In applying the caps to the actual allocation of damages, the following principles apply:

- For compensatory damages subject to the caps, each respondent is responsible for any portion of the total damages up to its cap.
- For punitive damages, each respondent is only responsible for the damages which have been assessed against it and only up to its applicable statutory cap.
- After the fact-finder has determined the amount of compensatory damages for emotional distress and future pecuniary harm, and the amount of punitive damages

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[49] The financial position of the respondent is a relevant factor in assessing punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 47, 270 (1981).

For guidance on the various factors to consider in calculating compensatory and punitive damages, *see* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Compliance Manual (BNA) N:6071 (7/14/92).

[50] *See EEOC v. Sage Realty*, 507 F. Supp. 599, 612-13 (finding two joint employers responsible for harassment of worker and holding them jointly and severally liable for back pay).

for which either or both respondents are liable, these amounts should be allocated between the two respondents in order to yield the maximum payable relief for the charging party.

- If the total compensatory damages are within the sum of the two respondents' caps, the damages should be allocated to assure that the full amount is paid.

- If one or both respondents are liable for punitive damages as well as compensatory damages, and the total sum of damages is within the applicable caps, the damages should be allocated, both between the respondents, and between compensatory and punitive damages for each respondent, to assure full payment. Thus, each respondent should pay the full amount of punitive damages for which it is liable, and any portion of the compensatory damages up to its statutory cap.

- If the sum of damages exceeds the sum of the applicable caps, the damages should be allocated, both between the respondents and between compensatory and punitive damages for each respondent, to maximize the payment to the charging party.

Example 14: CP was assigned by Staff Serve to work as a security guard at a store called Value, U.S.A. ("Value"). CP was subjected to persistent and egregious racial epithets by two supervisory employees of the store. CP complained several times to both a higher level manager at Value and to a supervisor at Staff Serve, but neither took any action to address the problem. After being subjected to egregious racial epithets that involved his family, CP informed the manager at Value and the supervisor at Staff Serve that the situation was intolerable. These individuals told CP to stop complaining and to live with these epithets as the price of holding the job. CP stopped reporting to work and asked Staff Serve to assign him elsewhere, but the firm failed to do so. CP was unable to find work for eight months.

CP files a charge against Staff Serve and Value. The investigator determines that both are liable for the racial harassment and constructive discharge. The investigator further determines that CP is due $40,000 in back pay and $60,000 in damages for emotional distress and that Staff Serve and Value are jointly and severally liable for these amounts. Although Value's conduct was at least as egregious as Staff Serve's, the investigator determines that Value's financial position is relatively weak, and that a punitive damage award of $30,000 against Value is appropriate, as compared to $50,000 for Staff Serve.

Staff Serve employs 137 employees (counting its regular staff people and the workers it has sent on assignment), and is subject to the $100,000 damages cap. Value employs 45 workers and is subject to the $50,000 cap on damages.

In conciliation, the investigator determines that Staff Serve and Value should work out a division of the $40,000 in back pay, for which they are jointly and severally liable. The investigator further determines that the damages should be allocated as follows: Staff Serve should pay $40,000 and Value $20,000 in compensatory damages, and Staff Serve should pay $50,000 and Value $30,000 in punitive damages. CP can thus obtain the full amount of damages due him, with neither respondent's liability exceeding its cap.

Example 15: Same facts as in Example 14, but CP only names Staff Serve as a respondent because Value has gone bankrupt. The sum of compensatory and punitive damages assessed by the Commission is $110,000 ($60,000 for emotional distress and $50,000 in punitive damages assessed against Staff Serve). The Commission pursues $100,000 in combined damages due to Staff Serve's statutory cap. The Commission and Staff Serve may agree to deduct the $10,000 in excess of the caps from either the emotional distress or the punitive damages. The Commission also pursues the full $40,000 in back pay from Staff Serve, which is not subject to the cap.

Example 16: Same facts as Example 14, except that both Staff Serve and Value are subject to the $50,000 cap. CP could obtain only a total of $100,000 in damages, even though the sum of compensatory and punitive damages was $140,000. The investigator works with CP and the respondents to determine how to allocate the damages between compensatory and punitive damages. The full amount of back-pay remains payable since it is not subject to the caps.

CHARGE PROCESSING INSTRUCTIONS

When a charge is filed by a worker who was hired by a temporary agency, contract firm, or other staffing firm and who alleges discrimination by the staffing firm or the firm's client, consider the following questions (refer to the questions and answers in the guidance for detailed information):

I. Coverage

1. Is the charging party (CP) an employee or an independent contractor? (Q&A 1)

- Determine whether the right to control the means and manner of CP's work performance rested with the staffing firm and/or the client or with the worker herself. Consider the factors listed in Question and Answer 1 of this guidance and all other aspects of CP's relationship to the firm and its client.

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. In that regard consider the following:

2. Is CP an employee of the staffing firm? (Q&A 2(a))

   - Consider the factors listed in Question 1 as they apply to the relationship between CP and the staffing firm.

3. Is CP an employee of the firm's client? (Q&A 2(b))

   - Consider the factors listed in Question 1 as they apply to the relationship between CP and the client.

Even if the client does not qualify as CP's employer, it is still covered under the applicable anti-discrimination statute if it interfered on a discriminatory basis with CP's employment opportunities with the staffing firm and has the requisite number of employees. (Q&A 3) *The same is true if the staffing firm does not qualify as CP's employer. However, a federal agency can only be held liable as an employer, not as a third-party interferer.* (Q&A 4)

If CP is a welfare recipient alleging discrimination in a work-related activity connected with a welfare program, the above considerations apply to determine coverage. (Q&A 5) *In such circumstances, the state or local welfare agency may function as a staffing firm and the employer for whom CP performed work as the client.*

4. If there is a question about coverage, does the staffing firm and/or the client have the minimum number of employees to be covered under the applicable anti-discrimination statute? (Q&A 6)

   - Ask the respondent to name and provide records regarding each individual who performed work for it during the applicable time period, including individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. Determine which of these individuals qualified as employees rather than independent contractors.

II. Assignment Practices (Q&A 7)

If CP alleges that a staffing firm declined to assign him or her to its client for discriminatory reasons, consider the following questions:

1. Does the evidence show that the staffing firm denied CP a job assignment for discriminatory reasons?

   - If so, the staffing firm is liable as an employer of CP for its discriminatory assignment practice, as a third party interferer, and/or as an employment agency for its discriminatory referral practice.

2. Does the evidence show that the client set discriminatory criteria for assignments by the staffing firm?

   - If so, the client is liable either as a joint employer of CP or a third party interferer.

III. Discrimination at Work Site (Q&A 8, 9)

If CP alleges that (s)he was subjected to discrimination while performing a job assignment for the staffing firm's client, consider the following questions:

1. Client: Does the evidence show that the client discriminated against CP?

   - If so, the client is liable as CP's employer or as a third party interferer. However, if the client is a federal agency it can only be held liable as an employer.

2. Staffing firm:

   a. Does the evidence show that the staffing firm participated in its client's discrimination, *e.g.*, by honoring the client's discriminatory request to replace CP with someone outside his or her protected class?

   b. Does the evidence show that the staffing firm knew or should have known of its client's discrimination and failed to take immediate and appropriate corrective measures within its control?

If the answer to (a) or (b) is "yes," the staffing firm is liable for its discrimination.

IV. Discriminatory Wage Practices (Q&A 10)

If CP alleges that the staffing firm paid discriminatory wages for his or her work for the firm's client, consider the following:

1. Is there an Equal Pay Act violation?

   - Did the staffing firm assign a person of the opposite sex to the same client to perform substantially equal work and pay that individual a higher wage?

   If so, the staffing firm is liable for the EPA violation. The client also can be found liable if it qualified as CP's joint employer.

2. Is there a violation of Title VII, the ADEA, or the ADA?

   - A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.

   - A sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination. Title VII also prohibits wage discrimination based on race, national origin, and religion.

   If the respondent committed wage discrimination in violation of Title VII, the ADEA, or the ADA it is liable as CP's employer or as a third-party interferer.

V. Allocation of Remedies (Q&A 11)

If both the staffing firm and its client have unlawfully discriminated against CP, remedies can be allocated as follows:

1. CP can obtain the full amount of back pay, front pay, and compensatory damages from either respondent, or from both combined.

2. Punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against each respondent according to its degree of malicious or reckless misconduct.

3. The total amount paid by a respondent for future pecuniary damages, damages for emotional distress, and punitive damages cannot exceed its statutory cap.

Damages should be allocated between the respondents in a way that maximizes the payable relief to CP. Contact the legal unit for advice in determining the allocation.

DAG

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Human Rights Commission

Subject: The Definition of Employee Under the West Virginia Human Rights Act, 77CSR7

FILED
AUG 13 9 31 AM '98
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Filed as emergency:

Fiscal Impact: none

ABSTRACT

The proposed rule is new. The following is a section by section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 defines the term employee as it relates to the Human Rights Act. The definition conforms to the definition in the Federal law as it's been interpreted by the EEOC and the United States Supreme Court. The definition is crafted to include employee's working for employment agencies on temporary assignment.

AUTHORITY

Statutory authority: W.Va. Code, §5-11-8(h), which provides, in part, as follows:

> The commission is hereby authorized and empowered:
>
> ...(h) To do all other acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this article, including the promulgation of legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code, implementing the powers and authority hereby vested in the commission...

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has one technical modification to suggest.