

**JASON D. WOODBURY**  
District Attorney  
775.283.7677  
jwoodbury@carson.org



**OFFICE OF THE  
CARSON CITY DISTRICT ATTORNEY**  
885 East Musser Street, Suite 2030  
Carson City, NV 89701  
775.887.2070 • 775.887.2129 fax  
www.carson.org

## INTERNAL MEMORANDUM

TO: Sheri Russell, Chief Financial Officer  
FROM: Todd Reese, Deputy District Attorney  
DATE: March 30, 2021

RE: Audit Committee Temporary Staffing  
Recommendation 1: Evaluation of Carson City's Employment Relationship with temporary employees.

---

### **I. Introduction**

This memorandum addresses a concern raised by Carson City's internal auditors in a temporary staffing audit from July 1, 2016, through June 30, 2018, (the "Audit") (attached here to as Exhibit A) that Carson City may not be properly following U.S. Department of Labor ("DOL") considerations concerning temporary employees. The Audit recommended further evaluation of the legal risks identified by the Audit. This memorandum finds that that Carson City's use of temporary employees does not expose Carson City to undue legal risk.

More specifically, the Audit made the following observation and recommendation:

#### **Observation 1:**

We noted Department of Labor considerations which may indicate an "employment relationship" between Carson City and the temporary employees the City hires. We noted four contracted individuals who had completed two or more assignments over a five-year period with one individual having completed six assignments altogether.

#### **Recommendation 1:**

We recommend the City conduct further evaluation by a legal professional on the legal risks identified from this internal audit.

Audit, page 4. Under "Audit Results" and the "Compliance" section, the temporary staffing audit continued:

We obtained and reviewed the applicable laws, regulations, policies, and procedures pertaining to the use of temporary staff and independent contractors. Our initial review noted potential risks with regards to Nevada PERS laws designated in NRS 286, Nevada Labor laws designated in NRS 608, and the Fair Labor Standards Act (FLSA).

*No instances of non-compliance were noted, however a legal determination of an “employment relationship” existing between Carson City and its temporary workers may indicate non-compliance with both FLSA and NRS 608.*

- o Specifically, Carson City under NRS 608.19, is subject to Department of Labor considerations involving the “economic reality” of a temporary employee’s relationship to the City. These considerations include items such as permanency of the relationship and the extent that services rendered are integral to Carson City operations.
- o FLSA and state laws mandate specific break periods.

This raised potential concerns after an additional evaluation was performed on the 55 of the 77 temporary employees who were not hired. We noted four individuals who had completed two or more assignments over a five-year period with one individual having completed six assignments during that time. Among those individuals, the average down time between assignments was noted as 65 days and the average number of weeks on assignment in total was 111. We further noted, during our review of transaction level activity, concern regarding the lack of documented employment relationship. In this instance, two temporary workers were undergoing unpaid training for a permanent position while also working on temporary assignments.

Audit, page 2.

Further, at the December 8, 2020 Audit Committee meeting, the Committee asked that Carson City’s use of temporary employees through Marathon be reviewed to ensure compliance with the laws governing the Nevada Public Employee Retirement System (“PERS”).

## **II. Statement of the Law**

The Audit references several sources of law regarding temporary employees; the Fair Labor Standards Act (FLSA), Nevada Revised Statutes (“NRS”) Chapter 608, and PERS under NRS Chapter 286. Carson City is also subject to the Family and Medical Leave Act (“FMLA”), 29 USC § 2601 et seq. and to NRS Chapter 245. The scope of this memorandum is limited to these authorities. Concerning these authorities, this memorandum initially examines whether an employment relationship exists between the Carson City and its temporary workers.

### **A. *Temporary Employees are not Independent Contractors.***

The FLSA “establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.” *Handy Reference Guide to the Fair Labor Standards Act*, United States Department of Labor, Wage and Hour Division (Rev. 1016, 2016), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1282.pdf>. As a local government employer, Carson City is subject to the FLSA.

The FLSA distinguishes between independent contractors and employees. An independent contractor is a person who performs services for another person under an express or implied

agreement and who is not subject to the other person's control, or right to control, the manner and means of performing the services, and is often paid in a lump sum as opposed to wages for hours worked. An employer who contracts with an independent contractor is not required to provide the independent contractor the benefits of the FLSA. On the other hand, most employers, including Carson City, are required to provide employees with the benefits of the FLSA. 29 USC §§ 206 and 207.

The FLSA test to distinguish between an employee and an independent contractor is called the "economic reality" test. *Final Rule, Independent Contractor Status Under the Fair Labor Standards Act*, 86 FR 1168 (2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-29274.pdf>; *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. Department of Labor, Wage and Hour Division (July 2008), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>. As explained in Fact Sheet #13, a person is deemed an employee, and an "employment relationship" exists between the person and the employer, if the employer-employee relationship meets the "economic reality" test. *Id.* This is the "employment relationship" and "economic reality" referenced by the Audit.

But the "economic reality" test is not applicable to temporary employees. The FLSA does apply to temporary employees hired by Carson City.

B. *NRS Chapter 608.*

The Audit also references NRS Chapter 608, and specifically NRS 608.19. Unfortunately, NRS 608.19 does not exist; but the Audit may be referring to the following sections:

NRS 608.019 Periods for meals and rest.

1. An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work for the purposes of this subsection.
2. Every employer shall authorize and permit all his or her employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Rest periods need not be authorized however for employees whose total daily work time is less than 3 and one-half hours. Authorized rest periods shall be counted as hours worked, for which there shall be no deduction from wages.
3. This section does not apply to:
  - (a) Situations where only one person is employed at a particular place of employment.
  - (b) Employees included within the provisions of a collective bargaining agreement.
4. An employer may apply to the Labor Commissioner for an exemption from providing to all or to one or more defined categories of his or her employees one or more of the benefits conferred by this section. The Labor Commissioner may grant the exemption if the Labor Commissioner believes the employer has shown sufficient evidence that business necessity precludes providing such benefits. Any exemption so granted shall apply to members of either sex.

5. The Labor Commissioner may by regulation exempt a defined category of employers from providing to all or to one or more defined categories of their employees one or more of the benefits conferred by this section, upon the Labor Commissioner's own motion or upon the application of an association of employers. Each such application shall be considered at a hearing and may be granted if the Labor Commissioner finds that business necessity precludes providing that particular benefit or benefits to the employees affected. Any exemption so granted shall apply to members of either sex.

NRS 608.190 Willful failure or refusal to pay wages due prohibited.

A person shall not willfully refuse or neglect to pay the wages due and payable when demanded as provided in this chapter, nor falsely deny the amount or validity thereof or that the amount is due with intent to secure for the person, the person's employer or any other person any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay or defraud the person to whom such indebtedness is due.

NRS 608.195 Criminal and administrative penalties.

1. Except as otherwise provided in NRS 608.0165, any person who violates any provision of NRS 608.005 to 608.195, inclusive, or 608.215, or any regulation adopted pursuant thereto, is guilty of a misdemeanor.
2. In addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$5,000 for each such violation.

Based on a review of these sections and discussion with the Carson City Human Resources Department ("HR"), Carson City appears to be complying with these sections.

C. *Definition of "Temporary Employees."*

Turning to temporary employees, this memorandum must address the question of what is a "temporary employee." With the exception of PERS, the term "temporary employee" is generally not defined in any of the laws discussed in this memorandum or in any other law that was able to be reviewed. Rather, the term "temporary employee" is generally used to describe a class of employees employed for a specific period of time to whom certain employment benefits may lawfully be denied. Accordingly, a "temporary employee" is defined more by when benefits must legally be provided to an employee.

The laws discussed in this Memorandum have the stated applicability timelines:

- FLSA – The FLSA does not contain a grace period. The FLSA's wage and overtime laws are applicable to a covered employee immediately on hire.
- FMLA – Carson City must provide FMLA benefits to an employee after an employee works at least 1,250 hours and has been employed for 12 months. 29 USCS § 2611(2)(A).
- NRS Chapter 245 – Carson City must permit employees to take annual leave after 6 months of employment with Carson City, and must pay out accrued annual leave to an employee

whose employment is terminated after 6 months of employment with Carson City. NRS 245.210.

- PERS – PERS is applicable to temporary employees employed by Carson City when the employee’s assignment exceeds 6 continuous months. (PERS is not applicable to part-time employees.) NRS 286.293(1)(a); 286.297(9). The PERS official policies, available at <https://www.nvpers.org/public/employers/PERS%20Official%20Policies.pdf>, define “Temporary Position” as “A position that will be staffed for six months or less.”
- NRS Chapter 608 – Certain provisions of NRS Chapter 608 are likely applicable to Carson City. (Minimum wage, etc.) The provisions applicable to Carson City do not have a grace period.

Therefore, consistent with when benefits must be provided to employees, a “temporary employee” is best defined as a full time employee employed by Carson City for a period of less than 6 months.

In addition to temporary employees employed directly by Carson City, persons working at Carson City through Marathon are also sometimes termed “temporary employees.” This class of employee, however, is distinct from temporary employees hired directly by Carson City. The laws applicable to employees hired through Marathon are the following:

- FLSA – Marathon and Carson City would likely be deemed joint employers, with Carson City as the secondary employer, and the FLSA would be generally applicable immediately when Carson City obtains a person’s services through Marathon. *Fact Sheet: Final Rule on Joint Employer Status under the Fair Labor Standards Act*, U.S. Department of Labor, Wage and Hour Division (January 2020), available at <https://www.dol.gov/sites/dolgov/files/WHD/publications/flsa-fr-joint-employer-fs.pdf>.
- FMLA – Like the FLSA, Marathon and Carson City would likely be deemed to joint employers for purposes of FMLA benefits, and the requirement of providing benefits to a person whose services are obtained through Marathon after 1,250 hours and 12 months of employment would apply. *Fact Sheet #28n: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA)*, U.S. Department of Labor, Wage and Hour Division (January 2020), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28n.pdf>. (Note: the 1250 hours and 12 months of employment would accrue from the date that a person was first employed with Marathon, not Carson City; thus, depending on how Marathon hires its employees, the person could already have earned this benefit when first employed with Carson City.)
- NRS Chapter 245 – In general, NRS 245.210 is likely not applicable to person whose services are obtained through Marathon because the person is not a direct employee of Carson City. Marathon is subject to comparable provisions in NRS 608.0197 regarding leave.
- PERS – PERS is not applicable to persons whose services are obtained through Marathon because Marathon is not a qualifying employer. NRS 286.290(1) (“No person may become a member of the System unless the person is in the service of a public employer.”).
- NRS Chapter 608 – Marathon is subject to NRS Chapter 608. The Labor Commissioner may interpret certain provisions regarding leave to limit temporary employees to a maximum 90-day period before certain annual leave provisions apply. While Carson City

is not subject to this provision, Carson City will need to cooperate with Marathon in affording a person whose services are obtained through Marathon the appropriate leave.

### **III. Analysis of the Law Applicable to Carson City Temporary Employees**

Observation 1 expressed concern over four contracted individuals, apparently through Marathon, who had completed two or more assignments over a five-year period with one individual having completed six assignments altogether. The Audit further noted two temporary workers, through Marathon, that were undergoing unpaid training for a permanent position while also working on temporary assignments.

In reviewing these matters with HR, it appears that Carson City properly complied with the laws discussed above. Further, it also appears that Carson City is currently complying with the laws discussed above. The Audit expresses concern with the FLSA, however, and to the extent that any purported violations occurred in 2016-2018, the statute of limitations for the FLSA is up to 3 years. 29 USC § 255.

Finally, under NRS Chapter 286 PERS does contain provisions allowing Carson City to employ a person who is receiving retirement benefits through PERS, without that person losing PERS benefits, if the Carson City Board of Supervisors declares a critical labor shortage. NRS 286.523. In an appropriate case, this may be a viable alternative for continuing to employ the person without compromising their PERS benefits.

### **IV. Conclusion**

Based on this memorandum's review of the applicable laws, this memorandum finds that Carson City is complying with the applicable laws and is not exposed to unnecessary risk due to its treatment of temporary employees—either those hired directly or those whose services are obtained through Marathon.

# EXHIBIT A



Temporary Staffing Audit  
Carson City, Nevada





## **EXECUTIVE SUMMARY**

Eide Bailly LLP performed an internal audit of Carson City usage and management of temporary staff for the period of July 1, 2016 through June 30, 2018. The internal audit focused on temporary staff usage and compliance with applicable policies, regulations, and contract terms. Additionally, the audit evaluated whether Carson City's temporary workforce is effectively and efficiently managed.

During the internal audit, it was noted that department heads and procurement staff were very knowledgeable about their processes and procedures and attentive to any improvements that may be needed.

During our review, we identified five recommendations that would improve Carson City's management of temporary workforce.

## **BACKGROUND**

As it pertains to the use of temporary labor, seasonal assistance is required for departments with established peak seasons such as Parks and Recreation Department and Fire Department. However, long term usage of temporary employees presents risks in the form of legal and compliance, as well as, increased administrative costs.

These risks can be minimized through a thorough examination of compliance issues, improved documentation of temporary worker activities, strategic training and policy development, as well as thorough cost analysis of highly skilled and experienced temporary contractors.

## **OBJECTIVE & SCOPE**

To assess the processes and controls surrounding the use and management of temporary workers as it relates to time tracking and invoice processing. Additionally, to identify potential opportunities to strengthen internal controls related to the use of temporary staffing with the City. Lastly, to identify operational efficiencies and effectiveness within the City.

The scope of the audit was from July 1, 2016 through June 30, 2018.

## **METHODOLOGY**

Procedures performed during this internal audit included the following:

- Reviewed relevant laws, regulations, policies and procedures applicable to temporary staff usage.
- Evaluated the planning and monitoring procedures performed over budgeted temporary staffing needs and actual expenditures.
- Examined transaction documentation for proper review and approval procedures.
- Evaluated the pay rates and period of employment for permanent employees who were prior temporary employees.
- Reviewed payroll records, contracts, invoices, pay and bill rates, procurement and budgetary activities, and legal and compliance considerations.
- Obtained and evaluated the performance measures and compliance considerations outlined by the temporary agency contracts.

- Research on workforce and temporary staffing best practices.
- Interviewed Carson City personnel and officials to obtain an understanding of its temporary staffing. Numerous interviews were conducted to obtain an understanding of the processes, key controls, key risks, and opportunities for improvement. The personnel we interviewed were as follows:
  - Karen Leet – Business Manager, Public Works Department
  - Darren Schulz – Director of Public Works
  - Patti Liebespeck – Business Manager, Parks and Recreation Department
  - David Navarro – Parks Superintendent
  - Diane Baker – Business Manager, Library
  - David Aurand – Business Manager, Fire Department
  - Carol Akers – Purchasing and Contracts Administrator
  - Alana Mills – Human Resources Generalist

## AUDIT RESULTS

We evaluated the adequacy of controls and processes related to the usage and management of temporary staff as well as related operational efficiencies and effectiveness in place by performing the following procedures:

- **Compliance**

We obtained and reviewed the applicable laws, regulations, policies, and procedures pertaining to the use of temporary staff and independent contractors. Our initial review noted potential risks with regards to Nevada PERS laws designated in NRS 286, Nevada Labor laws designated in NRS 608, and the Fair Labor Standards Act (FLSA).

*No instances of non-compliance were noted*, however a legal determination of an “employment relationship” existing between Carson City and its temporary workers may indicate non-compliance with both FLSA and NRS 608.

- Specifically, Carson City under NRS 608.19, is subject to Department of Labor considerations involving the “economic reality” of a temporary employee’s relationship to the City. These considerations include items such as permanency of the relationship and the extent that services rendered are integral to Carson City operations.
- FLSA and state laws mandate specific break periods.

This raised potential concerns after an additional evaluation was performed on the 55 of the 77 temporary employees who were not hired. We noted four individuals who had completed two or more assignments over a five-year period with one individual having completed six assignments during that time. Among those individuals, the average down time between assignments was noted as 65 days and the average number of weeks on assignment in total was 111. We further noted, during our review of transaction level activity, concern regarding the lack of documented employment relationship. In this instance, two temporary workers were undergoing unpaid training for a permanent position while also working on temporary assignments.

- **Contract Provisions**

We obtained the two relevant contracts between Carson City and the temporary staffing agency Marathon Staffing for the period of 8/1/2016 to 7/30/2018 and noted that defined performance measures for individual temporary workers were not established. The only performance measure noted between Carson City and Marathon was for periodic communications which were found to have been followed.

- **Planning and Monitoring**

We reviewed the planning and budgeting of temporary staffing needs performed on a department level. This included a review of the monitoring procedures performed as a control over the final amounts spent. Through interviews we noted best practices in place for budgeting and monitoring activities performed on the department level. On a city-wide level finance and procurement staff monitored budgeted amounts appropriately without exception.

- **Transaction Level Activity**

We obtained a system generated report of payments made to the contracted temporary staffing agency over a two-year period from 8/1/2016 to 7/30/2018. We judgmentally selected 20 transactions related to temporary staffing after the population of temporary staffing expenditures were evaluated for risk based on expenditure amounts. We obtained support for the 20 transactions including timesheets, invoices, and purchase orders. We found isolated instances of missing documentation and missing sign offs which were resolved by means of alternative supporting documentation.

Other observations made during our review of transaction level activity found that in one instance 32 hours of overtime was approved for a temporary worker over a one-week period. We also noted the usage of two different timesheet formats across four departments. Break times were also found to have been inconsistently recorded on these timesheets along with seven instances where break times were not recorded at all.

- **Temporary Versus Permanent Staffing**

From the transactional level activity testing (noted above), we identified a total of 77 temporary employees. The review of the 77 temporary employees revealed 22 individuals as either former employees or employees hired to permanent positions after their temporary work. We compared temporary pay rates to permanent pay rates as well as periods of employment. Minor inconsistencies were noted and later cleared after review of pay period detail.

Our analysis of the pay rates given to temporary employees who also served as permanent employees prior to their temporary assignments showed one instance where the bill rate of the employee on temporary contract exceeded the employees former pay rate by \$35 dollars an hour. At an average rate of approximately 10 hours worked per week and a total of 212 weeks worked over a four-year period, we noted an additional cost of approximately \$74,000 dollars for this one employee during the four-year period. We noted that this individual performed executive functions as a department head before moving to a temporary consulting assignment.

An additional cost analysis was performed on the temporary staff not hired to a permanent position with the assumption of an average 20-hour work week being performed by these individuals. Our analysis noted that approximately \$78,000 of additional administrative costs were incurred on 17 temporary employees over a five-year period (performed more than one assignment). Of the 17, approximately \$38,700 or 50% of the cost was incurred by 4 temporary employees who worked more than two assignments. This represents nearly half of the total additional costs incurred.

## **RECOMMENDATIONS**

While the procedures performed indicated that controls were operating as designed, we noted five general recommendations which are presented below, to assist management and the City in strengthening internal controls related to the use of temporary staffing, improving operational efficiencies and effectiveness, and reducing legal risk.

### **Observation 1:**

We noted Department of Labor considerations which may indicate an “employment relationship” between Carson City and the temporary employees the City hires. We noted four contracted individuals who had completed two or more assignments over a five-year period with one individual having completed six assignments altogether.

### **Recommendation 1:**

We recommend the City conduct further evaluation by a legal professional on the legal risks identified from this internal audit.

### **Observation 2:**

We noted a lack of uniformity with regards to format and break time recording among the timesheets reviewed.

### **Recommendation 2:**

We recommend that a single timesheet format be used by temporary workers and for management to implement the requirement to accurately record break periods.

### **Observation 3:**

We noted one instance where 32 hours of overtime was performed by a temporary worker over a one-week period. Policy does not specify the allowable overtime.

### **Recommendation 3:**

We recommend that city-wide policy and individual department policy involving the use of temporary employees in an overtime capacity be included to address the pre-approval needed and a specified number of hours allowed.

### **Observation 4:**

We noted one instance where a former employee was billed at a rate of \$35 more an hour as a temporary employee compared to what the employee was paid as a permanent staff. This is estimated to have cost approximately \$74,000 in additional expenditures over a four-year period.

### **Recommendation 4:**

We recommend that a cost analysis be performed when executive level former employees are brought on as temporary consultants. In such instances an independent contractor arrangement established directly with the employee may be more cost effective than using a temporary staffing agency.

### **Observation 5:**

We noted only one instance where a policy specific to the usage of temporary workers existed, and we found that no training specific to this topic was provided.

**Recommendation 5:**

We recommend city wide policies be drafted to include best practices in planning, budgeting, and management of temporary workers. This recommendation includes the use of training to ensure proper implementation of these policies.