

The Staffing & Placement Firm's Guide to Getting Paid (Quickly) in New Jersey



Second Edition
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BENDER COMMERCIAL COLLECTION LAW

The Staffing & Placement Firm’s Guide to Getting Paid (Quickly) in New Jersey

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

ABOUT THE AUTHOR 2

PREFACE 4

GENERAL COLLECTION ISSUES – GOODS VERSUS SERVICES 6

 WHETHER YOUR CONTRACT NEEDS TO BE IN WRITING..... 6

 THE STATUTE OF LIMITATIONS..... 7

SUING FOR RECEIVABLES: WHAT YOU NEED TO KNOW 8

 WHAT IS ACCOUNTS RECEIVABLE LITIGATION? 8

 THE K.I.S.S. CONCEPT (KEEP IT SIMPLE, SELLER) 9

 HOW LONG DOES IT TAKE? 9

CREDIT POLICIES FOR ALL INDUSTRIES 12

COLLECTION POLICIES FOR ALL INDUSTRIES..... 16

STAFFING & PLACEMENT FEES – COMMON CHALLENGES..... 21

 TIMECARD CHALLENGES..... 22

 CONTRACT CHALLENGES 23

 EXISTENCE-OF-CONTRACT CHALLENGES..... 23

 INTERPRETATION CHALLENGES..... 23

 PERFORMANCE CHALLENGES 24

 CAUSATION CHALLENGES 24

 COMPLIANCE CHALLENGES..... 26

 THE PRIVATE EMPLOYMENT AGENCY ACT 26

SEARCH GUARANTEES..... 29

ATTORNEY FEES: THE COST OF LITIGATION 30

 BILLING MODELS FOR ATTORNEY FEES 30

 CHARGING ATTORNEY FEES TO THE CLIENT 31

WHETHER TO SUE: PRACTICAL CONSIDERATIONS 33

CONCLUSION 36

APPENDIX 38

The Staffing & Placement Firm's Guide to Getting Paid (Quickly) in New Jersey

ABOUT THE AUTHOR



Jon Bender wants to help you increase your profits. This book will help you collect your receivables and spend more time making money instead of chasing it.

The Staffing & Placement Firm's Guide is one of four books Jon's written on business collections in New Jersey. In addition, he's written a collection guide for goods suppliers generally, one for service providers generally, and a specific guide for construction suppliers.

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Jon has spent 27 years handling accounts receivable litigation. His clients include suppliers and service providers in various industries, as well as commercial lenders.

In his free time, Jon is an avid boxing, Eagles and Phillies fan. He resides in Cherry Hill, New Jersey with his wife and four children.

To learn more about staffing and placement fee collections, or business collections in general, visit my website at www.NJCollectionLawyer.com.

The Staffing & Placement Firm's Guide to Getting Paid (Quickly) in New Jersey

PREFACE

PREFACE

Welcome. My name is Jon Bender and I'm an attorney focusing on accounts receivable collections.

This is one of four books I've dedicated to business collections in New Jersey, having also written a book for goods suppliers generally, one for service providers generally, and a specific guide for construction suppliers.

In *The Staffing & Placement Firm's Guide*, we'll discuss collection issues that range from general to industry-specific. We'll discuss collection litigation in general, how the law treats services differently from goods, and what to expect when you sue for receivables in New Jersey. We'll also discuss industry-specific defenses to staffing and placement fees.

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In addition, we'll talk about developing internal credit and collection policies to minimize your need to sue and maximize your recovery when you do.

I hope you'll find the content helpful, and invite you to reach out with any questions, comments or suggestions, and to connect through social media.

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GENERAL COLLECTION ISSUES – GOODS VERSUS SERVICES



Whether a vendor sells goods or provides services, suing for unpaid receivables involves an alleged breach of contract.

Yet there are 2 important differences between goods and services that could impact your right to payment. One relates to oral contracts, the other to the Statute of Limitations.

WHETHER YOUR CONTRACT NEEDS TO BE IN WRITING

In general, a contract can be oral or written, unless a specific law requires it to be in writing. Such a law is called a Statute of Frauds.

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The Uniform Commercial Code is a set of rules that govern commercial transactions in the United States. In New Jersey, it's codified at NJSA 12A:1-101 *et seq.*, and contains a Statute of Frauds for sales of goods. ¹

However, there's no Statute of Frauds in New Jersey for a contract for services. While an oral contract for services may be harder to prove, that doesn't make it unenforceable.

THE STATUTE OF LIMITATIONS

The Statute of Limitations is a law that limits how much time you have to file a lawsuit.

For goods sold, the UCC limits you to 4 years from the date of breach. You can limit this further to 1 year by contract, but can only extend the 4 years by a subsequent agreement, not the initial contract. ²

However, most contracts in New Jersey have 6 years from the breach of contract, ³ including non-payment for services rendered.

As a practical matter, you never want it to get that far. The older debt is, the harder it normally is to collect. Legally, you may have 6 years to commence a lawsuit for services, but the decision should come much earlier.

To learn more about staffing and placement fee collections, or business collections in general, visit my website at www.NJCollectionLawyer.com.

¹ -- NJSA 12A:2-201(1)

² -- NJSA 12A:2-725

³ -- NJSA 2A:14-1

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SUING FOR RECEIVABLES: WHAT YOU NEED TO KNOW



WHAT IS ACCOUNTS RECEIVABLE LITIGATION?

Accounts Receivable Litigation means lawsuits to recover business debt. The common thread in all such matters is an alleged breach of contract.

Think of your lawsuit in 2 stages: the litigation stage, where you prove your case to obtain a judgment, and the post-judgment stage, where you look for assets to collect it.

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THE K.I.S.S. CONCEPT (KEEP IT SIMPLE, SELLER)

From a litigation standpoint, you want to frame the issues in simple terms. Proving your case should come down to 4 Basic Questions:

- 1) Did the Customer Order the Goods or Services?
- 2) Did It Agree to a Price?
- 3) Did It Receive and Accept the Goods or Services? and
- 4) Did It Pay for Them?

These questions should lead inevitably to one conclusion: that the customer owes you the money. From your perspective, everything else is detail.

Questions 1 and 2 speak to whether you have a contract. Questions 3 and 4 speak to performance. If you had a contract, you performed and the other side didn't, you have a claim for your damages under breach of contract.

HOW LONG DOES IT TAKE?

Getting to Judgment

The litigation stage leading to judgment can be relatively quick or drawn out, depending on whether the customer defaults or fights the lawsuit.

After you commence the suit, you have a process server serve it on the defendant, who then has 35 days in New Jersey to file an answer.

If your customer doesn't answer, you can enter a default in the case and apply for a judgment. Factoring in time to serve the defendant, this can take as little as 6 or 7 weeks.

But if the customer files an answer, it can take more than a year to go to trial, depending on the discovery period assigned at the beginning of the case.

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The purpose of trial is to determine what the facts of the case are, so the judge can apply the law and enter judgment accordingly.

Discovery is the process of exchanging information and records so you can prepare for trial. Examples include interrogatories (written questions under oath), depositions (interviews under oath) and demands for documents and other records. After discovery, the court will schedule the matter for trial.

Yet if discovery shows you agree on the facts, you may not need a trial. Either side can make a motion for summary judgment, which states the material facts are undisputed and asks the court to rule in its favor.

Enforcing The Judgment

Unfortunately, winning a judgment doesn't guarantee payment. Collecting can be easy or hard, can take a few months or several years, if ever, depending on whether the debtor has assets and you're able to find them.

The first thing you should always do is record a judgment lien. This creates a statewide lien on all real estate interests the debtor has or later acquires. The lien is good for 20 years, and you can renew it. As a result, the debtor will have to deal with your judgment if it ever sells, buys or refinances real estate in New Jersey.

In my practice, I've collected many judgments, years after the fact, which did not appear collectible at the time we received them.

The Sheriff can seize physical assets and real estate if you find them, but selling them to satisfy your judgment involves time and expense. Therefore, the best assets to seize are liquid funds, like bank accounts, which just require a court order to turn them over to you. If you know where your customer banks, you might collect quickly.

To locate assets, you can formally demand information from the debtor or third parties with relevant knowledge. This is called post-judgment discovery.

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However, doing so warns the debtor that you're looking for assets, and may lead to it moving them.

Therefore, it's better to first find what you can under the radar. Your own records may reveal bank information, like on a credit application or copies of payments received. You can also have an investigator perform a bank account search. After you identify any accounts, you can have the Sheriff seize them without the debtor's prior knowledge.

Settlement

If both sides are willing, you can settle a case at any time, whether before litigation, during litigation or post-judgment. In exchange for a discount or a payment plan, settlement reduces the risk, expense and uncertainty of having to litigate and collect.

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CREDIT POLICIES FOR ALL INDUSTRIES

CREDIT POLICY

Whatever the industry, every business that sells on credit should develop an internal credit policy. The goal is to minimize the number of accounts that go unpaid. Consider adopting the following practices:

- do your due diligence on the customer;
- have clear credit terms;
- paper each order properly;
- invoice quickly and clearly;
- *motivate* the customer to pay you; and
- motivate the customer to pay *early*.

Do Your Due Diligence

A good credit policy begins with information-gathering, so you can make good credit decisions about your customers.

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Start with a detailed credit application. For each new customer, the financial information and trade references should help you decide whether to extend credit, or how much to extend.

Credit applications are limited, however, because a customer may provide false information or list only the creditors it pays. Therefore, before extending large amounts of credit, consider ordering a business credit report. Agencies like Experian or Dun & Bradstreet will give you objective financial data such as annual sales, the customer's payment history and public records like judgments, bankruptcies and UCC lien filings. This information, and the credit score based on it, can help you predict a customer's payment behavior.

Have Clear Credit Terms

Terms and conditions may appear on your credit application, in a service agreement or even on your invoices. Terms that are conspicuous on your invoices may not be enforceable the first time around, but put the customer on notice for future transactions.⁴

Basic provisions include payment terms (such as Net 30) and a forum selection clause (for out of state customers, this lets you litigate any disputes locally). And as discussed below, you should also include interest on past-due accounts and attorney fees if you go to collections.

Paper Each Order Properly

Unlike a sale of goods, your contract for services doesn't have to be written to be enforceable. However, putting it in writing helps you prove what you

⁴ -- see Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 144 N.J.Super. 556, 561-62 (Law Div., 1978)

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agreed upon, like the specific services ordered, the agreed-upon price, the time for performance, and any other important details.

Invoice Quickly and Clearly

The sooner you bill a paying customer, the sooner you get paid; the sooner you bill a nonpaying customer, the sooner you identify a problem account. You therefore want to send your invoices out promptly, either at the time of performance or immediately thereafter.

Before sending an invoice, have quality control measures in place to check it. Make sure the invoice is clear, itemized and free of errors. Errors can cause confusion for paying customers and provide delay opportunities for nonpaying customers.

Motivate The Customer To Pay You

Your terms and conditions are your ticket to getting paid, both on time and in general. Motivate the customer by charging interest on past-due accounts, typically between 1.5%-2% *per month* if the customer is incorporated,⁵ and attorney fees if you go to collections.

For customers who view paying as a business decision, you want to make it more expensive *not to pay you*. Interest and attorney fees will make them choose between paying what they owe now, or paying more later.

For creditors who intend to pay you, but have limited ability and competing creditors, interest and legal fees should get you higher on the priority list.

⁵ -- see NJSA 31:1-6

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I would also include an acceleration clause in your terms and conditions, which states that if the customer is in default under one invoice, you can declare all other invoices immediately due and owing. If you ever need to sue a customer, you want the right to sue now for the full balance it owes, not just the invoices that are already past due.

Finally, try to get a personal guarantee from the customer's owner. A corporation or LLC normally shields its owner from the company's debts, but a personal guarantee obligates him to pay if the business doesn't. This gives you another party to collect from, and a higher priority in the owner's mind.

The guarantee would normally appear in your credit application. While you would typically request it when the customer first applies for credit or when it requests a higher limit, you can require it any time as a condition of future sales.

If the owner refuses, he may lack confidence in his business's ability to pay. In that event, just be practical and make your best business decision.

Motivate The Customer To Pay Early

Offer the carrot, not just the stick. Incentivize early payments. If your terms are Net 30 and you're adding interest at 45 days, offer a discount if the customer pays within 15. Whatever this represents in lost revenue, consider the value of faster cash flow and not having to chase your money.

To view a sample credit application or sales terms, you can download a free copy at my website, www.njcollectionlawyer.com/services/collections-for-goods-services-generally.

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COLLECTION POLICIES FOR ALL INDUSTRIES

Collection Policy

In addition to a credit policy, every business should develop an internal collection policy. Having clear processes can help you identify problem accounts, find amicable solutions, determine which accounts require litigation, and increase your chances of winning and collecting a judgment.

IDENTIFY ISSUES QUICKLY

The longer an account remains unpaid, the harder it usually is to collect, so early detection is crucial. By watching the age of your receivables closely, you can identify accounts you need to pursue.

Develop an Accounts Receivable Aging Report

An accounts receivable aging report is a list of unpaid invoices which you can make on most accounting softwares. It lets you monitor the age of open receivables and identify problems early.

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REACH OUT TO THE CUSTOMER

Once you've identified a problem account, don't wait. The older a debt is, the less likely you are to collect. You therefore want to move quickly.

During the first 30 days of delinquency, be proactive by reaching out to the customer in a direct but nonthreatening manner. Phone calls are better than demand letters because you want to speak to the customer.

If the customer refuses your calls and fails to return them, that's a sign it's avoiding you. Although settlement is usually better than litigation, you may need to sue in such cases.

Yet if the customer takes your call, start with a polite reminder that the account's past due, and ask if there's any reason it hasn't paid you. Whether the issue is financial or otherwise, identifying the problem is half-way to solving it. And whatever the customer tells you, send an email memorializing the conversation. If you find yourself in a lawsuit, you'll need contemporaneous business records as evidence.

FIND OUT THE REASONS FOR NONPAYMENT

In almost every collection situation, there are 3 basic reasons a customer doesn't pay you: either it can't, it doesn't want to, or it genuinely disputes the charges.

The most important step is to find out the reasons for nonpayment. Once you understand them, you can gauge how to approach settlement or litigation.

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KNOW WHEN TO SETTLE

Settlement can occur at any time, before or after you file a lawsuit.

Given the cost of litigation and the uncertainty of collection, settlement can be a good option where there's a genuine dispute or the customer is having trouble paying.

Customer Disputes Charges

People tend to fight harder when they believe they're right. The customer that knows it owes the money, but just doesn't want to pay, may think twice about paying to defend a suit it can't win. But when the customer thinks it's right, drawn-out litigation may result.

If you feel the customer's acting in good faith, even if you disagree, consider a compromise before the conflict escalates. Settlement will eliminate the expense and uncertainty of litigation, and if both sides are reasonable, it may preserve your relationship and pay for itself many times in future sales.

Customer Can't Pay

If your customer wants to pay but has financial problems, consider making a deal. But first find out what the problem is, and how serious it is, so you'll know what the customer can really afford.

Every settlement comes down to an amount and terms. If you're giving a big discount, you want to get paid quickly. If you're giving a long payout, you might charge the full amount and possibly interest. The balance between discount and the time to pay is a matter of negotiation, but they're usually inversely related.

Keep in mind that the longer the payment terms, the more risk of nonpayment. If the customer goes out of business, you probably won't collect.

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Therefore, a lump sum (or a few short payments) makes sense where you think the customer's on the verge of closing. But you may also prefer it if you need cash now, or just don't want to police a payment plan.

On the other hand, if the customer's just having a cash flow problem and is likely to rebound, you might offer longer terms and demand full payment.

In sum, the terms you offer may depend on the customer's ability to pay, your own cash flow or financial needs, or your willingness to police a long payout.

Whatever the settlement terms, you should always have a written agreement. If you've already filed suit, you'll want to file a stipulation stating that if the customer breaches the settlement, you're entitled to judgment. If you haven't filed suit yet, you could hold off for a lump sum that's due shortly. But if you need to police a payment plan, I would file a complaint and an immediate stipulation of settlement. The purpose of the stipulation is to motivate the customer to make the payments, and streamline your path to a judgment if it doesn't.

INCREASE YOUR CHANCE OF WINNING A JUDGMENT

For each customer, you want to keep certain records you would need if you ever had to prove a collection case. This includes contracts, invoices, payment histories, and correspondence.

For uncontested matters, your contract will show what your terms were, and the invoices and payment history will show the amount due.

For contested cases, your correspondence also becomes important. By sending emails or letters after each important conversation, you might show, for example, that the customer previously admitted owing the money. Or that it's distorting a conversation you had, or making one up that never occurred.

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Maintaining proper records is therefore key to winning a judgment.

In addition, your terms and conditions, which are normally part of your credit policy, can also play a role in your collection policy. For example, if your terms let you apply payments to the oldest open charges, rather than the specific invoices the customer intended, you can use that to defeat a Statute of Limitations defense.

INCREASE YOUR CHANCE OF COLLECTING A JUDGMENT

Winning a judgment does not guarantee payment, but allows you to seize assets you can locate. Once again, keeping proper records will help you achieve this.

The best assets to seize are generally bank accounts, and you'll want to know where to find them. Keeping copies of every check or wire payment received will tell you where the customer banks.

Also, your credit application should require bank references and the customer's tax number. Even if the bank information becomes outdated, an investigator can use the tax number to search for current bank accounts.

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STAFFING & PLACEMENT FEES – COMMON CHALLENGES



In addition to regular collection issues, staffing and placement firms face industry-specific fee challenges. I've classified them into 4 main categories I call Timecard, Contract, Causation and Compliance Challenges.

In a Timecard Challenge, the client contests the amount of time billed for a temporary worker. This applies specifically to staffing and not placement cases.

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In a Contract Challenge, the client says there's no applicable fee agreement, and in a Causation Challenge, it says someone else (not your referral) caused the hiring. These apply to placement but not staffing cases.

And in a Compliance Challenge, the client says you violated some statute which precludes you from enforcing your fee. This can occur in either placement or staffing cases.

TIMECARD CHALLENGES

As more and more staffing companies become automated, Timecard Challenges become less likely.

A timecard is a mechanism for tracking the hours an employee works. It can be either a physical card or device, or built into a software application. The information is then transferred into a timesheet used for payroll, billing and other purposes.

Historically, companies used paper timecards, but they're prone to inaccuracy and other error, and companies sometimes forget to have clients approve and sign them. Manual time tracking can therefore result in disputed charges.

Timesheet software can minimize these issues by tracking billable hours digitally, which the client can review and approve electronically. This reduces human error and eliminates the need for physical signatures, making Timecard Challenges easier to defeat and less likely to occur.

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CONTRACT CHALLENGES

In most Contract Challenges, the client says there's simply no applicable fee agreement (what I call Existence-of-Contract Challenges). In other cases, it may read the contract differently to say no fee is due (Interpretation Challenges), or say you didn't actually earn it (Performance Challenges).

Existence-Of-Contract Challenges

There are 2 typical situations where the client denies having an applicable fee agreement.

In the first, it accepts your services but claims it never agreed to a price. Therefore, it claims there was never a contract to begin with. In the second, it may admit there's a contract, but hires your candidate for a different position and claims the contract doesn't apply. In both cases, it says it owes nothing.

To avoid or defeat these defenses, put everything in writing and include your fee and other essential terms. You should also state that your fee attaches to any position for which the client hires your candidate.

Interpretation Challenges

If your contract is silent or unclear on an issue, the client may claim it doesn't require a fee under the circumstances.

A common example is the duration of your referral. If you specify a fee but not how long it's good for, the client may say the referral expired.

Perhaps the industry custom assumes the referral's good for 2 years, 3 years, etc., and is therefore implied in your contract. Yet you'd need expert testimony to establish this at a trial.

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It's therefore best to anticipate such issues and provide for them in clear language. If your contract is silent on duration or other important issues, or if the language is ambiguous, your fee may depend on how a jury interprets it.

Performance Challenges

There are 2 common scenarios where the client says you didn't actually earn your fee. In both cases, the client claims you failed to perform under the contract, after the client itself prevented you.

The first case is where it lets a subsequent agency refer the same candidate, lets the subsequent agency set interviews and make other arrangements, and then claims you didn't earn the fee. This presents both Contract and Causation arguments (we'll discuss Causation in the next section). Yet you can protect yourself by providing an exclusive right to candidates you present first.

The second case is where it offers your candidate the job, the candidate accepts, and then it reneges the offer. While the client has the right to renege an offer, you can condition your fee, not on the candidate's starting work, but on his accepting the client's job offer.

CAUSATION CHALLENGES

Causation Challenges are fact-sensitive, and details vary from case to case. In most cases, the client credits a subsequent agency's referral, or direct contact from the candidate himself. In other cases, the client claims it and the candidate already knew each other.

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In such cases, New Jersey courts hold that unless you have an exclusive listing, you must be the “procuring cause” of a candidate’s employment in order to earn the fee.⁶

But what does “procuring cause” even mean? Our courts understand it in terms of connection and continuity. You need to show that you produced a candidate, that you caused the parties to negotiate, and the client hired him without a substantial break in the negotiations.⁷

As a staffing or placement firm, there isn’t much comfort in this. Causation requirements take control of your fee away from you. Consider that you can’t control if the client lets a subsequent agency set up the interview. You can’t control if the client runs a job ad and says your candidate responded to it. And you can’t control what a judge will say is “procuring cause.”

Therefore, the best way to win the causation game is to avoid it. Contract around it. Your fee agreement should remove any causation requirement and focus instead on priority.

For example, never say anything like “you owe us if as a result of our services” Instead, create an exclusive right for candidates you present first, and say that accepting your referral supersedes any prior knowledge of the candidate or his availability.

⁶ -- *Michele Matthews, Inc. v. Kroll & Tract*, 275 NJ Super. 101 (App. Div. 1994); see also *Mal Spinrad of St. Louis, Inc. v. Olsen-Stelzer*, 713 S.W.2d 813 (Tex.App.-Fort Worth, 1986)

⁷ -- *Michele Matthews. v. Kroll* (supra)

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COMPLIANCE CHALLENGES

Unlike Timesheet, Contract and Causation Challenges, Compliance Challenges don't speak to the merits of whether you actually earned your fee. They merely speak to whether you forfeited your right to enforce it.

The Private Employment Agency Act

The Private Employment Agency Act regulates the operation of personnel services in New Jersey.⁸ While the Act creates several categories, this discussion will focus on 3 main types, referred to as Employment Agencies, Temporary Help Services Firms ("THSF") and Consulting Firms.

Formal definitions appear in the Appendix, but in plain English, an Employment Agency normally refers to a placement firm that charges the employer, the job seeker or both. A THSF is a staffing firm that only provides temporary workers, and a Consulting Firm provides both placement and staffing services. Unlike an Employment Agency, a Consulting Firm can only charge the employer for placement services.

Requirements

Depending on your category, you must be licensed or registered to operate. Licensure is much more onerous than registration.

Employment Agencies require licenses.⁹ Consulting Firms only need to register. And a THSF generally must register,¹⁰ otherwise it's deemed an Employment Agency and requires a license.¹¹

⁸ -- NJSA 34:8-43, et seq.

⁹ -- NJSA 34:8-52(a)

¹⁰ -- NJSA 56:8-1.1

¹¹ -- NJSA 34:8-43; NJSA 34:8-52(a)

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However, some THSF's are exempt. The Act says it only applies to those that charge their employees a fee or liquidated charge (like a training fee or damages for leaving¹²), or that inhibit them from working for someone else (like a non-compete agreement¹³).¹⁴ A THSF that does neither has no obligation to register or obtain a license.¹⁵

Finally, a court may deem you a de facto Employment Agency based on your conduct.¹⁶ For example, let's say a Consulting Firm places an employee and receives a commission from his wages. Even if it's registered, a court will consider it an Employment Agency as a matter of law, and the lack of a license will be deemed a violation.

Effect of Noncompliance

The Act prohibits lawsuits for fees unless you were licensed or registered, as appropriate, when your cause of action arose.¹⁷

However, the courts don't limit the prohibition to fees. They hold that *any contract* by a noncompliant agency is unenforceable as a matter of policy.¹⁸ Therefore, they've refused to enforce other contract claims like non-compete and nondisclosure agreements,¹⁹ and contract-related torts like unjust enrichment.²⁰

As to *when your cause of action arose*, a cause of action refers to a legal claim that allows you to sue. Thus, it arises when your fee is due and you

¹² -- see, e.g., *Data Informatics, Inc. v. AmeriSource Partners*, 338 N.J. Super. 61 (App. Div. 2001); *Spaceage Consulting Corp. v. Montecastro*, 2015 WL 2070085 (App. Div. May 6, 2015)

¹³ -- see, e.g., *Data Informatics v. AmeriSource* (supra); *Interim Healthcare Middlesex Somerset, Inc. v. Highlands*, 2006 WL 173184 (App. Div. April 25, 2006)

¹⁴ -- 34:8-46(h)

¹⁵ -- see, *AIT Global Inc. v. Yadav*, 445 NJ Super. 513 (App. Div. 2016)

¹⁶ -- see, e.g., *Data Informatics v. AmeriSource* (supra)

¹⁷ -- NJSA 34:8-45(b)

¹⁸ -- *Data Informatics v. AmeriSource* (supra)

¹⁹ -- see, e.g., *Data Informatics v. AmeriSource* (supra); *Nitta v. Joe Mitsuo Yamamoto*, 31 NJ Super. 578 (App. Div. 1954); *Peri Software Solutions, Inc. v. Aggarwal*, 2007 WL 1245955 (App. Div. May 1, 2007)

²⁰ -- *Data Informatics v. AmeriSource* (supra); *Peri Software Solutions v. Aggarwal* (supra); *Spaceage Consulting v. Montecastro* (supra)

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can sue for nonpayment.²¹ While the plain language of the Act suggests you can cure a violation by the time your fee becomes due, at least one court has held contracts are incurably void if you were noncompliant when you entered them.²²

Whatever category you fall into, failure to comply can forfeit your right to collect your fees and enforce other claims. To avoid this, it's vital to identify your category and comply with its requirements.

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²¹ -- see, e.g., *Burlington County Country Club v. Midlantic Nat. Bank South*, 223 N.J.Super. 227 (Ch.Div.1987)

²² -- *Spaceage Consulting v. Montecastro* (*supra*)

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SEARCH GUARANTEES



GUARANTEE

When clients pay a placement fee, they want some assurance against the employee quitting or being fired.

If you offer a placement guarantee, the terms should be clear in your fee agreement and any filed fee schedule. Key provisions should include how long the guarantee period is, to what situations it applies (e.g., termination for cause, resignation, etc.), and whether you're offering a refund, adjustment or replacement search.

Some agencies like to advertise their “unconditional” guarantees, but you should avoid this term. Instead, state that on-time payment is a precondition to any guarantee. This achieves 2 related benefits: it motivates the client to pay promptly, and it relieves your obligation if it doesn't.

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ATTORNEY FEES: THE COST OF LITIGATION



BILLING MODELS FOR ATTORNEY FEES

Attorneys have different billing models, which commonly include hourly, contingency, and flat billing.

Hourly means you pay for the amount of time the lawyer works on your case, based on an hourly rate. Contingency means you pay a percentage of any recovery. And flat billing means you pay a fixed amount, which doesn't depend on time or results.

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In collections, lawyers commonly accept cases on a contingency basis, though you need a clear agreement which states what services this includes. The advantage to you is that you only pay a fee if there's a recovery.

But not all clients want a contingency fee. For example, for a particularly large balance, you may not want to pay a percentage of the recovery. Therefore, under New Jersey's ethics rules, an attorney who offers you contingency billing must also offer hourly.

In addition, your lawyer may offer a blended (hybrid) model, which combines a lower hourly rate with a lower percentage of the recovery.

CHARGING ATTORNEY FEES TO THE CLIENT

New Jersey courts generally follow the "American Rule," which provides that each side pays its own attorney fees.²³ However, a prevailing party can recover reasonable fees if provided for by contract, statute or court rule.²⁴

When determining a reasonable fee award, the Court determines a reasonable amount of time spent on the matter and multiplies it by a reasonable hourly rate.²⁵ Yet when a contingency fee is involved, it may award a higher amount to reflect the risk of nonpayment.²⁶

To shift fees by contract, you would state in your staffing or placement agreement, in your terms and conditions or on your credit application, etc., that in the event of nonpayment, the client is obligated to pay reasonable attorney fees. You might even provide that fees equal to one-third (33.3%) of the unpaid balance will be deemed reasonable.

²³ -- see Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 258 (2023)

²⁴ -- see Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) and RPC 1.5(a)

²⁵ -- Litton, 200 N.J. at 385

²⁶ -- see Walker v. Giuffre, 209 N.J. 124, 127–28 (2012) and Rendine v. Pantzer, 141 N.J. 292, 316–17 (1995).

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Statutory fees apply in particular kinds of cases where the legislature deems them appropriate, such as the Civil Rights Act,²⁷ the Consumer Fraud Act²⁸ and the Law Against Discrimination.²⁹

Finally, the Court may award fees when permitted by court rule. Rule 1:4-8(b), for example, provides that a party may move for sanctions for frivolous litigation, and the Court may award the prevailing party reasonable attorney fees incurred in presenting or opposing the motion.³⁰

Of these exceptions to the American Rule, the one you can prepare for is contractual fees. You can't control at the outset if there will be a relevant statute or court rule to shift legal fees, but you can create a contractual right to fees if the client fails to pay you.

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²⁷ -- NJSA 10:6-1 *et seq.*

²⁸ -- NJSA 56:8-1 *et seq.*

²⁹ -- NJSA 10:5-27.1

³⁰ -- N.J. Ct. R. 1:4-8(b)

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WHETHER TO SUE: PRACTICAL CONSIDERATIONS



The decision to litigate isn't always obvious. Even if litigation is the only way you'll get paid, a practical approach balances 3 questions: How hard will it be to get a judgment? What will litigation cost? And what's the likely return on investment?

How Hard Will It Be To Get A Judgment?

This factors in the likelihood of winning, how long it'll take and how hard you would fight if the lawsuit were contested.

Do you expect the client to default or defend? If the client defaults, winning is more certain, it shouldn't take long and you won't need to fight hard.

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But if the client defends, it takes longer and is more difficult. What reasons did the client give for not paying? Is there a legitimate dispute? How about counterclaims? Are there other possible defenses, like the Statute of Limitations?

If the facts and law are on your side, you should still prevail in the end, but a determined adversary can make it harder.

What Will Litigation Cost?

What will it cost if you're paying your lawyer on an hourly basis? If you expect the client to default, it should cost much less than if the client defends. If you've retained your lawyer on a contingency basis, does the contingency fee include contested litigation?

What's The Likely Return On Investment?

Will there be assets to satisfy a judgment?

Is the company still operating? Even if the client is struggling, if the lights are still on and the phone is ringing, assume it's paying someone. Suing should make you a higher priority.

On the other hand, if the client's out of business, collecting is harder. The longer it's been closed, the less likely you'll find active bank accounts or other assets to seize.

What about other judgments? The more judgment creditors, and the more aggregate judgment debt, the more competition you face for the limited assets available. If other creditors have already executed, there may not be assets left for you to seize. But if they're not actively executing, you have an opportunity to take a judgment and levy aggressively.

Finally, can you go after the owners? Absent fraud or a guarantee, personal liability will depend on the client's corporate status. If the client was

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incorporated at the time of the sale, the owners should be shielded from liability. If it wasn't incorporated, or if the corporation was suspended, you could go after them personally.

Corporate status reports and certain filings are available to the public. For a modest fee, you can obtain them on the State's website.³¹

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³¹ -- <https://www.njportal.com/DOR/businessrecords/>

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CONCLUSION



CONCLUSION

The purpose of this book was to provide staffing and placement firms with the knowledge they need to collect their receivables quickly and efficiently.

We addressed general topics like important differences between services and goods, collection litigation generally, and the need regardless of industry to develop good credit and collection policies.

We also covered unique defenses to staffing and placement fees, and things you can do to defeat or avoid them.

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In addition, we discussed attorney fees, including fee shifting, and practical considerations regarding the decision to litigate.

Whether or not you have current collection needs, I recommend working with an experienced collection lawyer to review your credit and collection policies, or if you have none in place, to help you develop them.

If you do have current collection needs, an experienced collection lawyer should be adept at spotting relevant issues and finding available assets.

If you have any questions, comments or ideas about the subject matter, or about business collections in general, I'd be happy to hear from you. Feel free to contact me as follows:

- jbender@NJCollectionLawyer.com; or
- (856) 667-1669.

Finally, if you found this book helpful, please share it and feel free to copy and use it with source attribution.

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APPENDIX

N.J.S.A. 34:8-43. Definitions (excerpts)

“Employment agency” means

any person who, for a fee, charge or commission:

- (1) Procures or obtains, or offers, promises or attempts to procure, obtain, or assist in procuring or obtaining employment for a job seeker or employees for an employer; or
- (2) Supplies job seekers to employers seeking employees on a part-time or temporary assignment basis who has not filed notification with the Attorney General pursuant to the provisions of section 1 of P.L.1981, c. 1 (C.56:8-1.1); or
- (3) Procures, obtains, offers, promises or attempts to procure or obtain employment or engagements for actors, actresses, performing artists, vocalists, musicians or models; or
- (4) Acts as a placement firm, career counseling service, or resume service; or
- (5) Acts as a nurses' registry.

The director shall have the authority to determine, from time to time, that a particular employment agency or career-related service or product, not otherwise expressly subject to the provisions of this act, is subject to whichever requirements of this act he deems appropriate.

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“Temporary help service firm” means

any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries worker's compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers.

A temporary help service firm is required to comply with the provisions of P.L.1960, c. 39 (C.56:8-1 et seq.).

“Consulting firm” means

any person required to be registered under section 23 of this act (34:8-64) that:

- (1) Identifies, appraises, refers or recommends individuals to be considered for employment by the employer; and
- (2) Is compensated for services solely by payments from the employer and is not, in any instance, compensated, directly or indirectly, by an individual who is identified, appraised, referred or recommended.

The Staffing & Placement Firm's Guide to Getting Paid (Quickly) in New Jersey

N.J.S.A. 34:8-45. Application of act to persons in activities regulated by act; licensure or registration precondition to action for fee, charge or commission

- a. The provisions of this act shall apply to any person engaging in any of the activities regulated by this act including persons whose residence or principal place of business is located outside of this State.
- b. A person shall not bring or maintain an action in any court of this State for the collection of a fee, charge or commission for the performance of any of the activities regulated by this act without alleging and proving licensure or registration, as appropriate, at the time the alleged cause of action arose.