



issue paper

American Staffing Association

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Protecting Your Direct Placement Fees

Few problems in the direct placement business are more vexing than fee disputes with your client companies. They exact a toll—your money, time, and emotional energy.

Many companies have successfully engaged in direct placement for many years. However, even highly successful recruiters can become relaxed when it comes to creating enforceable agreements with their clients, and taking other precautions. Their failure to do so can endanger their direct placement fees.

Let's review some practices which will help you minimize the number of fee disputes you encounter, and favorably settle or win those which do arise. Our focus will be on contingency recruitment.

Create a Contract With Your Client

The basis for collecting a full placement fee is creating a contract with your client. It is very important that you enter into a contract with your client **before** referring any candidates to the client. A contract is defined as an agreement between two or more parties that creates an obligation to do or not do a particular thing. The essential elements of a contract are (1) competent parties, (2) an offer, (3) an acceptance, and (4) legal consideration.

Let's look at the four essential elements in the direct placement context. First, there are competent parties: the recruiting firm and its corporate client. Second, there is an offer: the recruiter offering to find a candidate for its client for a fee, generally a percentage of the candidate's first year's compensation. The third element, acceptance, can occur when the client responds agreeing to have the recruiter refer candidates to it, the client interviews candidates referred to it, or the client hires a candidate. Finally, the fourth element of the contract, legal consideration, consists of the activities performed by the recruiter in reliance upon the client's promise to pay a fee if it hires a candidate referred by the recruiter.

Contracts may be either oral or written (signed by both parties). Oral and written contracts are generally equally valid. However, an exception is direct placement agreements in Massachusetts, where one appellate court ruled that contracts between recruiting firms and clients must be in writing and signed by both parties in order to be enforceable in a Massachusetts court.

Although oral and written contracts may be equally valid, written contracts are preferable for several reasons, including:

- Their existence is **much easier** to prove.
- Their terms are easier to enforce.
- Recruiters are far less likely to have fee disputes with a client when they have a written contract with the client.

You should always follow these steps:

- Obtain an unequivocal verbal agreement by your client to pay your placement fee during your initial conversation with your client, **before** referring candidates. This first step is often referred to as “clearing the fee.” It is not sufficient to assume your client understands its obligation to pay your fee. Have the client acknowledge and agree to that obligation. Anything other than an affirmative “yes” from the client may prove insufficient and endanger your placement fee.
- **Always** forward your fee agreement to your client, whether or not it will be signed by the client. Even in situations where the client has not signed the fee agreement, courts have frequently looked to and applied the terms of the recruiter’s fee agreement when disputes have arisen between recruiters and their clients.
- Signed fee agreements should be used whenever possible, and should always be used if you may need to enforce the agreement in a Massachusetts court.
- Preprinted signature lines for your client’s signature should **not** be placed in your fee agreement **unless** you will insist on your client returning the signed fee agreement **before** referring candidates. If the client fails to sign and return the document and later objects to paying your placement fee, the client’s or its attorney’s first argument will be that the client never agreed to your terms since it never signed your agreement. A better approach is to forward your fee agreement without a preprinted client signature line, and in your telephone discussion with your client, request that the client write “Approved” at the end of the fee agreement, sign it, date it, scan it, and return it to you via email. If the signature process “falls through the cracks,” an unsigned signature line does not provide the client a ready-made argument.
- Another way to obtain “written” approval from your client is to have them send you an acknowledgment email stating that your fee agreement “is agreed to,” or words to that effect. However, this approach will likely **not** work in Massachusetts.

Document the Process

Documentation concerning both the contract with your client and your efforts during the search process is critical. One of the **most important factors** in prevailing in a placement fee dispute is **credibility, and good documentation builds credibility**. Conversely, the credibility of your claim and you as a witness may be substantially undermined if your documentation is poor.

The most important piece of documentation is your fee agreement. In **every** instance, you should immediately confirm your oral agreement (“cleared fee”) by sending a copy of your fee agreement to your client, email being the preferred and customary method.

You should keep copious notes (ideally in your recruiting software) regarding each search, from start to finish. By the time you have made a placement, your notes and documents should provide a chronological narrative of all conversations with the clients and candidates and all actions taken by the parties, including the date the client agreed to pay your placement fee, the date the fee agreement was sent to your client, the dates of scheduled interviews, the results of the interviews, the content of offers made to the candidate(s), and all documents provided or exchanged during the process. All email communications should be retained.

You will want to rely on your records when testifying in a court proceeding. In order to ensure the use and admissibility of your notes and documents in court, you should:

- Keep notes and copies of documents on a day-to-day basis as to all recruiting assignments.
- Enter the notes contemporaneously with the occurrence of the activity or event being recorded.

Apart from using the documentation in court proceedings, these records will be invaluable to you or your attorney in negotiations with the client when attempting to resolve a collection dispute short of the filing of a lawsuit.

Fee Agreement—Protective Provisions

There are several types of provisions you should consider adding to your fee agreement in an effort to thwart fee disputes with your clients. They include:

- This type of language should be included at or near the beginning of your fee agreement:

“As part of Recruiting Firm’s service to Client, Recruiting Firm is providing this confirmation of the parties’ agreement.”

- This type of statement is particularly important when your fee agreement will not be signed by your client (but should be included even when it will):

“If these terms do not reflect Client’s understanding of the parties’ agreement, please contact Recruiting Firm immediately. Recruiting Firm will rely on Clients’ acceptance of referrals from Recruiting Firm as establishing that the Client has accepted these terms.”

- The following type of provision (found in the [ASA search and placement model contract](#)) should be inserted to counter a Client’s argument that it doesn’t believe a placement fee is due because they previously “knew” the candidate:

“If Recruiting Firm refers a candidate to Client with whom Client has already interviewed or scheduled an interview, and Client so advises Recruiting Firm within _____ business days following the referral, Client will not owe Recruiting Firm a fee in the event Client hires the candidate. Client shall provide Recruiting Firm with documentation at Recruiting Firm’s request sufficient to establish that the interview has been held or scheduled.

Client Fee Agreements

Your client tells you that it will not agree to your fee agreement. Rather, you have to sign your client’s recruiting agreement if you wish to work with them. Beware of the fee agreements you receive from your clients. They often contain problematic provisions, including nonsolicitation (hands-off) obligations and onerous indemnification provisions.

Your client’s recruiting agreement should be carefully reviewed, preferably by legal counsel, before you sign it since you are generally bound by the terms of an agreement once signed, even if you did not read it before signing it. Further, ignorance of a contract’s terms or the law is no defense under the law.

Backdoor Hires

You are conducting a search for your client, ABC Corp. Your client has interviewed your candidate Sarah and is extremely impressed with her. Unfortunately, your hiring authority’s budget will not permit her to extend an offer to Sarah at this time, so you and she agree to discuss Sarah later in the year. A month later, you have a search assignment with another client for a position for which Sarah would be an excellent candidate. In trying to contact Sarah at [what you believe to be] her current place of employment, you discover she is no longer employed there. In fact, you determine she has gone to work for ABC Corp. Congratulations, you have discovered a backdoor hire.

Periodically (at least quarterly), you should check for backdoor hires. Most often, backdoor hires are discovered by checking candidates’ LinkedIn accounts, since most of your candidates religiously update their LinkedIn profiles. If you discover a backdoor hire, the following steps are recommended.

- First, speak to the candidate to obtain as much information as possible, including the candidate’s start date, starting salary, and sequence of events leading to her hire. In most instances, the candidate—rather than your client—will be the best source regarding facts concerning the placement.
- Second, contact the client and congratulate them on hiring your candidate, and tell them you are calling to confirm the candidate’s first year’s compensation in order to send your invoice for the placement.
- Third, invoice the client for the placement. Do not wait, do not hesitate, do not delay. Issue the invoice!

While fee disputes may be unavoidable, consistently following these few best practices should reduce the number of disputes, and put you in a strong position if your client later balks at paying your placement fee. You can also consult the ASA search and placement model contract, found at americanstaffing.net, to get a basic agreement template and additional optional provision language that can be incorporated in your contract to reduce the risk of fee disputes.

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