## Leasing Employees - Be Aware of Joint Employer Obligations

Leasing employees from a staffing agency, either on a temporary or long term basis, is becoming a more common practice. While there are a number of benefits to leasing employees, the arrangement is not risk free. This article discusses issues associated with the use of a temporary workforce.

Businesses may use temporary employment agencies to provide more flexibility with their workforce, maintaining a core workforce and utilizing temporary employees as the need exists. However, even though a staffing contract may state that the contracting entity is not the employer of the temporary workers, in fact the entity may be liable under various employment laws as a "joint employer" with the agency, despite the fact that the worker is paid by the agency and is not on the contracting business' payroll.

**Who is the legal employer?**

Since the agency normally hires and pays the employee, provides workers' compensation coverage, and if necessary, terminates the employee, it has an employer/employee relationship with the worker. However, during the job assignment, the entity to whom the worker is assigned may be considered a joint employer, depending upon the amount of control it exercises over the worker. A determination of joint employment is made by looking at the entire relationship. Factors to consider in determining if there is a joint employment relationship include:

- the nature and degree of control over the worker;
- the degree of supervision, direct or indirect, exercised over the work, including the scheduling of hours worked;
- the furnishing of work space and/or equipment for the job;
- the power each has to determine the pay rates or the methods of payment of the employee; and
- the right each has to hire, fire or modify the worker's employment conditions.

**What is the liability for the joint employer?**

If the agency and the contracting entity are held to be joint employers, both may be liable under federal or state employment laws.

**Anti-Discrimination**

If the entity to whom a worker is assigned treats that worker in a discriminatory manner, or subjects the employee to a hostile environment, it may be liable. Further, generally, the entity to which a worker is assigned is required to provide an accommodation if it has notice of the need for it and can do so without an undue hardship.

**Family and Medical Leave Act (FMLA)**

The FMLA generally covers private employers with 50 or more employees and all schools and public agencies. Employees jointly employed by two employers must be counted by both for FMLA purposes, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA.

When organizations are considered joint employers under the FMLA, only the primary employer is responsible for giving notices concerning FMLA leave, providing the leave, and maintaining health benefits. In a joint employment situation, the primary employer is the one that has the authority to hire or fire, assign or place the employee, and provide pay and benefits. The secondary employer is responsible for accepting an employee returning from leave if the secondary employer continues its relationship with the agency and the agency elects to return the employee to that job.

**Fair Labor Standards Act (FLSA)**

The FLSA makes both employers liable for minimum wage and overtime requirements.

**National Labor Relations Act (NLRA)**

Joint employers may both be liable under the NLRA if they share matters governing essential terms and conditions of employment such as hiring, supervision, disciplining and discharging. Therefore, both employers may be found liable with respect to a meritorious unfair labor practice charge. In addition, the National Labor Relations Board has taken the position that temporary employees from an agency may be included in a bargaining unit or voting unit if the temporary employees share a "community of interests" with the regular employees.

**Occupational Safety and Health Act (OSHA)**

Generally with joint employers under OSHA, the employer at whose business location the temporary employee is assigned will be the liable employer for work-related injuries. The staffing agency will normally be cited only if it knew or should have known of unsafe conditions or if the citation is necessary to correct a violation.

**Benefits Statutes**

Depending on the terms of a business entity's benefit plans, in addition to other factors, leased employees may be entitled to benefits provided to an entity's regular employees.

**Best Practices**

To minimize the potential risks associated with leasing employees, an employer should take a number of steps.

1. Include a provision in the staffing agency contract that makes the staffing agency responsible for payment of all federal, state and local employment taxes, including income taxes, FICA and unemployment taxes.

2. Employers should verify that the employees are covered under the staffing agency's workers' compensation policy.

3. Employers should accommodate the needs of a leased worker with a disability, or be able to justify why it would be an undue hardship to do so.

4. Employers should ensure that temporary or leased employees are not subjected to discriminatory treatment or harassment.

5. Employers should review all policies and benefit plans, to ensure that leased employees are not eligible to receive company benefits.

6. Employers with less than 50 regular employees should determine whether by virtue of using leased employees, they come within the FMLA.

7. Employers should seek indemnity agreements in the contracts they sign with temporary staffing agencies so that the agency retains liability for employment-related claims and agrees to indemnify the client for any losses they may incur attributable to the actions of the staffing agency.

*Article submitted by Mel Muskovitz, a member of the Employment and Labor Section in the Ann Arbor office of Dykema Gossett PLLC. Other articles written by Mr. Muskovitz can be viewed at www.dykema.com. Mr. Muskovitz can be reached at (734) 214-7633 or via e-mail at mmuskovitz@dykema.com.*