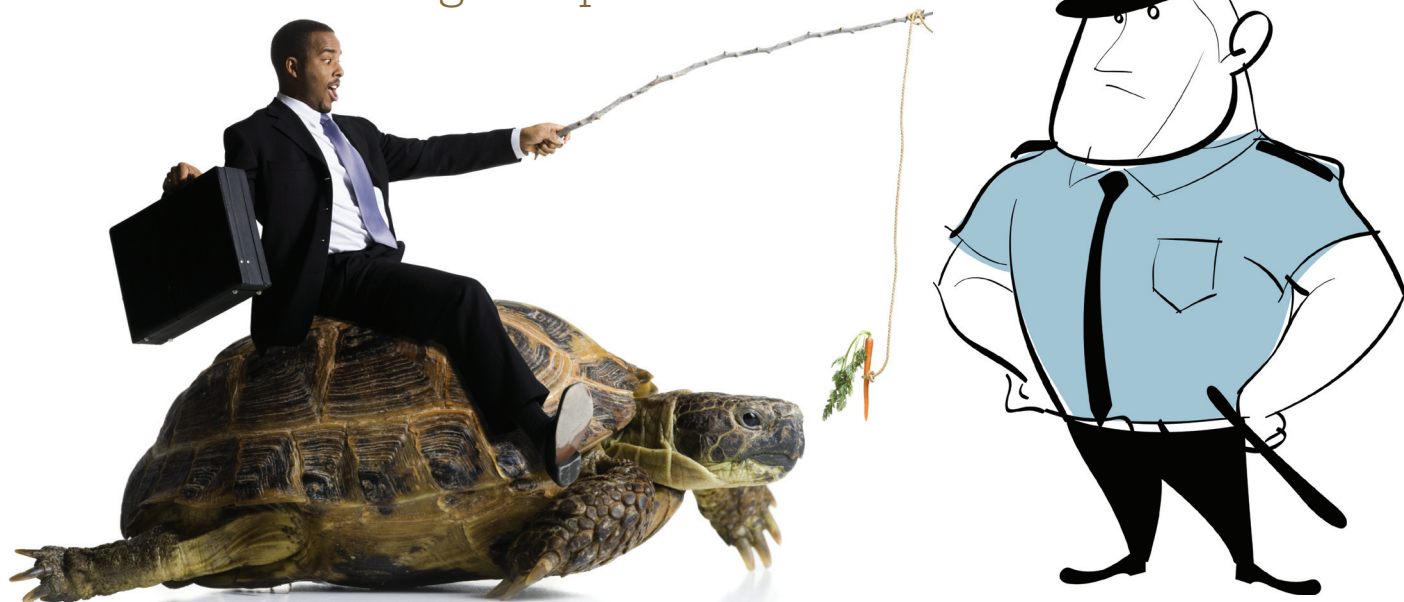


Carrot or Stick?

Two perspectives on ensuring compliance



By Jason Ezratty and Christopher Minnick

Everyone in our industry has heard of Microsoft and FedEx's contingent workforce woes by now; misclassification of workers cost Microsoft \$97 million in back benefits payments and may end up costing FedEx more than \$1 billion. Such financial penalties are the giant club that federal and state regulators use to influence the behavior of corporations.

If much of the risk associated with contingent workers is so widely known and the punishment is severe enough, why are so many companies not compliant? Many companies struggle with compliance simply because their employees do not understand what it means to be compliant.

Because compliance can span a wide range of topics, contingent workforce (CW) program owners can benefit by viewing compliance from the carrot and stick perspectives.

The stick. The civil foundation — an accumulation of laws and regulations — governs a company's use of contingent workers. For many companies, it is the civil foundation and the penalties associated with it that provides the greatest motivation to formalize a CW program in the first place.

The carrot. The corporate culture of an organization — the policies, business practices, and leadership styles — governs a company's use of contingent workers. While corporate policies can be shaped to provide employees with incentives to comply with the aforementioned laws and regulations, corporate culture is the force that drives individuals to comply with the policies.

SNAPSHOT

- Companies should develop policies to meet legal requirements
- Key issue is worker classification
- Global complications; laws and regulations vary widely in other countries
- Educate employees on what the rules and regulations mean and the consequences of non-compliance
- Use technologies to help ensure compliance

CIVIL FOUNDATION

Many CW program owners find the legal and regulatory framework related to contingent workers perverse and often baffling, especially considering most are procurement or human resource specialists, not attorneys. With compliance responsibilities normally spread across the organization in a functional or silo approach, savvy program owners are masters at building a network of internal and external stakeholders to ensure compliance.

With the myriad laws and regulations [see box], companies must assess their liability and where their risks lie in order to devise a comprehensive set of policies to avoid unanticipated obligations to contingent workers and unnecessary risk. Furthermore, employees must understand rules and regulations and the consequences of non-compliance. After all, no one will fear a stick they cannot see.

THE CLASSIFICATION CONUNDRUM

A central issue in the regulation of contingent workers is their proper classification. State and federal laws and regulations question whether a worker is an employee of a staffing firm, the client company, or is some other entity, like an independent contractor. There are severe consequences for misclassifying workers: fines, back taxes, legal fees, and retroactive access to benefits, such as stock options. In certain states and certain industries, knowingly misclassifying workers may lead to imprisonment for some employers.

How, then, to avoid this giant club? Generally, there are two factors that, when looked at in conjunction with one another, largely determine whether a company faces sole liability or shares liability jointly with providers of contingent workers or with independent contractors — supervisory control and the specific law.

Supervisory control. Generally, if both the company and the provider of contingent workers exercise control over the workers, they may be considered joint employers. In most real-world cases, placing restrictions on contingent worker usage (such as tenure limits, different color badges, restricted access to company parties, etc.) is not likely to affect the determination of co-employment status.

The specific law. The application of the joint employer doctrine varies significantly under the different state and federal employment and labor laws. The courts and regulatory agencies look to the statutes and regulations at issue in deciding how to apportion liability for breaches of employer obligations.

Asking the following questions can assist in the correct sourcing of workers:

Is the work being performed by one resource or a team of resources? Is payment based on hourly rates or a fixed fee? Are there deliverables and milestones associated with the work and have they been clearly defined in a project agreement? Are there penalties if the deliverables or milestones are not met?

Establishing checkpoints early in your process will ensure you are properly classifying workers.

CW program owners may also consider using the stick — “it’s the law” — to their benefit. One CW program owner developed “scary grams” to address exception requests from hiring managers, reminding executives that their approval to an exception request, as a named executive

of the company, means they are assuming personal responsibility and may be named in any federal or state investigation or lawsuit if something should go wrong. As you can imagine, this gets people’s attention.

GLOBALIZATION

The issue is even more complex for program owners running international programs.

The Organisation for Economic Co-operation and Development (OECD) provides an index of the employment protection legislation that allows meaningful comparisons to be made across countries of the relative strictness of employment laws. This information can be useful when determining which countries may offer the greatest flexibility toward temporary employment scenarios and which ones wield the biggest stick.

CORPORATE CULTURE

Laws and regulations set the basis of many corporate policies and business rules, but leadership and corporate culture are what drive compliance. Companies must develop policies that incentivize good corporate behavior and enable managers to effect change.

Laws and Regs

Following are just some of key statutes and regulations that every CW program must be aware of.

Compensation and Benefits. Workers’ compensation insurance; unemployment insurance; employment taxes; independent contractor issues, such as the application of Section 530 to technical services and IRS classification guidelines; wage and hour issues under the federal Fair Labor Standards Acts; Family and Medical Leave Act; health and pension benefits, including the application of “coverage tests”; record keeping exemptions, safe harbor plans, and employee contracts and waivers.

Employment Practices. Equal Employment Opportunity, including head count issues under Title VII of the Civil Rights Act; Affirmative Action, EEO-1 reporting and OFCCP Internet Applicant rules; Americans with Disabilities Act; labor-management issues; federal Occupational Safety and Health Act and state workplace safety laws; wrongful discharge; immigration and I-9 verification; privacy protection under the Health Insurance Portability and Accountability Act and Federal Trade Commission; and Background and Reference Checks under the Fair Credit Reporting Act.

One of the greatest opportunities for improving compliance is in addressing the lack of coordination and integration of purpose and methods across cross-functional departments. The concept of CW compliance applies to multiple roles within an organization — HR, procurement, legal, finance, IT, security, facilities, tax, accounting, suppliers, end users, etc. Each of these functions is critical in shaping an overall integrity of a CW program and compliance with the program. Problems occur when compliance reviews are restricted to small groups; limited involvement often translates to limited effectiveness.

DEFINING RULES

If your stakeholders do not know what the rules are, they cannot be expected to meet them, and management is responsible for defining the rules.

Management must begin by defining what the needs are from a compliance perspective, i.e., what is to be done. This might include obtaining financial approval to bring on a worker or conformance to a specific law or regulation in a specific industry. These are must-have items and are non-negotiable.

Next, managers must explain why the requirement is in place. What is the risk of non-compliance — termination, financial penalty from the IRS, loss of revenue for the company, etc. Time spent explaining the requirement is paid back tenfold because it helps get people to participate.

The third step is to define how the requirement is to be met. Managers should give specific steps, as well as specific warnings about common mistakes.

GUIDE RAIL FOR COMPLIANCE

Corporate culture aside, technology is one of today's most effective business tools for ensuring compliance. Well-designed and thoughtful software configurations can guide user compliance by simplifying decision making, enhancing user satisfaction, reducing risks, and controlling purchasing costs. When compliance is easy and stress-free, users are much less likely to resent the policies they are being asked to follow.

While some VMS tools are not easily configurable, many are, which means a business analyst can, through the use of administration tools, configure the software to mirror a desired workflow.

Some of the most underdeveloped and underutilized features of many VMS tools are the user notification and feedback mechanisms. Program managers can use system generated email notifications to call users to action or positively reinforce a message or behavior that leads to greater compliance. Use these features to build greater program awareness and understanding of your policies by being more specific with your messages.

Internal customer surveys are a useful measurement tool to gauge user satisfaction and uncover non-compliant

behavior. However, over surveying and unnecessarily long surveys after a transaction often result in low response rates. Configuring your VMS to capture snippets of relevant information during the transaction can assist in making improvements to a process and delight your customers. And don't forget to collect information from your suppliers' recruiters; they are a fountain of valuable information.

An emerging technology practice to drive user behavior and compliance is the use of defaults and forced-choice alternatives. You are probably familiar with both of these without having put much thought into them. For example, that music player you downloaded to listen to music at work (don't worry, we won't tell anyone) probably opened a box that recommended that you click "next" for a quick install? That is an example of a default.

A forced-choice alternative to a default is when a company requires that a user make an active choice or be denied access to a product or system. Many VMS clients are likely using this practice today. For example, many companies require suppliers to "check the box" to comply with their confidentiality agreements and code of ethics policies before gaining access to their system.

The use of defaults clearly presents an opportunity to overtly and covertly influence behavior and drive compliance. A word of caution, ill-advised defaults can also result in a backlash from users and put companies at risk. Program owners should proceed cautiously and work closely with stakeholders to ensure defaults work as the carrots they are meant to be, not sticks that will be resented and circumvented.

The sheer size and scope of many companies' contingent workforce coupled with complex global laws and regulations makes compliance difficult but not impossible. Now is the time for corporate leaders to put their money where their mouth is and commit the necessary resources to take compliance seriously.

There are more than enough sticks out there in the forms of laws and regulations; what is missing is an emphasis on creating a corporate culture that incentivizes compliance. We need more carrots! 🍌

WEB RESOURCES

cei.org
www.oecd.org

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