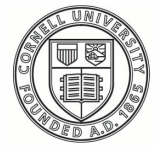

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The Global Employer: A Global Flexible Workforce - Temporary and Other Contingent Workers

Baker & McKenzie

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Abstract

[Excerpt]

Baker & McKenzie's Global Employment Practice Group is pleased to present its 53rd issue of the Global Employer entitled *A Global Flexible Workforce: Temporary and Other Contingent Workers*.

In times of fast-moving market conditions, straitened economics, changing workforce demographics and an increasingly global and mobile labour market, many multinationals are relying heavily on global contingent labour to provide greater flexibility, bridge gaps and manage costs.

However, the challenge of using temporary and other contingent workers-temporary agency workers, independent contractors, freelancers, project workers, fixed-term employees, outsourced workers etc. - cannot be underestimated. As the trend towards more flexible labour increases, so do concerns about the social effects of a disenfranchised workforce. It is no surprise then, that global scrutiny and regulation of contingent worker arrangements is on the rise.

China recently introduced new labour dispatch rules significantly limiting the ability of companies to hire staff through staffing agencies. The new law, due to take effect on July 1, 2013, could affect up to 60 million workers in China. Europe has seen the Temporary Agency Workers Directive increase the cost of using a temporary workforce, and in the US, new federal and state laws, agency enforcement initiatives and class action lawsuits are increasing the risks associated with many contingent worker arrangements.

To address some of the key legal compliance issues faced by multinationals, leading Baker & McKenzie attorneys from 12 jurisdictions across Asia Pacific, Europe, Latin America and North America have contributed to this country-by-country guide. What emerges is that a collaborative global approach to managing the legal compliance and other risks associated with temporary and other contingent workers is essential if multinationals wish to take full and proper advantage of the opportunities that a flexible workforce can bring.

Keywords

temporary workers, workforce, contingent workers, labor market

Comments

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The Global Employer™

A Global Flexible Workforce: Temporary and Other Contingent Workers

Contents

The Global Employer

A Global Flexible Workforce: Temporary and Other Contingent Workers

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Question	Position in China
What types of temporary and other contingent workers are used in China?	In China, temporary agency workers are called 'dispatched employees'. There is no legal definition of "contingent workers" under PRC law. The most common temporary labour arrangement in the PRC is labour dispatch under which licensed staffing agencies second their employees to work at host companies. Independent contractors are generally not recommended except in limited circumstances for use in China as there is no legally defined concept of independent contractor in China, and there is always a risk of *de facto* employment. Fixed-term employees are entitled to almost all the same protections and benefits as open-term employees and are therefore not really "contingent staff" as the term is understood in other jurisdictions. It is worth noting that part-time employment under PRC law is much more flexible than in some other jurisdictions and may be considered as an option in appropriate circumstances.
What are the key legal or other restraints on the use of such workers?	Dispatched Employees: • On December 28, 2012, the Standing Committee of the National People's Congress passed an amendment (effective July 1, 2013) to the PRC Employment Contract Law. Under this amendment labour dispatch may be used only for the following job positions: (i) temporary (no more than six months), (ii) auxiliary (staff engaged in the Company's non-core business who provide services to those involved in the core business) or (iii) substitute (staff hired to temporarily replace employees on fixed leave). • Host companies will be limited to hiring only a certain number or percentage of their workforce through labour dispatch, although the exact threshold will be specified later in regulations issued by the Ministry of Human Resources and Social Security. As an indication, under the draft rules of Guangdong Province, no more than 30 percent of the total workforce may be hired through agencies. Part-Time Employees: • Part-time workers are limited to working an average of four hours per day, and a total of 24 hours per week for a particular employer. • Part-time employees are free to work for more than one employer, so long as (i) their total working hours for any single employer do not exceed the maximum part-time hours limits (see above); and (ii) any employment relationship concluded subsequently to any already existing employment relationships does not prejudice the performance of the already existing relationships. • No probationary period for part-time employees is allowed.

How is the use of temporary agency work regulated?	Dispatched Employees:
	• Companies wishing to engage in labour dispatch must now obtain a special license from the local labour bureau and the capital requirements amount to RMB 2 million.
	• Staffing agencies are required to sign employment contracts with dispatched employees with a fixed-term of at least two years.
	• During any period when the employee is still employed by the staffing agency, but is not actually seconded to any host company, the staffing agency must continue to pay the employee minimum wage on a monthly basis during the rest of the employee's employment contract term.
	• The host company must:
	  • implement state labour standards and provide the corresponding working conditions and labour protection;
	  • communicate the job requirements and employment compensation to the dispatched employees;
	  • pay overtime pay and performance bonuses and provide benefits appropriate for the job positions;
	  • provide the dispatched employees who are on the job with the training necessary for their job positions;
	  • in case of continuous secondment, implement a normal wage adjustment system;
	  • bear joint liabilities with the staffing agency to dispatched employees for their harm caused by the staffing agency in violation of law; and
	  • not second the dispatched employee to another host company or set up a staffing agency and second employees to itself or its subsidiaries.
	• Host companies are (only) able to return a dispatched employee in accordance with the grounds stated in Article 39 of the PRC Employment Contract Law (dealing with summary dismissal for cause) and at the end of an employee's medical treatment period, if the employee can no longer perform his/her duties, or if the employee is incompetent and remains incompetent after training and reassignment.
	• Neither the staffing agencies nor the host companies can charge the dispatched employees fees for the secondment, and the staffing agencies cannot take any part of the compensation paid to the dispatched employees by the host companies.
	• Dispatched employees are entitled to equal pay for equal work, meaning that they cannot be paid lower amounts than directly hired employees in similar positions simply because they are seconded.
	• Dispatched employees also have the right to join a union at the staffing agency or the host company.

What are the most serious risks in practice for companies in using contingent workers?	The most serious risk for a host company that uses labour dispatch arrangements in excess of the statutory limits and/or for job positions that clearly fall outside the statutory restrictions is that an employee can claim that the labour dispatch arrangement is invalid and therefore claim that a *de facto* employment relationship exists with the host company. If the *de facto* relationship lasts for more than one month, the employee can claim double wages, and if it lasts for more than one year, the employee may claim that an open-term employment relationship exists. In addition, if host companies violate the provisions governing labour dispatch, they can be fined up to RMB 10,000 for each employee hired through labour dispatch. Concerning part-time employment, if a part-time employee works for a single employer over four hours per day or 24 hours per week, the employee may be deemed a full-time employee of that employer and entitled to all full-time employee's benefits and protection.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in China?	The limited type of positions and percentage allowed by law, as well as the consequences of violation (see above), are major deterrents to companies in using labour dispatch arrangements. Companies are analyzing all positions staffed with dispatched employees and considering offering direct employment contracts to some or all dispatched staff or using outsourcing arrangements as an alternative. Companies are also checking whether the staffing agencies that they are using are properly licensed to avoid unlawful labour dispatch arrangements and potential fines and/or even *de facto* employment relationships.
What steps should companies wishing to engage contingent workers take?	Companies should identify positions which may and should be staffed with dispatched or part-time employees. Companies should check whether the staffing agency is properly licensed. For temporary positions (which are now limited to six months), companies should renegotiate their service contracts with staffing agencies that traditionally insisted on two-year dispatch terms. Companies should have clear documentation to evidence the nature of each position staffed with dispatched employees and the time worked by part-time employees. Companies should keep abreast of national and local developments in this area, since absolute limits on the use of dispatched staff and potentially other terms and conditions will likely be issued by July 1, 2013.
What other options are available, if any, for companies wishing to engage a flexible workforce?	Independent contractors and outsourcing arrangements could be taken into consideration. However, the relevant contractual documents and the implementation of such arrangements should clearly be distinguished from the documents and implementation of an employment relationship and/or labour dispatch arrangements in order to avoid or mitigate the risk of a *de facto* employment relationship and/or the consequences of an unlawful labour dispatch.
What's on the horizon?	Absolute limits on the use of dispatched staff are likely to be issued by the Ministry of Human Resources and Social Security by July 1, 2013. Implementing measures on the licensing process for engaging in labour dispatch business is also expected by July 1. More detailed implementation rules with respect to using labour dispatch arrangements will be expected both at the national and local level.

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Question	Position in Japan
What types of temporary and other contingent workers are used in Japan?	The most commonly used contingent labour arrangements in Japan are temporary agency workers, more frequently called dispatched workers (*haken rodosha*), and fixed-term employees (*yuki keiyaku rodosha*). These employees work under the supervision and control of the company for whom they perform their duties. Independent contractor arrangements are also not uncommon. Companies cannot supervise or control independent contractors.
What are the key legal or other restraints on the use of such workers?	The use of temporary agency workers is regulated under the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers ("Worker Dispatch Act"). The use of fixed-term employees is regulated under the Labour Standards Act and Labour Contract Act. With regard to independent contractors, the manner in which they can be used is restricted because companies must avoid the risk of their being classified as employees for labour law purposes.
How is the use of temporary agency work regulated?	There are strict regulations regarding the use of dispatched workers. The Worker Dispatch Act and the relevant regulations set forth the following restrictions, among others: License: The dispatching agency must have a license (or registration in certain cases) in order to dispatch workers to another company. Limit on Duration: A dispatched worker may be used for only one year, in principle. This can be extended to three years by following certain procedures. However, this limit on the duration does not apply to 26 specified types of specialized work. Screening of Candidates: Under a dispatching arrangement, a host company cannot directly interview the candidates or otherwise conduct a screening process. Further, an amendment to the Worker Dispatch Act was enacted on March 28, 2012 which partially entered into force on October 1, 2012 and will fully enter into force on October 1, 2015. The most critical change is the addition of a deemed employment offer for illegal use of dispatched workers, which will come into effect on October 1, 2015. If the company uses a dispatched worker in violation of the relevant laws, the host company will be deemed to have offered the dispatched worker a direct employment contract.
What are the most serious risks in practice for companies in using contingent workers?	In a dispatching arrangement, the most common risks are the issuance of a corrective order by a government agency, or, in the worst case, a criminal charge for violation of the Worker Dispatch Act. Also, it is possible for dispatched workers to bring claims against a host company for damages. Courts are generally reluctant to find a direct employment relationship between a host company and a dispatched worker, but this is possible in exceptional cases. Continued page 7.

	Continued from page 6. In fixed-term employment, the most common risk is application of the doctrine of refusal to renew established by court precedents, and recently codified under the Labour Contract Act. Under this doctrine, an employer may not refuse to renew a fixed-term employment contract without a justifiable reason in certain situations. In addition, the recent amendment to the Labour Contract Act provides that a fixed-term employee who has worked for more than five years in total must be offered an indefinite term employment contract, if the employee applies for one. This five year period will run from April 1, 2013, the date this amendment enters into effect. The amendment also requires that the terms and conditions of employment for fixed-term employees be fair when compared to those for permanent employees in terms of duties and responsibilities. The most critical risk concerning independent contractors is the risk of them being considered direct employees of the company. An independent contractor may claim direct employment with the company depending on the degree of supervision and control exercised over him/her by the company and other relevant factors.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/ planning to use contingent workers in Japan?	The use of irregular employees, including dispatched workers and fixed-term employees, has gradually increased over the last decade or so. There are social concerns as to the effect of this increase and in the salary curves of irregular employees compared with those of regular employees. The amendments to the Worker Dispatch Act and the Labour Contact Act, as mentioned above, were enacted in response to such social concerns, and they add more protections for irregular employees. The number of irregular employees may change in response to these amendments.
What steps should companies wishing to engage contingent workers take?	We advise companies using dispatched workers to ensure that the terms and conditions of their dispatching arrangements comply with the Worker Dispatch Act (particularly the limitation on duration). As explained above, the amendment to the Worker Dispatch Act provides for deemed employment offers in the event of the illegal use of dispatched workers, effective October 1, 2015. With regard to fixed-term employees, it is important to review hiring practices and renewal provisions/practices in light of the five-year threshold introduced by the recent amendment to the Labour Contract Act. Also, we recommend that companies compare the terms and conditions of employment for fixed-term employees with those for permanent employees to ensure that the fixed-term employees are treated fairly, as the amendments require.
What other options are available, if any, for companies wishing to engage a flexible workforce?	It is not uncommon for the employees of a company to provide services to another company under a service agreement, as opposed to a dispatching arrangement. Sometimes, the service provider physically stations its employees at another company. However, in such a case, the service provider must ensure that it has full supervision and control over its employees when they provide the services and that the client company does not directly supervise and control them.
What's on the horizon?	As explained above, there have been amendments to both the Worker Dispatch Act and the Labour Contract Act in relation to dispatched workers and fixed-term employees. Some of the amendments have not entered into force, and even with regard to amendments that have entered into force, the practices surrounding the amendments have yet to be established. It is important to monitor not only changes in the regulations but also changes in actual practices, including enforcement by the government and the court.

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France

Question	Position in France
What types of temporary and other contingent workers are used in France?	In France, depending on the situation, companies can use temporary workers via temporary agencies ("*entreprise de travail temporaire*") or hire employees under fixed-term contracts where there is a permitted reason for doing so, for example: replacement of an absent employee, seasonal work or sudden increase in workload. Under certain circumstances, it is also possible to use independent contractors or enter into a services agreement with another company providing workers to undertake a specific project.
What are the key legal or other restraints on the use of such workers?	Temporary contracts are only permitted in certain exceptional situations under French law. The basic principle is that all employees should be hired under indefinite-term employment contracts, and this can only be deviated from in exceptional circumstances permitted by law. French case law also restricts the use of independent contractor and services agreements to ensure that such contracts are not used to deprive workers of the protections provided under French Labour law.
How is the use of temporary agency work regulated?	Under French law, there are very specific rules governing various aspects of temporary agency work, including: the reasons for entering into a temporary contract; contract duration; renewal options; requirement for a written contract between companies ("*contrat de mise à disposition*"); precise and temporary functions; and the prescribed waiting period between two temporary contracts with the same individual, etc. In any event, a temporary contract must not have the object or effect of occupying a position connected to a company's normal and permanent activity. The courts may compare the functions of a temporary worker to those of a permanent employee to determine the reality of the situation.
What are the most serious risks in practice for companies in using contingent workers?	Failure to comply with the rules governing temporary work may cause the temporary contract to be regarded, by virtue of law, as an indefinite employment contract. This could lead the French Labour courts to treat any termination of the contract as an unfair dismissal, and award the employee severance indemnities and damages. Moreover, failure to comply with the rules governing temporary work renders the legal representative of the company liable for a maximum fine of EUR 3,750 per offence i.e., per employee concerned. In a worst case scenario, non-compliance could also constitute illegal lending of labour or illegal subcontracting ("*délit de marchandage*"), in relation to which the applicable sanctions are: • for the legal representative: maximum fine of EUR 30,000 and/or a maximum imprisonment of two years; • for the legal entity: maximum fine of EUR 150,000; Continued page 9.

	Continued from page 8. • invalidation of the contract between the companies; and • the workforce supplier and the client may be sentenced jointly and severally to pay damages to the relevant employees. Finally, with respect to temporary employees, the company must enter into an agreement with the temporary agency which complies with all mandatory provisions. Failure to do so renders the legal representative of the company liable for a maximum fine of EUR 3,750 per offence i.e., per employee concerned.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/ planning to use contingent workers in France?	In practice, many companies in France feel frustrated about the strict limitations on using fixed-term or temporary workers. This can significantly limit a company's activities; for instance, if a company decides to launch a new service or product and wants to test its viability, it is not permitted to hire a temporary or fixed-term worker to do so. However, notwithstanding the restrictive legal framework, companies do still use temporary or fixed-term labour, and the number of temporary contracts is on the rise.
What steps should companies wishing to engage contingent workers take?	Employers must assess whether their business needs correspond with one of the reasons for which temporary or fixed-term contracts are permitted in France. If a temporary or fixed-term contract is not permitted, the employer should instead hire under an indefinite term employment contract, and make use of the trial period during which the employee can be terminated at any time without justification.
What other options are available, if any, for companies wishing to engage a flexible workforce?	Under certain circumstances, it is possible to use independent contractors or enter into a services agreement with another company providing workers for the accomplishment of certain specific projects that fall outside the regular and normal activity of the company. However, French law in relation to this option is also quite restrictive, and the risks linked to such options are as serious as those related to the use of temporary work.
What's on the horizon?	A draft bill currently before the French Parliament intends to promote non-precarious work and includes, in particular, a measure aimed at discouraging employers from using fixed-term contracts (by implementing an increased rate of certain social security contributions).

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Germany

Question	Position in Germany
What types of temporary and other contingent workers are used in Germany?	In Germany, temporary agency workers, fixed-term employees and independent contractors are used to satisfy temporary employment needs. Whilst temporary agency workers and fixed-term employees generally work at the company's premises and are integrated into the company's work organisation, independent contractors render their services off- and on-site, and are not bound by the company's instructions.
What are the key legal or other restraints on the use of such workers?	Fixed-term contracts of longer than two years may only be entered into if the employer has a valid reason for a limited duration contract. Without such valid reason, fixed-term employment contracts can be entered into for a maximum of two years. Within this two year period, the contract can be renewed a maximum of three times, but the total employment period must not exceed two years. Fixed-term contracts must specify in writing the exact term of the contract or, if that is not yet known, the detailed conditions upon which the contract shall terminate, and must be signed by both parties. Otherwise, it will be deemed to have been entered into for an unlimited period of time.
How is the use of temporary agency work regulated?	Employers/agencies who lease employees to third parties for a limited period of time to be employed as if they were the hirer's own employees require a governmental license to do so. The employer/agency must apply to the competent authority for the license, and must provide proof of sufficient means, of the employer's representatives having no criminal record, and of the employer using proper contracts, etc. The license is granted initially for one year, can be renewed, and will be for an indefinite period if it was renewed for three consecutive years. The workers are entitled to the same essential working conditions (including wages/special allowances and working time) applicable to the client's own employees in comparable roles right from the start ("Equal Pay"/"Equal Treatment"). In order to be able to fulfil the obligations of "Equal Pay" and "Equal Treatment", the client is obliged to provide the agency with the respective information in the labour lease contract. The workers must have access to facilities available to the hirer's own employees. The hirer is obliged to inform the workers about vacancies in the company (by putting up a corresponding list, for example). In relation to the contractual requirements for agency work, there is a distinction between the contract between the agency and hirer and the agency and the worker. The labour lease contract between the agency and hirer must be in writing and contain specific information, in particular whether the agency is in possession of a governmental license, and which specific professional qualification is required for the position in question.

What are the most serious risks in practice for companies in using contingent workers?	The main risk of agency work is that the hirer leases workers from an agency which is not in possession of the proper governmental license. This carries the following risks: (i) the employees concerned can claim to be employed by the hirer (with all employment law consequences, including termination protection from the hirer (instead of the agency), as well as possible hirer liability for back pay, tax withholding, and social security contributions in respect of fees paid to the worker), and (ii) both agency and hirer can be fined with up to EUR 30,000, and in certain cases up to EUR 500,000. In very exceptional cases, a violation of the hiring out laws can even constitute a criminal offence, resulting in imprisonment. An agency's violation of the "Equal Pay"/"Equal Treatment" principle can be deemed as an administrative offence to be punished with a fine of up to EUR 500,000 in addition to possible compensation for the worker's financial losses. The company may also be directly liable to the social security authorities for any contributions left unpaid by the agency. The main risk of fixed-term employment is that the employee may successfully claim to be employed for an indefinite period of time, which would mean that the employer is bound by the termination protection regulations when terminating the employment relationship. The main risk of independent contractors is that the contractor may successfully claim to be (dependently) employed by the company with all employment law consequences, including termination protection.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in Germany?	Recent changes in Germany to the rules for engaging agency workers has led to a major change to the common practice of using agency work. In particular, the fact that a statutory minimum wage now applies to the agency work sector, and that the same essential working conditions must be granted to agency workers, are a major deterrent to companies using temporary agency arrangements. Changes in legislation also mean that agency work has to be "temporary" (either the employment contract between the worker and the agency must exceed the work at the hirer, or the agency work must be limited in time from the beginning) and that a governmental license is required for all kinds of agency work, even if where the work is not commercial. Fixed-term employment contracts are only an option where the labour requirements are temporary, up to a maximum of two years; a longer fixed-term must be justified by objective reasons to be valid. Independent contractors can only be used if they will not be integrated in the company's work organisation, and be bound by individual- and procedure-related instructions.

What steps should companies wishing to engage contingent workers take?	For companies wishing to engage contingent workers, it is essential to determine the needs and the appropriate working arrangement to suit those needs. While the use of agency workers is more flexible in terms of contract duration, using fixed-term employees could be less expensive. Regarding agency work, it is important that the hirer ensures that the agency holds the appropriate governmental license, and that both relationships (between the agency and the worker and the agency and the hirer) comply with the corresponding legal regulations. When using self-employed workers, the parties must also ensure that the legal requirements are met, in particular that the contractor is not integrated in the company's work organisation, and not bound by individual- and procedure-related instructions. Should a German court come to the decision that the actual facts indicate a dependent employment, the relationship will be treated as such, irrespective of any written terms.
What other options are available, if any, for companies wishing to engage a flexible workforce?	Aside from agency work, fixed-term employees, independent contractors (and outsourced labour), there are no other options available under German Law for companies wishing to engage a flexible workforce.
What's on the horizon?	Given that Germany's temporary agency worker legislation was recently amended, no other major changes are on the horizon. Over the next few months, we will find out how the courts are interpreting the new regulations, and expect the temporary agency regime to be become even more rigorous.

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Question	Position in Italy
What types of temporary and other contingent workers are used in Italy?	The most commonly used contingent labour arrangements in Italy are temporary agency workers and fixed-term employees. Another type of contract for work on a subordinate employment basis, although not as common, is so-called job-on-call (*lavoro intermittente*). For work on a self-employed basis, "project agreements" (*contratto a progetto*) may be used, but are subject to stringent statutory requirements that must be met for the agreement to be valid.
What are the key legal or other restraints on the use of such workers?	Italian employment laws apply to both employed labour, including fixed-term employees, as well as to self-employed individuals. Italian law on temporary workers is aligned with EU temporary work legislation. Work agencies require a license, issued by the Ministry of Labour, to be able to supply workmanship on a temporary or indefinite-term basis.
How is the use of temporary agency work regulated?	Italian regulations provide for the following terms on which temporary agency workers may be engaged: "Staff leasing": when a temporary worker, who remains employed by the work agency, is assigned on an open-ended basis to a user. This type of temporary work is only possible in certain situations specifically prescribed by applicable regulations. "Definite-term supply": the more classic form of temporary work, when a temporary worker is assigned to a user to cover a specific business need for a maximum of 36 months (or 42 months in certain cases). Further to a recent change in the law, the first 12 months of any such assignment can take place in the absence of business-related reasons. While assigned to a user, the worker is entitled to equal terms when compared to the client's own employees in comparable roles. This right applies to all salary items (including certain bonus arrangements) and general working conditions, such as working hours, holidays, etc. From day one of an assignment, workers are entitled to access facilities available to the client's own employees, and the client's list of vacancies so they can apply for employed roles with the client. The work agency must provide both the user and the worker with certain written information about the assignment and must check the client's requirements for the assignment, and to check the worker's qualifications and suitability.
What are the most serious risks in practice for companies in using contingent workers?	The main risk is that the arrangement is re-categorised into one of employment. This would entitle the worker both to certain protections, in particular, protection against dismissal, and also may mean that the employer owes back pay and potentially penalties in respect of tax withholdings and social security contributions, with respect to fees paid to the worker. (e.g. a project worker who is recognized as a subordinate employee). Continued page 14.

	Continued from page 13. Fixed-term employees also enjoy specific legal protection: the terms they are engaged on must be no less favourable overall than those offered to permanent employees. Furthermore, in the absence of a valid business reason that justifies the contract term, the employee can claim indefinite-term employment from the beginning of the working relationship. There are specific penalties for breach of the rules applying to temporary agency workers. In all cases in which temporary workers are used outside of the statutory requirements, the employee can claim employment directly with the user. Work performed by on-call workers, when statutorily provided conditions are not present, would also trigger a claim for conversion of the agreement into indefinite term employment.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in Italy?	Recent amendments to the law, especially the Fornero Reform of July 2012, have introduced new restrictions on the use of most types of contracts that are typically used for contingent workers, including project agreements, job-on-call agreements and fixed-term work, with the objective of promoting employment on a more stable basis. However, even in this less favourable environment, the use of contingent workers and flexible employment arrangements is still very common.
What steps should companies wishing to engage contingent workers take?	The key step is for the employer to assess its needs, and identify the appropriate labour arrangement to suit those needs. Key questions will be how long the resource is needed, what kind of activity the worker will be performing. What regulation applies will also be a factor in the choice. It is then important that the supply route chosen is properly documented and complies with the relevant regulations. Although an Italian Labour Judge would always look at actual facts of the arrangement, the written terms agreed on are key evidence, for example, whether the relationship was intended to be one of employment or of self-employment. All relevant requirements should be met, for example the term in a fixed-term agreement, must be agreed between the parties in writing in order to be valid.
What other options are available, if any, for companies wishing to engage a flexible workforce?	The Italian labour market is still largely founded on the idea that full-time, indefinite-term employment is the "normal" type of working relationship. As such, flexible arrangements are somewhat of an exception. That said, the Italian legislator seems to be more inclined to protect certain, disadvantaged categories of workers with flexible employment arrangements, for example young individuals entering the job market taking on apprenticeships. Apprenticeship contracts may be entered into for a minimum period of six months, and are associated with generous social security discounts; however, to avoid the risk of possible abuses, companies shall only be allowed to hire apprentices (also through temporary agencies) within a ratio of three for every two skilled employees; also, no further recruitment of apprentices shall be allowed if less than 30 percent (50 percent in the near future) of existing apprentices have not been confirmed as permanent employees at the end of the apprenticeship contract.
What's on the horizon?	The Fornero Reform of July 2012 (the biggest reform of Italian labour market regulations in the past 10 years) is likely to be subject to further adjustments, to temper the initial rigor of certain provisions, by introducing exceptions and/or by delaying the application of other onerous provisions.

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Question	Position in the Netherlands
What types of temporary and other contingent workers are used in the Netherlands?	The most commonly used contingent labour arrangements in the Netherlands are temporary agency workers, fixed-term employees, self-employed workers with no staff / freelancers [*zelfstandige zonder personeel*], seasonal workers, on call workers [*oproepkrachten*] and independent contractors.
What are the key legal or other restraints on the use of such workers?	In addition to the general principles of employment law as laid down in Dutch statute, Dutch law, where appropriate, provides for specific rules and regulations concerning contingent workers, including: • Specific regulations in respect of contracts of temporary agency workers laid down in section 7:690 et seq of the Dutch Civil Code and the Labour market Intermediaries Act [*Wet Allocatie Arbeidskrachten door Intermediairs*] (WAADI Act). • The so-called 'chain rule' requiring that if more than three fixed-term employment contracts are concluded between the same parties with intervals of no more than three months or if the total duration of fixed-term employment contracts is more than 36 months, the latest fixed-term employment contract will be deemed to be an indefinite employment contract and will not end by operation of law. • Independent contractors and self-employed workers are governed by Dutch contract law, provided that the contract between parties cannot be re-qualified as an employment contract (e.g. contractor works independently, is not paid during illness, is not provided with paid holiday, invoices the client (exclusive VAT) and is not paid a gross salary, etc.). Specific rules apply in respect of on-call workers (e.g. in relation to the obligation to provide work, limitations in respect of continued payment of salary during illness, etc.).
How is the use of temporary agency work regulated?	Temporary agency workers are regulated by section 7:690 *et seq* of the Dutch Civil Code. Within the temporary employment relationship there are three parties involved; the employment agency (i.e. the formal employer), temporary worker and the hirer (i.e. the material employer). The relationship between the hirer and the employment agency is a contract to perform services. The relationship between the hirer and the temporary worker is not considered to be a relationship on the basis of an employment contract. The contract between the temporary worker and the agency is an employment contract. As such, temporary worker agencies are assumed to bear employer responsibility. In addition, the WAADI Act regulates the temporary agency product market. No license system applies in respect of the engagement of temporary agency workers. A Collective Labour Agreement, concluded by General Federation Temporary Work Agencies - ABU with the major trade unions, for the large part covers temporary agency workers, and provides for the applicable terms and conditions of employment. Continued page 16.

	Continued from page 15. Also note, that based on a legislative change in the WAADI Act effective July 1 2012, every employer engaged with the secondment of employees to a third party is required to register with the trade register of the Dutch Chamber of Commerce. Violation of this obligation is subject to a penalty of EUR 12,000 per employee.
What are the most serious risks in practice for companies in using contingent workers?	With respect to independent contractors and self-employed workers with no staff, the main risk is that the arrangement will be qualified as an employment contract. In that case, the mandatory employment and dismissal laws will apply which, *inter alia*, requires that the contract cannot be terminated unilaterally at any time, the employer is obliged to continue payment of salary during illness, days' holiday, etc. With respect to flexible workers, such as on call workers and temporary agency workers, the employer must bear in mind that after a certain period a permanent employment contract may arise on the basis of the chain rule (see above). In that case, the employer may lose its desired flexibility.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in the Netherlands?	On April 11, 2013, the Dutch parliament concluded a social agreement with trade unions and employers' associations providing for the amendment of Dutch dismissal law, and several measures to increase the productivity of the Dutch labour market. As part of this, several measures are proposed in respect of flexible / contingent workers, although to date, the precise content remains unknown.
What steps should companies wishing to engage contingent workers take?	The key step is for the employer to assess its needs, and identify the appropriate labour arrangement to suit those needs. Key questions will be how long the resource is needed, whether it will be dedicated to the service recipient or non-exclusive, and whether the service recipient wants to manage the workers directly or delegate these responsibilities. What regulation applies will also be a factor in the choice. It is then important that the supply route chosen is properly documented and complies with the relevant regulations. Although the Dutch Courts would always look at actual facts of the arrangements, the written terms agreed are key evidence, for example as to whether the relationship was intended to be one of employment or of self-employment.
What other options are available, if any, for companies wishing to engage a flexible workforce?	Other than the options set out above (and outsourced labour), no other options are available.
What's on the horizon?	We anticipate that the proposed amendment to Dutch employment law on the basis of the social agreement concluded with trade unions and employers associations will be implemented between January 1, 2014 and January 1, 2016.

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Spain

Question	Position in Spain
What types of temporary and other contingent workers are used in Spain?	The most commonly used contingent arrangements in Spain are fixed-term employees, temporary employment agency workers (generally for work at the company's own premises), independent contractors (for work both at a company's own premises or in the contractor's own home or office) and outsourcing companies.
What are the key legal or other restraints on the use of such workers?	Fixed-term contracts can only be used in Spain when there is a sufficient temporary cause for doing so, and are subject to time restraints. In the absence of justification, the contract will be treated as an indefinite term contract. Independent contractors are subject to commercial law; the main risk is one of misclassification. Temporary employment agencies are also restricted, since agency workers can only be hired under fixed-term contracts. The main risk with outsourcing is the "illegal transfer of employees."
How is the use of temporary agency work regulated?	Temporary employment agencies require a license to operate in Spain. In a temporary agency work relationship, the employer is legally the agency, not the client company. The agency pays salaries, social security contributions, and adopts disciplinary measures towards employees. However, the agency workers are under the client's supervision and control. "Temporary Use" - Agency employees may only be hired on a temporary basis and cannot be hired (i) to substitute employees on strike; (ii) to perform certain dangerous activities nor (iii) if in the previous 12 months, the client has made the position redundant through an unfair dismissal, or by means of redundancy. "Liabilities" - The client is held liable for the agency's non-payment of salary, severance compensation for dismissal (if any) and social security contributions, and jointly and severally liable when the contract does not comply with legal requirements. Administrative fines apply for misuse of temporary employment agencies. "Equal terms" - The worker is entitled to equal terms when compared to the client's own employees in comparable roles (wages, rest periods, overtime and working hours). "Day one rights" - Agency workers have access to facilities available to the client's own employees, including transportation, nursery services, and also access to its vacancies list so they can apply for employed roles with the client.
What are the most serious risks in practice for companies in using contingent workers?	Independent contractors - The main risk is that the commercial relationship is re-categorised into one of employment. Consequences include claims of severance compensation for employees upon termination, penalties for lack of tax withholdings /social security contributions in respect of fees paid to the independent contractor, payment of contributions / withholdings and potential liabilities for damages caused on the independent contractor´s social security pensions. Continued page 18.

	Continued from page 17. Outsourcing companies - the arrangement between the two companies could give rise to an illegal transfer of employees if the client company is acting as the real employer of the employees of the outsourcing company. Any illegally transferred employee will be entitled to become an indefinite term employee at either company, at the employee's choice. In addition, both companies will be jointly and severally liable for all employment and social security obligations with respect to the employees transferred. Illegal transfer is also subject to substantial fines, and, in extreme cases, could expose the company to criminal liability. Companies could also be disqualified from contracting with the Public Administration. Fixed-term employees - the main risk is that the fixed-term contracts are not temporary but respond to permanent needs. In such a case, upon expiration of the contract, the fixed-term employee may claim severance compensation for unfair dismissal. Also, specific penalties apply. Temporary agencies - see above.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in Spain?	Fixed-term contracts - Use of these contracts is very common, given current headcount restrictions due to the economic downturn. However, the fact that these contracts can only be entered into if the company has a sufficient temporary cause, the increase of severance compensation payable upon termination and existing time constraints (e.g. contracts for specific projects are limited to three years) may have a deterrent effect on the use of these contracts. Independent contractors/outsourcing - the risk of re-categorization and illegal transfer of employees has not reduced the use of these arrangements but companies should perform due diligence to ensure they are legally compliant. Temporary agencies - The higher cost and limitations mentioned above may have a deterrent effect on the use of temporary employment agencies.
What steps should companies wishing to engage contingent workers take?	The employer must assess its needs and identify the appropriate labour arrangement to suit those needs. Key questions will be how long the resource is needed and for which purpose, how the services will be rendered, which will be the contingent worker´s autonomy, the risks mentioned above, etc. It is then important that the route chosen is properly documented and complies with relevant regulations. Although the Spanish Courts would always look at actual facts of the arrangements, the written terms agreed are key evidence.
What other options are available, if any, for companies wishing to engage a flexible workforce?	There is a new type of indefinite term employment contract ("contract for entrepreneurs") for companies with less than 50 employees, which allows for a one year trial period. New - Temporary contract ("first job contract"): its duration ranges from three to six months (extendable to 12 months if established under a sector level collective bargaining agreement) and applies to unemployed persons under 30 years with work experience not exceeding three months. New - On-the-job-training agreement for first-job: to hire persons under 30 years old who have concluded their studies (even if more than five years have elapsed since the conclusion of studies, as opposed to standard training contracts) . New - Employment regulations of 2012 enhance an employer flexibility since work conditions may now be more easily modified (e.g. salary, working time, etc)
What's on the horizon?	The Spanish Government may implement additional measures to promote employment, and enhance flexibility of employment conditions.

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Sweden

Question	Position in Sweden
What types of temporary and other contingent workers are used in Sweden?	The most commonly used contingent labour arrangements in Sweden are temporary agency workers and fixed-term employees (generally for work at a company's own premises), independent contractors (for work both at a company's own premises, and in the contractor's own home or office) and outsourced labour (generally provided offsite, from the provider's own premises). Sweden has been subject to some criticism from the European Union lately, due to its rules regarding fixed-term employees where the EU has stated that the Swedish rules are too employer-friendly.
What are the key legal or other restraints on the use of such workers?	Swedish employment laws apply to all employed labour, including fixed-term employees, but not to independent contractors. Temporary agency workers and outsourced labour will be covered by Swedish employment law in relation to the company that employs them, but not in relation to the company that uses their services (however, please see below on the new Swedish legislation on the agency workers, implementing the Agency Workers Directive 2008/104/EC).
How is the use of temporary agency work regulated?	Employment agencies do not require licenses to operate in Sweden. However, there is a new law, the Agency Worker Act that came into force in January 2013 that states that the company using temporary agency workers may not do so on less favourable terms and conditions than those that apply to their own employees, unless the agency workers are permanently employed with the agency (i.e. also receive salary and benefits in between projects for companies). This principle of equal treatment only covers the basic terms and conditions of employment. The hirer must also provide the agency worker with information on any vacancies within the company and may not, through agreement with the agency, prevent agency workers from taking employment with the hirer.
What are the most serious risks in practice for companies in using contingent workers?	The main risk is that the arrangement is re-categorised into one of employment. This would entitle the worker both to certain protections, in particular, protection against termination (just cause will be required) and also may mean that the employer owes back pay and potentially penalties in respect of tax withholdings and social security contributions in respect of fees paid to the worker. This risk of course does not apply to fixed-term employees whose employment status will already have been recognised. However, the employment of a fixed-term employee that has been employed for more than two years during the last five years, will automatically turn into an indefinite term employment.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/ planning to use contingent workers in Sweden?	The Agency Work Act is a major deterrent to companies in using temporary agency arrangements, as this is likely to lead to increased costs.

What steps should companies wishing to engage contingent workers take?	The key step is for the employer to assess its needs, and identify the appropriate labour arrangement to suit those needs. Key questions will be how long the resource is needed, whether it will be dedicated to the service recipient or non-exclusive, and whether the service recipient wants to manage the workers directly or delegate these responsibilities. What regulation applies will also be a factor in the choice. It is then important that the supply route chosen is properly documented and complies with the relevant regulations. Although Swedish Courts would always look at actual facts of the arrangements, the written terms agreed are key evidence, for example as to whether the relationship was intended to be one of employment or of self-employment.
What other options are available, if any, for companies wishing to engage a flexible workforce?	There is a great variety of freelance and other flexible labour in Sweden. These arrangements can offer benefits for workers as well as clients, and are supported by sophisticated payroll and umbrella contracts. One commonly used approach is to use fixed-term contacts for up to 24 months, as the fixed-term contract rules are flexible, at least from an international perspective (for example, a company does not have to justify hiring the employee for a fixed rather than indefinite term.)
What's on the horizon?	The use of temporary agency workers is subject to criticism by Swedish unions, and we expect to see further restrictions by collective bargaining agreements or by law.

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Question	Position in the United Kingdom
What types of temporary and other contingent workers are used in the United Kingdom?	The most commonly used contingent labour arrangements in the UK are temporary agency workers and fixed-term employees (generally for work at a company's own premises), independent contractors (for work both at a company's own premises, and in the contractor's own home or office) and outsourced or "bodyshopped" labour (generally provided offsite, from the provider's own premises).
What are the key legal or other restraints on the use of such workers?	UK employment regulation applies to both employed labour, including fixed-term employees and to a lesser extent "workers" who provide services personally. The market for temporary agency labour is however generally less regulated than in other European countries and "employee leasing" does not generally require a license.
How is the use of temporary agency work regulated?	Employment agencies do not generally require licenses to operate in the UK. However, the terms on which temporary agency workers are engaged are regulated as follows: "Week 12 rights" - after 12 weeks on assignment to a client, the worker is entitled to equal terms when compared to the client's own employees in comparable roles. This right to equal terms applies to wages (including some bonus arrangements) and working hours including holidays. "Day one rights" - workers have access to facilities available to the client's own employees, and also access to its vacancies list so they can apply for employed roles with the client. Terms between the agency and the worker, and the agency and the hirer. The agency must provide both the hirer and the worker with certain written information about the assignment and has other obligations, in particular "quality control": to check the client's requirements for the assignment, and to check the worker's qualifications and suitability.
What are the most serious risks in practice for companies in using contingent workers?	The main risk is that the arrangement is re-categorised into one of employment. This would entitle the worker both to certain protections, in particular, protection against dismissal where the worker has two years' service (one year for workers hired before April 6, 2012), and also may mean that the employer owes back pay and potentially penalties in respect of tax withholdings and National Insurance (social security) contributions in respect of fees paid to the worker. This risk of course does not apply to fixed-term employees where employment status will already have been recognised. However, fixed-term employees also enjoy specific legal protection, which means that the terms they are engaged on must be no less favourable overall than those offered to permanent employees. There are specific penalties for breach of the rules applying to temporary agency workers, as outlined above. As well as compensation for the worker's financial losses if the client fails to provide equal terms, Continued page 22.

	Continued from page 21. Lastly, where TUPE (business transfer regulations) applies to outsourced labour - which potentially includes even a single individual - certain information and consultation obligations apply, the breach of which can attract fines of up to 13 weeks' pay per affected employee. TUPE also protects the employees against any negative changes to their terms and restricts the circumstances in which they can be dismissed without liability for unfair dismissal (worth up to around GBP 80,000 per employee). The individual contractor, or company that provides them, can be asked to indemnify the hirer against all of these risks. Larger employment agencies are not however always willing to give indemnities, whilst individual contractors and their service companies may have insufficient assets.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in the United Kingdom?	The new regulation that applies to agency workers, in particular the requirement to offer equal pay from week 12 of an assignment, is a major deterrent to companies in using long-term temporary agency arrangements. The requirement to provide equal terms to fixed-term, when compared to permanent, employees, is also a significant deterrent. Given that fixed-term employees also enjoy the same statutory protection as permanent employees, such as unfair dismissal (subject to length of service requirements) there is little benefit to these arrangements other than in terms of expectation-setting.
What steps should companies wishing to engage contingent workers take?	The key step is for the employer to assess its needs, and identify the appropriate labour arrangement to suit those needs. Key questions will be how long the resource is needed, whether it will be dedicated to the service recipient or non-exclusive, and whether the service recipient wants to manage the workers directly or delegate these responsibilities. What regulation applies will also be a factor in the choice. It is then important that the supply route chosen is properly documented and complies with the relevant regulations. Although the UK Courts would always look at actual facts of the arrangements, the written terms agreed are key evidence, for example as to whether the relationship was intended to be one of employment or of self-employment.
What other options are available, if any, for companies wishing to engage a flexible workforce?	There is a great variety of freelance and other flexible labour in the UK. These arrangements offer benefits for the workers as well as their clients, and are supported by sophisticated payroll and umbrella contracts. In addition, a new category of worker in the UK, "employee shareholders", will exist from September 2013. "Employee shareholders" can choose to give up some employment rights (most significantly, unfair dismissal) in return for shares in their employer worth at least GBP 2,000. Take-up is however expected to be limited.
What's on the horizon?	Government consultation to simplify temporary agency regime, to include a right to enforce individual rights directly in the Employment Tribunal. Potential repeal of the "service provision" rules under TUPE, which would limit its application to outsourcings to where the service amounts to an "undertaking", planned to take effect from October 2013.

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Argentina

Question	Position in Argentina
What types of temporary and other contingent workers are used in Argentina?	The most commonly used contingent labour arrangements in Argentina are temporary agency workers, as well as temporary and fixed-term employees (generally for work at a company's own premises). Independent contractors who are independent and in business on their own account may be engaged occasionally.
What are the key legal or other restraints on the use of such workers?	Argentine law does not accept the mere intermediation of permanent staff through outsourcing entities. The service provider must provide work or a service, rather than being a mere intermediate between staff and the principal. Pursuant to the Argentine Employment Contract Law (ECL), the principal shall be joint and severally liable with the service provider when there is a breach of employment and/or social security regulations. Should the service provider fail to comply with these regulations, the principal will be exposed to claims from the service provider's employees. In addition, Argentine law prioritizes indefinite term relationships, and as such, temporary relationships are the exception. Companies may only engage in temporary relationships when there is an extraordinary business need. Argentine authorities are very strict when analysing the facts and evidence that allegedly constitute an exception to these rules. Non-compliance creates an employment liability and a social security liability. The law will presume that there is an employment relationship so that whenever an individual renders services and receives compensation, there is a presumption of employment. If the Company classifies an employee as an independent contractor and there is no reasonable basis for doing so, the Company may be held liable for employment, social security contributions and income taxes in connection with that individual, plus interest and penalties. The hiring entity has the burden of proving that services were hired with an independent contractor, rather than with an employee.
How is the use of temporary agency work regulated?	As a general principle, Section 29 of the ECL establishes that workers contracted by third parties (other than registered temporary agencies) to work for a hirer shall be deemed as direct employees of the hirer. Regardless of any agreement that may exist between the agency and the hirer, both shall be jointly and severally liable for all labour and social security duties. However, workers hired through registered temporary work agencies shall be deemed to be direct and permanent employees of the agencies. However, to protect the worker, the joint and several liability of the agency and the user company still applies in case of any breach of the labour and social security duties. Therefore, Section 29 bis establishes that the hirer shall be jointly and severally liable for all labour obligations, and shall withhold from the agency`s fees the workers´ social security contributions in order to deposit them in a timely manner. In such cases, the worker shall be considered included in the collective bargaining agreement applicable for the hirer's premises and/or activity, shall be represented by the union and shall receive the benefits of the pertinent health care provider retained by the user company.

What are the most serious risks in practice for companies in using contingent workers?	The most serious risks in practice for companies in using contingent workers is that the companies could be held *jointly and severally* liable with the agency if any infringement occurs, and be obliged to withhold from the agency`s fees the workers´ social security contributions in order to deposit them in a timely manner. This situation often occurs when the agency is proven to be a mere "workforce provider" (for labour purposes) or a mere "payroll processor" (from a taxation viewpoint); i.e., the temporary workers are placed in a long-term, on-site position, doing practically the same work as the permanent workers of the company, which simply uses the agency´s services to avoid paying the workers the usual benefits and meeting the severance policies against abrupt termination that protect the permanent workers. On the other hand, if the temporary worker is directly hired by the company (without using the agency´s service) but it is proven that such worker was not actually hired to meet extraordinary business needs of the company, the worker may claim to be treated as a regular, permanent employee. Then, if the company fails to comply with this claim, it may be exposed to pay the corresponding severance items for breach of the labour contract. On the other hand, when hiring fixed-term employees, companies should comply with the requirements set forth by the ECL, in relation to its extension, execution and prior notice. If any of the requirements are not fulfilled, the contract will be treated as an indefinite term contract. In case of termination before the expiration date (so called *ante tempus*), the employee is entitled to severance pay due to unfair dismissal, plus compensation for damages conferred by law (loss of profits and consequential damage, assessed by the Courts). Generally, judges assess damages for the amount equivalent to the remuneration that the worker would have earned had he continued working until the expiration of the term. Furthermore, even where a fixed-term contract was properly used, upon expiration of the term, the employee will be entitled to the equivalent to fifty percent of the usual seniority compensation due to termination for dismissal applicable to contracts executed for an indefinite period of time if the term of the contract is higher than one year. Finally, misclassification of independent contractors can result in significant liabilities due to lack of registration of the employment contract in the mandatory payroll book (triggering special compensation for the employee and a fine from the administrative labour authority); lack of payment of social security contributions and omission to act as withholding agent of social security obligations (triggering aggravated interest and fines); and lack of payment of labour benefits (paid holidays, paid leaves, thirteenth salary, etc.) and compliance with certain obligations (provision of work certificate).
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in Argentina?	An *en banc* decision of the National Labour Court of Appeals (with jurisdiction in the Buenos Aires District) in the case *Vazquez vs. Telefonica de Argentina S.A.* held that unlawful employment intermediation through an intermediary (the "Formal Employer") is to be defined as irregular employment with the "user" of the services (the "Real Employer") and subject to all the penalties of irregular employment. Under this ruling, the aggravated penalties apply because the Real Employer failed to register the employee in its employment records. This decision is significant due to the economic impact on the Real Employer, because said user of the services must acknowledge the employment relationship as a direct relationship, pay the severance along with the penalty, and may be liable to the social security contributions. This ruling is intended to reduce the benefit for companies of using contingent workers. The only way to eliminate the risks of co-employment or joint employment liability is to Continued page 25.

	Continued from page 24. stop using a contingent workforce. However, given business needs, doing away with contingent workers entirely is not likely to happen, and companies are still using contingent workers. Companies are also still hiring temporary and fixed-term employees for work at their own premises; and engaging (although to a lesser extent) individuals as independent contractors.
What steps should companies wishing to engage contingent workers take?	To mitigate the risks when hiring contingent workers, companies should register the temporary employees in a special section of the mandatory payroll book, stating that they are hired as temporary personnel through the Agency; act as withholding agent of tax withholdings and social security contributions; control compliance of the Agency with its obligations, since the User Company is joint and severally liable for any infringement, and be obliged to pay to the employee or to the social security authorities. They also should avoid long-term relationships and request the Agency to rotate the personnel. If the temporary worker is hired to meet the Company's extraordinary requirements during a peak period, the term should not exceed six months per year. We also recommend not hiring individuals as independent contractors when those individuals are likely to be considered actual employees. Instead, these individuals should be engaged as employees under employment contracts. If that is impossible, as an alternative, the company may engage these individuals via a third party where the individuals are employed by the third party (either as agency temporary workers or as contractor's employees). In this case, the company would be joint and severally liable with the employer, vis-à-vis, the individuals and the tax authority, but social security payments and withholdings would have to be made by the third party employer. Needless to say, the company should control the employer's compliance of labour and social security regulations related to the individuals. This status should not trigger severe liabilities as long as the corresponding employers comply with the applicable labour and social security regulations. Finally, it is possible for certain individuals currently retained as independent contractors to set up an entity that would hire other individuals that, in turn, would render services to the company. However, note that this course of action is only reasonable if this entity is an actual company that assumes entrepreneurial risks, has multiple clients, etc. Finally, regarding temporary and fixed-term employees for work at a company's own premises, the company must comply with the restrictions set forth by the ECL, in order to avoid facing any contingency.
What other options are available, if any, for companies wishing to engage a flexible workforce?	When hiring temporary employees through an agency, the companies should use a temporary agency with a national reputation; avoid doing business with small companies formed by and consisting of one or two individuals. Always secure a written contract with the temporary agency which clearly sets out the legal status of the individual, the fact that the temporary agency is responsible for all employment-related matters, confidentiality safeguards, indemnifications, and other appropriate provisions etc. The temporary agency and its employees also should enter into a written agreement by which the contingent workers acknowledge their status as employees of the agency.
What's on the horizon?	Foreign companies doing business in Argentina must be aware that the *en banc* decision referred to above in the Buenos Aires district constitutes a serious threat to the model of engagement of personnel through contractors or temporary agencies due to headcount restrictions. Furthermore, other jurisdictions may follow the legal doctrine of this case. This ruling has a significant impact on this model of engagement, and leads to uncertainty for companies in relation to their obligations to make social security contributions and withholdings.

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Brazil

Question	Position in Brazil
What types of temporary and other contingent workers are used in Brazil?	The most common contingent labour arrangements in Brazil are temporary agency workers, independent contractors and outsourcing. In relation to independent contractors and outsourcing, it is common for the work to be performed either at the company's own premises or at the contractor's premises. Fixed-term employment is very strictly regulated in Brazil and as such fixed-term employees are not commonly used.
What are the key legal or other restraints on the use of such workers?	Brazilian employment regulation applies to both fixed-term employees and temporary workers and, to a lesser extent, outsourcing. Under Article 443 of the Brazilian Labour Code, a definite term agreement is only valid if it relates to: (a) services whose nature or duration justifies setting a fixed-term; (b) transitory business activities; or (c) probationary employment agreements. Aside from these situations, employment agreements must be for an indefinite term. Temporary Agency Workers, on the other hand, may only be contracted via Temporary Agencies (duly authorized to operate by the Ministry of Labour) in the event of a significant and temporary increase in business demand or to replace an employee that who for whatever reason is not working at the time (e.g. vacation, sick leave, pregnancy leave).
How is the use of temporary agency work regulated?	Law 6.019/74 regulates the activities of temporary agency workers in Brazil and requires that: • temporary workers are hired as employees of the temporary agency, with whom they maintain a direct employment relationship, • the agency makes temporary workers available to companies in need of contingent workers (the client) via a services agreement between the agency and the client, • the services agreement must be in writing and expressly provide all the labour rights guaranteed by Law 6.019/74, • the temporary worker may only work for each client for a three month period, although that period may be renewed for the period in certain permitted circumstances and upon written notice to the Ministry of Labour.
What are the most serious risks in practice for companies in using contingent workers?	The main risk is that the arrangement is re-categorized into an employment relationship. This would entitle the worker to labour rights and certain protections, and may also mean that the employer owes back pay and potentially penalties in respect of tax withholdings (social security) contributions in respect of fees paid to the worker. Larger employment agencies are not however always willing to give indemnities. Continued page 27.

	Continued from page 26. The individual contractor or employees engaged through an outsourcing company can also ask to be recognized as employees, with the payment of all outstanding labour rights. However, this risk does not apply to fixed-term employees whose employment status has already been recognized.
To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in Brazil?	The legal limitations on the use of temporary workers and definite term employees do significantly limit the possibility of using such workers in the long-term. Although companies do still use contingent workers in Brazil, the use is usually fairly limited due to the legal restrictions referred to above.
What steps should companies wishing to engage contingent workers take?	Employer should assess their needs, and identify the appropriate labour arrangements to suit those needs. Key questions will be how long the resource is needed, whether it will be exclusive and whether the service recipient wants to manage the workers directly. Which regulation applies will also be a factor in the choice. It is then important that the supply route chosen is properly documented and complies with the relevant regulations. Although the Brazilian Labour Courts would always look at actual facts of the arrangements, the written terms agreed are key evidence, for example as to whether the relationship was intended to be one of employment or of self-employment.
What other options are available, if any, for companies wishing to engage a flexible workforce?	There are not that many options in Brazil for companies wishing to engage a flexible workforce locally. There is more flexibility where there is no employment relationship, but this carries the risk referred to above of creating a *de facto* employment relationship.
What's on the horizon?	Congress has been discussing a bill of law regulating outsourcing (which is currently not subject to any specific laws in Brazil), for a few years now. Whilst we do not know when the bill is likely to be approved, we expect that it will regulate outsourcing activities to provide more comfort for companies using outsourced labour and reduce the risks that such arrangements are re-categorized into employment.

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Question	Position in the United States
What types of temporary and other contingent workers are used in the United States?	The most commonly used contingent labour arrangements in the US include: • Part-time, project, and seasonal employees (workers hired to help with increased work demands or seasonal industry fluctuations). • Independent contractors (companies or individual workers who contract to do work according to their own processes and methods and who are typically hired on an as needed basis). • Temporary or staffing agency workers (workers employed by a staffing company that provides workers to client companies under contract and who are usually placed in temporary jobs at the clients' work sites).
What are the key legal or other restraints on the use of such workers?	In general, federal employment laws impose numerous requirements on the use of workers classified as "employees" and few requirements on the use of workers classified as "independent contractors." Statutes which include this employee / independent contractor distinction include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), the Fair Labour Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the National Labour Relations Act (NLRA), the Social Security Act, the Internal Revenue Code and various other laws. Temporary or staffing agency workers frequently are considered employees of both the staffing firm and the "host" company because both exercise considerable control over workers. As a result, companies using staffing agency workers generally must comply with the same laws and regulations applicable to employers. Under Equal Employment Opportunity Commission guidelines, both the staffing agency and the host have an obligation not to discriminate with regard to the worker's hiring, firing, and other terms and conditions of employment. The staffing agency and the host also are generally obligated under the ADA to provide the worker with any reasonable accommodation needed on the job, absent undue hardship. Other federal laws, such as the Occupational Safety and Health Act, as well as certain industry standards, impose a shared responsibility on companies to provide a safe workplace for contingent workers. State law may provide greater protections to non-employees. In addition, many employment laws prohibit third parties (which would include host companies) from interfering with the employment opportunities of any individual by discriminating against the individual on a protected basis. Independent contractors generally are not protected by federal employment laws. If, however, a company's employees harass or discriminate against an independent contractor because of race, the company can be liable under Section 1981 of the Civil Rights Act of 1866, which prohibits discrimination in the formation of contracts, as well as in all aspects of the contractual relationship. Continued page 29.

	Continued from page 28. Companies also should be aware of any restraints on the use of contingent workers imposed by collective bargaining agreements. Unions frequently attempt to limit the use of contingent workers by, for example, negotiating contract provisions which limit the amount of time the worker can be employed or require companies to recall laid-off union members to fill temporary positions.
How is the use of temporary agency work regulated?	The use of temporary staffing agencies is largely unregulated at the federal level in terms of operational constraints, taxes, fee limitations, contract requirements, benefits, or other laws and regulations. Some state laws impose licensing, registration, and other requirements on temporary staffing agencies, as well as rights and protections for workers.
What are the most serious risks in practice for companies in using contingent workers?	The most significant risk related to using contingent workers is that independent contractors will be reclassified as employees. This risk is significant in view of current federal and state agency enforcement initiatives against the misclassification of contractors. The IRS is auditing employers, the Department of Labour (DOL) is pursing its Misclassification Initiative, and state agencies eager for new sources of revenue are more likely to challenge improper contractor relationships. In addition, a single case can trigger a government investigation, exposing the company to even greater financial risk in the event there are other instances of misclassified workers. Plaintiffs' lawyers also are focused on independent contractor issues because collective action lawsuits under wage and hour laws tend to produce big damage awards and significant attorneys' fees. These compliance risks are heightened due to difficulties determining and applying the patchwork of legal standards used to determine whether an independent contractor status exists and whether a joint employment or co-employment relationship exists. Federal and state labour and employment laws use different tests for different purposes. As a result, a worker may be an employee under one law and not under another, or in one state and not another. Some of the factors courts consider when deciding whether an individual is an independent contractor or employee include: who controls the manner in which the work is done, who sets the worker's hours, whether the work is performed on the employer's property during regular business hours, how long the company's relationship with the worker lasts, the method of payment, who provides the tools necessary to perform the job, whether the work is part of the company's regular business, the amount of monetary risk the worker has in the job, the level of skill required for the work, and how the parties describe their relationship. If workers are reclassified from contractor to employee, there may be substantial liabilities in terms of past employment federal income tax withholding, social security tax, federal and state unemployment taxes, workers' compensation insurance, interest, and penalties. Reclassified workers may also be entitled to retroactive coverage, vesting and contributions in one or more company benefit plans. These risks can be lessened, or avoided, where the company engages the workers through a staffing agency.

To what extent (if any) does the legal regime reduce the benefit for companies for using a contingent workforce? Are companies still using/planning to use contingent workers in the United States?	New federal and state laws, agency enforcement initiatives, and class action lawsuits are increasing the risks associated with certain independent contractor arrangements. Employers are continuing to use contingent workers to maximize workforce flexibility and to respond to changing market needs in an uncertain economy. Increasing regulation - including the Patient Protection and Affordable Care Act - and rising healthcare costs also are encouraging some employers to evaluate the use of contingent workers. Contingent workers typically are not entitled to healthcare coverage.
What steps should companies wishing to engage contingent workers take?	Companies must make informed decisions when engaging contingent workers to ensure the arrangement will meet its needs. Key issues include how long the resource is needed, the nature of the expertise required, and the degree to which the company wants to manage the workers directly or delegate these responsibilities. To minimize the risk of inadvertently creating an employment relationship with workers classified as independent contractors, companies should be mindful of the factors that determine who is a common law employee, including the IRS 20-factor test to determine whether a worker is an independent contractor or an employee. In addition, companies should consider conducting an audit of all contingent workers to ensure they are properly classified under applicable state and federal laws. Companies using staffing agencies should carefully screen those agencies since the company may be jointly liable if a staffing agency is found to have unlawful practices. In addition, companies should ensure contracts and agreements clearly identify the responsibilities and services of each party, including for hiring, firing, training, assigning work, providing workers' compensation insurance, handling payroll, withholding, payment of taxes, etc. Companies also should draft provisions to protect it from unnecessary liability and to provide for indemnification where appropriate. Companies also should be mindful of the issue of retroactive benefits exposure. US law affords employers broad latitude to determine eligibility for coverage under welfare, benefit, pension, profit-sharing, and retirement plans. Companies using contingent workers should review their benefit plans and policies and ensure they contain adequate eligibility definitions and exclusions. Some companies choose to manage their contingent workforce internally while others outsource this function. Outsourcing is often recommended to minimize joint employer issues.
What other options are available, if any, for companies wishing to engage a flexible workforce?	There is a great variety of flexible labour in the US. Companies also use contract firms, entering into an agreement with the firm 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 include security, landscaping, janitorial, and data processing, services. Companies also can outsource departmental functions to companies that provide these services for a fee.
What's on the horizon?	At federal level, companies confront proposed legislation imposing new recordkeeping burdens, notice requirements to workers, and penalties / fines for misclassification. Significantly, President Obama's 2014 budget proposal seeks increased funding for the Wage and Hour Division, additional funds to pursue violations of the FLSA, and funding to combat the misclassification of employees as independent contractors. The budget also earmarks money to the states to help them identify and recover unpaid taxes and pursue misclassification investigations. While the President's proposed budget is likely to face Congressional opposition, the proposal signals the administration's enforcement priorities. States also are increasing enforcement efforts and enacting or considering laws to increase penalties for misclassification.

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