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Think Your Temp Is Just a Temp? Think Again, He Could Be Your Employee!

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It may surprise you to know that regardless of what you call a temporary or leased worker, he may be an employee under the law. So, what about the temp agency that provided the worker? Well, the temp agency may be an employer too—a joint employer.

A joint employment relationship exists when two separate businesses exercise sufficient control over the terms and conditions of a person's employment. For example, when a business obtains a temporary worker from a staffing agency, depending on the level of control the business has over the temporary worker, the business and the staffing agency may both be liable as joint employers of the worker.

Why do joint employment relationships matter?

In short, they harbor unexpected liability. You may be legally accountable as an employer for a worker that you did not think was your employee. In fact, you may have hired that temporary or leased worker with the very intention of avoiding the typical employer-employee relationship and its obligations. Nevertheless, a court may find that you are an employer and are therefore (at least partially) liable.

How do courts determine if a business is a joint employer?

Courts look to a variety of factors in order to determine whether a business is a joint employer. These factors ultimately turn on the law at issue; however, many factors do overlap. The following will provide you with a brief outline of the factors used by courts in analyzing whether a business is a joint employer under the Fair Labor Standards Act, Title VII, and the New Jersey Law Against Discrimination.

Fair Labor Standards Act

The Third Circuit has enumerated several factors courts should use in determining whether a business is a joint employer:

- The business's authority to hire and fire the worker;
- The business's authority to establish work rules and assignments and to set the worker's compensation, benefits, and work schedules;
- The business's involvement in the day-to-day supervision of the worker; and
- The business's control of employment records, such as payroll, insurance and taxes

These factors are not exhaustive, and the Third Circuit has explained that courts should also consider any other evidence of "significant control." Nevertheless, these factors can guide businesses in determining whether they may be liable as a joint employer under the Fair Labor Standards Act.

Title VII

When deciding whether a business is a joint employer under Title VII, courts consider the same factors used to determine whether an individual is an employee or an independent contractor. These factors include:

- The hiring party's right to control the manner and means by which the product is accomplished;
- The skill required;
- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;
- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The method of payment;
- The hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business;
- The provision of employee benefits; and
- The tax treatment of the hired party

New Jersey Law Against Discrimination

Similar to the Title VII analysis, courts consider the same factors to determine whether a business is a joint employer under the New Jersey Law Against Discrimination as they do to determine whether an individual is an employee or an independent contractor. These factors include:

- The business's right to control the means and manner of the worker's performance;
- The kind of occupation of the worker—supervised or unsupervised;
- The skill involved in the worker's work;
- Who furnishes the equipment and workplace;
- The length of time in which the worker has worked;
- The method of payment;
- The manner of termination of the work relationship;
- Whether there is annual leave;
- Whether the work is an integral part of the business of the 'employer;'
- Whether the worker accrues retirement benefits;
- Whether the 'employer' pays social security taxes; and
- The intention of the parties

What about employee handbooks and anti-harassment/discrimination training?

While you may be tempted to skip giving a temporary worker a handbook or having him attend anti-harassment/discrimination training, this may not be in your best interest. In fact, failing to provide a temporary worker with a handbook and/or training may limit your ability to use your anti-harassment/discrimination policy as a defense should the temporary worker allege that he experienced harassment or discrimination and was unaware of your policies. For example, in *Jones* v. *Dr. Pepper Snapple Group*, a former temporary employee alleged that she experienced harassment. She claimed that she unaware of the employer's anti-harassment policies because she did not receive an employee handbook until she was later hired as a permanent employee. While the trial court granted summary judgment in favor of the employer, the New Jersey Appellate Division reversed the trial court's holding, finding that there was an issue of fact regarding whether the employer exercised reasonable care in preventing the alleged harassment given that the employee did not receive a handbook during her temporary employment. The employer in this case would have clearly been better off if it had given the employee a handbook when she initially started her temporary employment.

Ultimately, while you may see the temp as just a temp, a court may likely disagree. The court's label is what matters, so you should exercise caution when using temporary or leased workers. Moreover, it is in your interest to ensure that all of your workers (employees and temps alike) are aware of your anti-harassment/discrimination policies and complaint procedures.

Attorney

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