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General Counsel Report

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Staffing Companies Provide Temporary Employees, But Who Is The Employer?

Staffing companies can provide a useful service to employers, offering them staff to fill temporary vacancies. Plus, because the staffing company pays the workers, it means the temps are employees of the staffing agency, right? Wrong, at least for purposes of the American's with Disabilities Act.

Although staffing agencies hire the workers, pay wages, provide benefits, withhold taxes, pay employer taxes, etc., the companies that use the staffing agency often direct how and when the work is performed, supervise the work, and expect the workers to comply with company policies and procedures. In a situation like this, the staffing agency and the client company are considered joint employers under the ADA, and both are responsible for ADA compliance.

The EEOC recently filed a lawsuit against a staffing firm in California along with a manufacturer headquartered in New York City. In the suit, the EEOC alleges that both the staffing firm and the manufacturer violated the Americans with Disabilities Act (ADA) when they refused to provide reasonable accommodations to a long-term temporary employee.

The employee was hired by the staffing company and assigned to work as a general laborer for the manufacturer. During his employment, the employee was diagnosed with a chronic kidney condition. The employee was assigned to run a machine that required continual bending and twisting, which aggravated his kidney condition and caused him severe pain. The employee asked for a chair to minimize his bending and twisting (a request for accommodation) and the manufacturer refused.

The employee then provided a doctor's note to the staffing agency stating that repeated bending and twisting could exacerbate his kidney condition and recommending that he refrain from extreme bending, twisting, or lifting, which might predispose him to a cyst rupture. The EEOC's suit claimed the employee offered several accommodations that could enable him to perform his job duties, including permitting him to sit while operating manual machines, assigning him to a different machine, or assigning him to one of the assembly lines.

Instead of engaging in the interactive dialogue, or reviewing alternative accommodations, the manufacturer directed the staffing company to end the employee's long-term assignment. The staffing company then failed to place the employee at another job with a different client.

In this case, both the manufacturer and the staffing agency had an obligation to engage in the interactive dialogue and provide a reasonable accommodation to this employee. Best practice would have been for them to work together to find a reasonable accommodation. Our tip: If you use a staffing agency or operate one, address the ADA and the potential for joint liability in the staffing contract.

Proposed Paid Family Leave Regulations Published

Paid Family Leave is on its way! In our Grand Bargain Update, we gave a summary of what we know about the new Massachusetts Paid Family Leave. Proposed regulations were promised by March which would provide more clarity to employers regarding this new law. Well, the newly formed Department of Family and Medical Leave (DFML) decided not to make us wait. Draft regulations have been **posted** for purposes of public comment. The Department of Family and Medical Leave has also updated their **page** with additional information.

Contribution Rate Split for Employers with 25 or More Employees:

- Medical leave contribution: .52% payroll deduction
  - Employer's share 60% minimum
  - Employee's share 40% maximum
- Family leave contribution: .11% payroll deduction
  - Employer's share 0% minimum
  - Employee's share 100% maximum
- Total contribution: .63% payroll deduction

Contribution Rate Split for Employers with 24 or Fewer Employees:

- Medical leave contribution: .31% payroll deduction
  - Employer's share 0% minimum
  - Employee's share 100% maximum
- Family leave contribution: .11% payroll deduction
  - Employer's share 0% minimum
  - Employee's share 100% maximum
- Total contribution: .42% payroll deduction

Draft Regulations

The draft regulations do not contain much in the way of new information, so we should expect more information to be forthcoming, below are some noteworthy aspects of the draft regulations:

Employee Workforce Count: The average number of employees should be determined by counting the number of employees, including full time, part time, seasonal and temporary employees, on the payroll during each pay period and dividing by the number of pay periods. The workforce count should be based on the previous calendar year. Employers that use contract workers that are reported on a 1099 must also include those individuals in the employee count.

Quarterly Filing: Following the end of each calendar quarter, employers will be required to file a report through Mass TaxConnect system. The report will need to include the employers FEIN and the number the employer's state tax number. The report must also contain the following information for each employee:

- name
- social security number
- wages paid or other earnings

If the employers paid 1099 contractors during the calendar quarter, the employer must also report the names and social security numbers of those individuals, and the amounts payments made.

Remitting Contributions for Medical Leave and Family Leave: Based on the employer's quarterly filing, a contribution will be calculated, and employers will have 30 days after the end of the calendar quarter to remit payment. There will be a penalty for failure to make required contributions.

Employers with Private Plans: Employers with a private plan may apply to be exempt, and once approved exemptions will be effective for one year. Employers may apply for an exemption from medical coverage, family leave coverage, or both. To be approved for an exemption, the private plan must confer all of the same rights, benefits and protections as those provided under the Paid Family Medical Leave Law. The Department of Family Medical Leave may audit any private plan, and withdraw approval if the plan does not meet the requirements of the law.

Claims for Benefits: To make a claim for benefits, employees must provide the employer with: (i) at least 30 days' notice of the anticipated start date of the leave, (ii) the anticipated length of the leave, (iii) the type of leave, and (iv) the individual's expected return date. If, for reasons beyond the individual's control, the individual cannot provide 30 days' notice then the individual shall provide notice as soon as is practicable. **The Department will notify the employer within 5 days after the date the employee has made a claims for benefits providing the employers with: (i) the employee's name; (ii) the type of leave; (iii) the expected duration of the leave; (iv) whether the request is for intermittent leave; and (v) any other information needed to verify the claim. Employees filing claims will be required to provide the Department consent to share information regarding the claim with employers.**

Upon request, employers will be required to provide the Department with records relevant to a claim including the employee's wages over the last 12 months, job descriptions, the employee's full-time or part-time status, amount of prior leave taken, weekly hours worked, etc.

Certifications: The regulations specify the information that must be contained within employee certifications for leave. It seems likely the Department will release model certification forms prior to 2021.

Length of Time for Claims to Be Processed: Payment of leave benefits will begin no less than 14 calendar days after the eligibility determination.

Employer Notice of Approval of Benefits: Employees and employers will receive contemporaneous notice of whether a claims is denied or approved. The approval for payment of benefits notice will include: (i) The reason for the approved leave benefits; (ii) The duration of the approved leave benefits; (iii) For intermittent leaves, the frequency and duration of the leave benefits; and (iv) The expiration of the approved leave benefits.

Request for Extension of Benefits: An employee seeking to extend benefits will have to make a claim at least 14 calendar days prior to the expiration of the original approved leave. The Department will then notify the employer no less than 5 business days following receipt of the employee's request to provide the employer with notice of the requested duration of the extension, whether the new leave is continuous or intermittent and any other information that is determined to be valid. The employer will then be expected to provide (within 5 business days) any necessary information for the claim to be processed including evidence of a fraudulent claim.

Joint Employer Liability Continues to Hurt Unprepared Employers

We have looked at joint employment within the context of the Americans with Disabilities Act (ADA), and the staffing agency vs. the client employer's obligation to provide accommodations. However, the complexities surrounding joint employment extend far beyond the ADA.

The DOL recently announced a settlement agreement with a Pennsylvania-based book binding company to pay $598,366 in back wages, damages, penalties and liquidated damages to settle charges that it violated the FLSA's minimum wage, overtime and recordkeeping provisions.

According to the DOL, the company obtained workers through temporary employment agencies and operated as a joint employers. The temporary agencies failed to pay the federal minimum wage or overtime. Investigators claimed the book-binding company made no efforts to determine whether the workers were properly paid, even though it received detailed invoices from the agencies. In other words, the book-binding company was charged with being equally responsible even though the temporary agency alone paid the employees, and without evidence that the book-binding company instructed the temporary agency to violate the FLSA.

The term "joint employment" is not found in the FLSA, and there is significant variation in the factors courts use to determine when a joint employment relationship exists. In 2018, the U.S. Supreme Court declined the opportunity to review the issue and resolve the differences across jurisdictions. Not surprisingly, joint employment has become a significant issue in a number of employment arrangements including temporary staffing.

The DOL recently announced plans to address joint employment under the FLSA via regulation, and bills have been introduced in Congress to address the issue. The National Labor Relations Board extended the public comment period for its proposed rulemaking that will define joint employer status. The rule would find joint employment only if two employers share or co-determine the employees' essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction.

At present, the joint employment issue continues to be one that presents risk for contractors that use subcontractors, franchisers, and employers that use staffing agencies, among others. It is important to review the terms of contracts carefully. More importantly, remember that just because another entity is paying employees does not mean your organization is clear of liability if the employees are not paid properly.

Our Solution: Joint Employer Liability Audit – Back in 2016 the Federal Department of Labor announced an increased focus on what it described as the "fissured workplace." The workplace in many industries is no longer a traditional business with a single employer. Companies increasingly contract out or otherwise outsource activities to be performed by other businesses, increasing the risk of an inadvertent joint employer arrangement. Blurred lines from the fissured workplace made achieving compliance with the Wage and Hour Laws a difficult task. Intense competition between business models like subcontractors, temporary agencies, labor brokers, franchising, licensing and third-party management, has led to a sharp uptick in DOL audits and lawsuits. This Audit focuses on the identification of independent contractor misclassification as well as arrangements that may lead to joint employer liability. We stand ready to help!

Work Harder…For the Good of All Mankind

Here's my abridged version of the email Elon Musk sent to employees at 1 o'clock in the morning a little over a week ago:

Last year was our most successful year ever. But, we're cutting our workforce. For those remaining, prepare to work even harder. Your work is essential to ensure the future of mankind.

You can read all of Musk's actual words, **here**. Some of them are quite inspiring. I certainly admire a company mission that speaks to preserving the planet and ensuring a good future for the next generations. But, is the mission sustainable [pun!] when those tasked with fulfilling that mission can't sustain the environment [pun!]?

In his email, Musk acknowledges that his employees already face poor work-life balance. The workforce cuts indicate that the balance will get worse. Musk's words imply that any employee concerned about the lack of balance isn't embodying the mission.

What can managers and HR professionals learn from the communication?

1. Don't communicate a layoff via email. An email can buttress in-person (if at all possible) or phone (if necessary) communications.
2. Don't communicate to employees at 1am. Don't! Even if you tell your employees that you don't expect a response at that time, the fact that you're emailing at that hour implies that you expect them to also be working at that time.
3. Don't forget that your mission depends on your employees. They have legitimate needs that require thoughtful valuation and consideration.
4. Don't forget that it takes time to create an application, develop a curriculum, create and sell a product, or save the planet. Typically, the best employee is someone who can sprint from time to time, but mostly jogs at a consistent pace. Ensure employees aren't so exhausted from sprinting that they can no longer jog.

Please reach out if we can help:

- Develop innovative policies to recognize employee needs and reward employee performance;
- Train managers and HR professionals on ways to build productive and constructive workplace relationships with employees;
- Guide your organization through a tough time, like a restructuring or job eliminations.

General Counsel Office Hours

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Attorney Michael E. Foley's bio.

As General Counsel, Mike will be available within his virtual and gratis office hours for all SCHRC members in good standing from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help SCHRC members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his SCHRC General Counsel Office Hours at 508-548-4888.