Massachusetts Staffing Association MSA
Affiliated with American Staffing Association

730 Sea Street
Quincy, MA 02169
617.997.2310 ▪ F 800.790.5547
msa@msastaffing.com ▪ msastaffing.com

November 4, 2015

William McKinney
Director
Executive Office of Labor and Workforce Development
19 Staniford Street, 2nd Floor
Boston, MA 02114

Re: Sept. 30, 2015 Listening Session on Massachusetts Employment Agency and Temporary Worker Right to Know Regulations

Dear Director McKinney:

This follows our discussion during the above-referenced listening session held pursuant to Gov. Baker's Executive Order 562. As a reminder, the Massachusetts Staffing Association represents the Commonwealth's staffing agencies. These agencies placed nearly 300,000 workers in temporary and contract assignments in 2014, and effectuated the direct hire of numerous workers by clients. Executive Order 562 notes that "confusing, unnecessary, inconsistent and redundant government regulations inconvenience individuals . . . inhibit business growth and the creation of jobs, and place Massachusetts for profit enterprises at a competitive disadvantage relative to their out-of-state and foreign competitors," and directs state agencies to "ensure that every regulation is clear, concise and written in plain and readily understandable language."

Massachusetts' temporary worker right to know regulation, 454 CMR 24.00, et seq., is neither clear nor concise, and presents operational burdens with which staffing agencies cannot practically comply. For that reason, we are writing to propose modifications to the regulations to (i) clarify them so that well-intentioned staffing agencies may fully understand and thus abide by their legal obligations; and (ii) relieve such agencies from operational burdens that—in stark contrast to the Executive Order's stated objective—unnecessarily impede the placement of workers in jobs.

These suggested changes address the main issues of concern that we discussed during the listening session and previously during a meeting with Jean Zeiler, general counsel of the Department of Labor Standards—providing clarity for the definitions of staffing agency, employment agency, and placement agency; providing clarity regarding who is a "professional" employee exempt from the regulations' job notice requirement; and providing a workable framework through which staffing firms can practically comply with the requirement that temporary workers be provided with written notice of changes to their assignments.

We summarize each of our proposed modifications below. Also, please see the attached suggested redlined modifications to both the "Staffing Agency FAQs" and "Information for Workers and Job Applicants" – found on the Department of Labor and Workforce Development's website – which reflect the modifications that we propose for the regulations.

*Definitions of Staffing Agency," "Employment Agency," and "Placement Agency"*

Since the regulations in their entirety pertain to and flow from the above-referenced terms, it is important that the terms be defined clearly so members of the staffing industry know how their agencies will be classified – and thus what their legal obligations are. The definitions, which are codified in the Employment Agency and Temporary Worker Right to Know Laws, respectively, are extremely difficult to understand and thus will lead to inadvertent transgressions by staffing agencies that are unsure of their obligations.
Recognizing that that statutory definitions cannot be changed, we think the best way to provide clarity is to provide concrete examples of the various business models that fall under each of the definitions. To that end, we suggest that the regulations' definitions of placement agencies and employment agencies be changed to reflect the following:

> "Placement agencies" include firms that hire and place workers on assignments with clients, regardless of length, and *client-paid* direct hire firms, in which the worker is hired directly by a client. In almost all cases, with the potential exception of certain modeling agencies, a staffing agency will fall under the definition of placement agency. Accordingly, the applicable regulations for placement agencies will apply to staffing agencies.
>
> "Employment agencies" include what are commonly referred to as *applicant-paid* direct hire firms, in which the worker is hired directly by a client.

We also suggest that these definitions be included in the Staffing Agency FAQs.

*Clarification of the Definition of "Professional" Employees Exempt from the Regulations' Notice Requirement*

The regulations require staffing agencies to provide written notice of assignment details to certain temporary employees, with the exception of secretaries, administrative assistants, and "professional" employees whose *duties* are defined under the Fair Labor Standards Act (FLSA). By cross-referencing the FLSA's professional employee duties test, which in and of itself has led to confusion among employers for many decades, the regulations leave staffing agencies guessing as to which of their employees may be exempt. Therefore, we urge that both the regulations and the Staffing Agency FAQs be amended to include additional illustrative jobs that typically meet the duties test, and also explicitly specify that a temporary employee must meet *only* the duties' test of the FLSA's professional exemption—and need not be paid a salary pursuant to the FLSA's salary basis test—in order to be exempt from the regulations' job notice requirement.

*The Regulations' Requirement to Provide Additional Job Notices Upon Changes to Assignments*

The regulations state in section 24.08(5): Any changes to the terms of employment or assignment contained in the Job Order shall be immediately provided to the Worker, by the same method in which the initial Job Order was transmitted. The Staffing Agency shall obtain from the Worker acknowledgement of the changes.

Given the fluid nature of temporary assignments, changes occur frequently, often with little advance notice. Moreover, many times temporary workers are apprised of such changes directly by the clients to which they are assigned, but neither the client nor the temporary worker informs the staffing firm of the changes, or they may so inform the staffing firm after the change has already

occurred. These changes may be expected to last the duration of the assignment or may be temporary.

For example:

- A client spontaneously releases workers early for a holiday break, and the staffing agency is not informed of this change to the work schedule until after the holiday break.
- A temporary worker may be asked to stay at work for additional (overtime) hours to cover for workers who have called out or to assist with unanticipated activity, and the staffing agency is not informed of this change to the work schedule until after the additional hours have been worked.
- The client decides to increase the temporary worker's pay rate, and communicates this change to the temporary worker and subsequently to the staffing agency.
- Due to production issues, a temporary worker's schedule is altered while the issues are rectified.
- Due to inclement weather, a client alters its hours or temporarily closes its operation, of its own accord or pursuant to a state order.
- Due to a holiday, the staffing firm must accelerate the pay date.

Requiring a changed Job Order in accordance with Section 24.08(5) in instances like these creates an administrative burden on staffing firms, particularly for small and medium sized firms. The relevance of these Job Order change notifications is questionable particularly when considering that the temporary worker is already aware of the change or a temporary change has already occurred and the terms of the original Job Order have been reinstated.

Accordingly, we request that Section 24.08(5) of the regulations be changed to: Any changes to the terms of employment or assignment contained in the Job Order that are reasonably expected to last the duration of the employment or assignment and for which the Staffing Agency is aware shall be provided to the Worker prior to the end of the first pay period in which the Staffing Agency becomes aware of the changes by the same method in which the initial Job Order was transmitted. The Staffing Agency shall obtain from the Worker acknowledgement of the changes either verbally or in writing; however, the Worker will be deemed to have acknowledged the changes by continuing to work on the assignment after the changes became effective.

Additionally, the Staffing Agency FAQs should be revised to reflect this change to the regulations. Revising the regulations and the Staffing Agency FAQs in such manner will address operational burdens with which staffing agencies cannot practically comply and thus further the executive order's goal of removing impediments to job growth.

*Expanding Scope of the Regulations to Include Online Staffing Platforms*

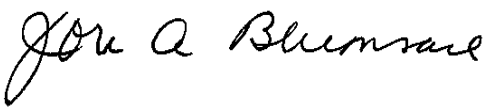
In July 2014, we suggested that the scope of the regulations be extended to include online staffing platforms. DLS agreed that the Temporary Worker Right to Know Law and the Regulations apply to these online staffing platforms, and that any business that engages in the activities covered by the regulations is engaging in a regulated activity. However, there were no changes made to the final regulations to address this concern.

The online staffing platforms continue to evolve and proliferate, and there are online staffing platforms operating in Massachusetts that are not licensed or registered with DLS.

We respectfully ask that you reconsider this issue and amend the regulations to clearly encompass within their scope these online staffing platforms.

Thank you for your consideration. Should you wish to discuss these issues further, please do not hesitate to contact me.

Very truly yours,



Jori Blumsack
President
Massachusetts Staffing Association