

STAFFING SUCCESS

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THE MAGAZINE OF THE AMERICAN STAFFING ASSOCIATION



Harnessing the Power of **STAFFING TECHNOLOGY**

The technology-related solutions designed specifically for the industry are vast, and not always easy to interpret and implement along the continuum of staffing and recruiting services. ASA recently unveiled the Essential Elements of Staffing Technology—an integrated ecosystem map that will change how companies tackle tech.

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ASA research reveals that while most Americans cannot reliably define what the skills gap is, they can certainly identify the challenges they experience when their current skills do not match the skills employers are seeking.

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These staffing and recruiting companies developed the industry's best communications and marketing campaigns this year—check out the 2017 ASA Genius Award winners and their standout strategies.

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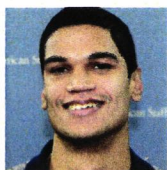
MEET THE **contributors**



Brian Delle Donne

Delle Donne has been a leading force in driving innovation throughout his career in operating roles in the industry. After serving

as chief operating officer at both large public and privately held information technology staffing, engineering, and human resources solutions firms, he has amassed a wealth of insight into effectively applying innovation. One of the original founders of New York City-based Talent Tech Labs, Delle Donne stepped in to head up this unique entity, which is focused on promoting technological developments in the field of talent acquisition. At TTL, Delle Donne and his team identify and assist emerging companies with breakthrough ideas to gain commercialization and scale.



Patrick Hanafin

Hanafin joined the American Staffing Association in May as public relations coordinator. In his role, he monitors and reports on

daily staffing and recruiting industry news, contributes to issuing ASA press releases, works as part of the association's video production and editing team, helps manage ASA awards and recognition programs, and much more. Hanafin played a key role in launching the Staffing World® Tech Park, which debuted in October and showcased technology solutions for the staffing industry. He also is a regular contributor to *Staffing Success* magazine. Hanafin is a graduate of George Mason University, where he earned a bachelor's degree in communications.



Cynthia Poole

As director of research for the American Staffing Association, Poole leads the association's research team and oversees ASA research

and data initiatives, including the weekly ASA Staffing Index, quarterly ASA Staffing Employment and Sales Survey, ASA Skills Gap Index, and ASA Workforce Monitor®. Poole is the primary author of the ASA annual economic analysis of the staffing industry, which this year was relaunched as the ASA Staffing Industry Playbook. She also is a regular contributor to quarterly ASA State of the Industry webinars and *Staffing Success*. Poole has a master's degree in

business administration and more than 20 years of experience in strategic research and analysis, project management, and financial management in various industries.



Mike Rode, Esq.

Rode is the former vice president and general counsel of and now consultant to Management Recruiters International

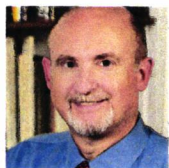
Inc., one of the world's largest executive recruitment and staffing organizations. In that capacity, he developed substantial expertise in legal matters relating to executive recruitment and staffing, franchising, and employment. As an attorney at Reminger Co. LPA, his practice focuses on labor and employment and general business matters, including discrimination, wage and hour, employment relations, trade secret, and IP issues. Rode has extensive experience in providing training regarding properly conducting workplace investigations, employee discipline and discharge issues, and employment discrimination issues.



Jennifer Silber, CAE

Silber joined the American Staffing Association in 2006 as the organization's editor. She is lead editor of the industry's most-read daily

publication, *Staffing Today*, and also manages and contributes to other ASA publications and projects. Silber is a regular contributor to *Staffing Success*, which includes editing the ASA annual economic analysis of the staffing industry—relaunched this year as the ASA Staffing Industry Playbook.



Peter Weddle

Weddle is a recruiter, human resources consultant, and business executive turned author and commentator. Weddle has

published more than two dozen employment-related books, including *The New Golden Rules of Job Board Success: Four Principles for Optimizing Operational and Bottom Line Performance*. Weddle is editor and publisher of Weddle's LLC (*weddles.com*), a publisher of print guides to job boards.

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Creating a Rock-Solid **Fee Agreement**

By Mike Rode, Esq.

In this scenario, a recruiting firm is trying to **recover a placement fee for a candidate** that it referred, whom the **client later hired**. Does the firm have any legal standing? How can it **avoid “backdoor” hires** in the future?

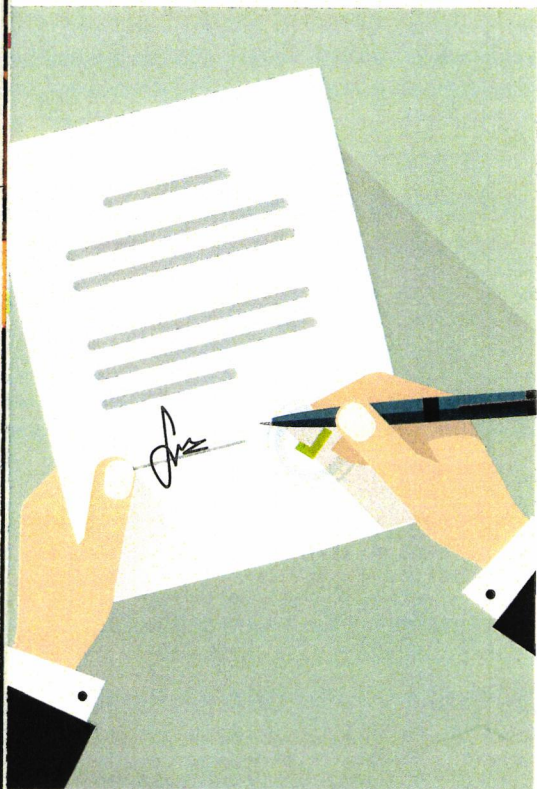
AHG Corp. has been a longtime client of Staffing Direct, a search and placement firm operating in Concord, MA, under the leadership of Jeffrey Jarvis. After a particularly long search, Staffing Direct refers Leslie Loomis as a candidate for AHG’s nurse practitioner position. AHG is impressed with the candidate, but claims that it cannot afford her and decides not to fill the position. One month later, Jarvis is alerted to the fact that Leslie Loomis is now working for AHG Corp. Clearly, AHG Corp. went behind the recruiting firm’s back to directly hire Loomis and avoid paying a direct placement fee. But what legal action can Jarvis take?

Jarvis, whose firm is a member of the American Staffing Association, remembers reading a recent ASA issue paper on this exact subject. He finds what he’s looking for in the legal section of *americanstaffing.net*: “Protecting Your Direct Placement Fees.”

The paper confirms that AHG Corp. has committed a “backdoor hire,” and that Staffing Direct is entitled to a placement fee, so long as the original contract with the client included appropriate language detailing the recruiting firm’s and client’s relationship.

Creating a Client Contract

The basis for collecting a full placement fee is creating a contract with your client. It is very important that you enter into a



One of the **most important factors** in prevailing in a placement fee dispute is **credibility**, and **good documentation builds credibility**.

contract with your client *before* referring any candidates to the client. The essential elements of a contract are (1) competent parties, (2) an offer, (3) an acceptance, and (4) legal consideration.

In the direct placement context, there are competent parties: the recruiting firm and its corporate client. There is also 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.

Generally, contracts may be either oral or written (signed by both parties). However, in direct placement agreements in Massachusetts, where Staffing Direct does business, contracts between recruiting firms and clients must be in writing and signed by both parties in order to be enforceable in a Massachusetts court. Luckily Jarvis finds that there was indeed a written and signed contract with AHG Corp.

The paper goes on to explain that, when entering into contracts with a client, generally recruiting firms 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.
- *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.
- 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.

Documenting 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.

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. Jarvis notes that his recruiters have retained extensive documentation on the entire search process with AHG Corp., and specifically with the candidate Leslie Loomis.

Including 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, including language confirming the parties' agreement as well as countering any potential client's argument that it need not pay a placement fee because it was previously in contact with the referred candidate. The ASA issue paper, as well as the ASA search and placement model contract, contain sample language for such protective provisions.

Beware of 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.

Thwarting Backdoor Hires

Jarvis learns that he should be periodically (at least quarterly) checking for backdoor hires, which seems to be the issue at hand with Loomis. Most often, backdoor hires are discovered by checking candidates' LinkedIn accounts, since most candidates religiously update their LinkedIn profiles. The ASA issue paper recommends the following steps if a backdoor hire is discovered:

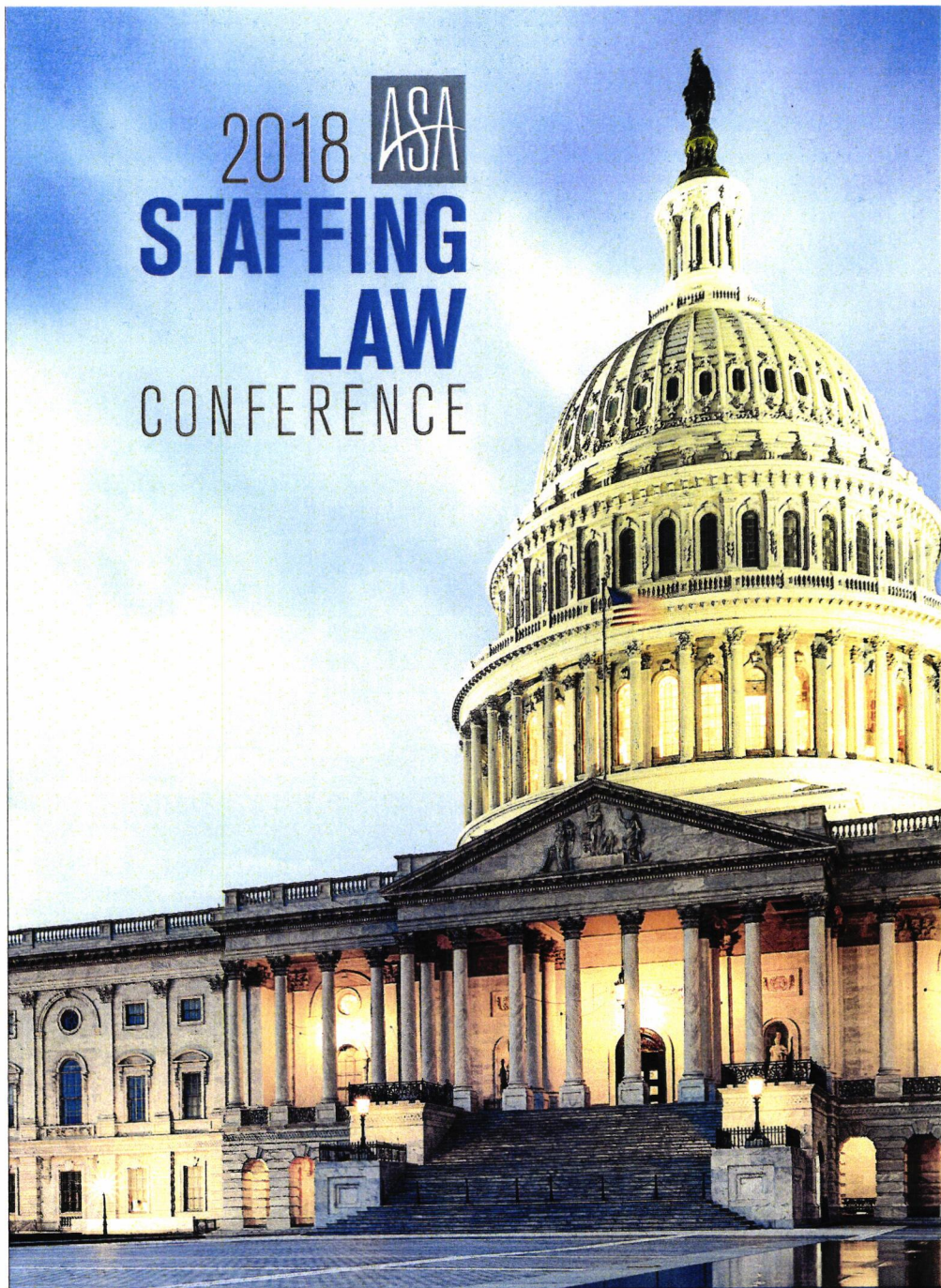
- First, speak to the candidate to obtain as much information as possible, including the candidate's start date, starting salary, and sequence events leading to her hire. In most instances, the candidate—rather than your client—will be the best source regarding facts concerning the placement.
- Second, 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.

While fee disputes may be unavoidable, Jarvis learns that consistently following these best practices should reduce the number of disputes, and put his firm in a strong position if a client later balks at paying a placement fee. ■

Mike Rode, Esq., is an attorney in the law firm Reminger Co. LPA. A former vice president and general counsel of and now consultant to one of the world's largest executive recruitment and staffing organizations, he has substantial expertise in legal matters relating to executive recruitment and staffing, franchising, and employment issues.

This material is not intended, and should not be relied on, as legal advice. ASA members should consult with their own counsel about the legal matters discussed here. Send feedback on this article to success@americanstaffing.net. Engage with ASA on social media—go to americanstaffing.net/social.

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