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For Staffing Clients—A Guide to Staffing Firm Roles Under the CCPA

The goal of this guide is to provide perspective on how the obligations of the California Consumer Privacy Act of 2018 apply as between a staffing firm and its clients to best meet the objectives of the new law.¹ The American Staffing Association appreciates that understanding the legal roles and responsibilities between staffing firms and its clients is the foundation to establishing a solid, mutually beneficial relationship between the parties, and ultimately benefits temporary workers, job candidates, and anyone else whose personal information may be impacted by the relationship.

When discussing the roles and responsibilities of the parties under the CCPA, it is important to understand when an entity qualifies as a “business” or a “service provider.” A “business” is defined as a for-profit entity that collects personal information about California consumers and *determines the purposes and means of processing such information*.² A “service provider” is a for-profit entity that processes personal information *on behalf of a business* and to which the business discloses a consumer’s personal information for a business purpose pursuant to a written contract. The CCPA imposes obligations primarily on *businesses*, which are then expected to impose certain obligations on the *service providers* who are processing personal information on their behalf.

Perhaps most important to staffing firm–client relationships are the questions 1) Is the staffing firm determining the *purposes and means* (i.e., why and how) of processing personal information? and if not 2) Is the staffing firm processing the personal information *on the client’s behalf* and subject to its instruction? In many cases, staffing firms are best able to offer their services through sourcing and recruiting of talent independent of the client’s control. Conversely, in many client engagements—particularly involving temporary workers—staffing firms may not access any personal information of the clients, and thus wouldn’t be a *business* or a *service provider* under the CCPA. The key to answering these questions is to consider each service a staffing firm may offer to clients and analyze the roles and responsibilities of each party in order to define the parties’ respective data protection obligations.

Business vs. Service Provider in Staffing-Related Services

When discussing the appropriateness of CCPA compliance obligations, it is important to understand what type of services are being offered by the staffing firm, and how personal information is shared and used in the services. As a result, the answers to who the *business is* and who the *service provider* is may differ for the personal information relating to one type of individual (e.g., temporary workers) over another (e.g., client employees). Below we review certain types of staffing-related services to demonstrate how this analysis plays out.

¹ This guide is not intended, and should not be construed, as legal advice. Staffing firms and their clients should seek the advice of knowledgeable legal counsel regarding the matters discussed herein.

² The definition of “business” also has a threshold requirement. Businesses must satisfy one of the following thresholds: (i) annual gross revenue in excess of \$25 million; (ii) annually buy, sell, or share the personal information of at least 50,000 California consumers; or (iii) derive at least 50% of its annual revenue from selling California consumers’ personal information.

- **Temporary Staffing Services.** Staffing firms generally have their own independent relationships with temporary workers and determine the purposes and means of processing their information. For example, the staffing firm will source, screen, and then determine which temporary workers to hire, as well as engage in processing activities (as the employer of the temporary workers) such as onboarding, payroll and benefits administration, and offboarding. Thus, the staffing firm is acting as a *business* when processing personal information *about temporary workers*. However, the staffing firm’s client may have its own requirements for why and how to process the personal information of temporary workers who are on site, such as to supervise their work or to control the client’s IT or physical environment (e.g., issuing a badge to enter client’s buildings, or network credentials to access client applications or issue an email address). Thus, the staffing firm’s client is also acting as a *business*—independent of the staffing firm—when processing personal information about the temporary workers.

Separately, staffing firms generally do not receive access to the client’s personal information or otherwise process such personal information as part of providing temporary staffing services. Staffing firms generally do not issue email addresses to temporary workers or provide them with access to the staffing firm’s network or computing environment. The temporary worker is typically issued an email address by the client and given access to the client’s network and computing environment. On occasion the temporary worker is provided with a laptop by the staffing firm, but all network connectivity (e.g., VPN) is controlled by the client. Therefore, all such processing is done by the temporary worker on the client’s systems and subject to its direction. **As a result, the staffing firm should not be considered either a *business* or a *service provider* under the CCPA with respect to the client’s internal personal information.**

While not directly bearing on the CCPA, the General Data Protection Regulation, after which the CCPA is patterned, features the concepts of a “controller” and a “processor,” which are similar in nature to the concepts of a “business” and a “service provider,” respectively, under the CCPA. According to recent guidance from the European Data Protection Board (EDPB)—the governing body of European Union member state regulatory agencies—on the distinction between controllers and processors, temporarily employed staff are “**not to be seen as processors since they will process personal data as a part of the controller’s entity.**”³ Moreover, the temporarily employed staff is considered a part of the controller and not a third party insofar as they are processing personal data with the authorization of the controller. This recent guidance helps to underline the fact that there may be no data processing relationship between the staffing firm and its client (under the GDPR, or, by analogy, under the CCPA) as it relates to the client’s personal data that is accessed by temporary workers.

- **Direct Hire/Search.** When a staffing firm processes the personal information of job candidates, it determines the purposes and means of processing the information

³ European Data Protection Board Guidelines 07/2020 on the concepts of controller and processor in the GDPR (Sept. 2, 2020) p. 76 (available at: edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202007_controllerprocessor_en.pdf).

for its own vetting and preselection of candidates. When the client processes personal information of the candidates being considered for direct hire, the client also determines the purpose and means of processing the information for its own selection and hiring process. Thus, both parties are likely acting as independent *businesses* for CCPA compliance purposes (and comparably, independent controllers under the GDPR).

- **Recruitment Process Outsourcing.** In an RPO arrangement, the staffing firm handles the organization and coordination of the client's recruitment process on behalf of the client. This means that the staffing firm organizes and coordinates the client's recruitment process and the processing of job candidates' personal information each at the direction of the client, which acts as a *business* in this scenario. Thus, the staffing agency acts as a *service provider* to the client for the personal information the staffing firm collects and processes on behalf of the client.

Separately, it's possible that a staffing firm may also offer as a service the recruitment of candidates from the staffing firm's own independent candidate sources. In this instance, the portion of the service that involves using candidates from the staffing firm's independent candidate sources should be treated the same as the staffing firm's direct hire/search service (see above).

- **Managed Service Provider.** MSPs support clients in multiple aspects of workforce management, including the selection, alignment, and coordination of suppliers that provide workforce solutions to the client. The staffing firm performing MSP services generally processes information from the suppliers on behalf of the client. Thus, it acts as a *service provider* to the client (and comparably, acts as a processor under the GDPR).

Clients and staffing firms all benefit by including clearly defined roles and responsibilities in their agreements. Data protection legislation expects parties to all transactions involving personal information to consider with specificity their respective roles and responsibilities in order to accurately contract for data protection language. It should not be a one-size-fits-all exercise. Staffing companies have worked diligently to take on privacy compliance obligations where applicable by analyzing closely each of its core services to understand the respective roles and responsibilities under data protection legislation for staffing firms and clients, so clients can appropriately focus on their own processing of personal information. Aligning this understanding between the parties early on lets staffing firms serve their clients in the most efficient and streamlined manner and ensures that both parties have appropriate data protection terms in place.

About ASA

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