Compliance Check

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The Focus

A Compliance Check Newsletter

Temporary Help and FMLA

Pursuant to § 825.106 of the FMLA regulations, a temporary help agency and an employer who hires employees from the agency may be considered joint employers for purposes of determining employer coverage (employs 50 employees for 20 workweeks in the current or preceding year) and employee eligibility (must have worked 12 months, 1250 hours and a location that has 50 employees within a 75 mile range).

The FMLA regulations utilize standards established under the FLSA to determine whether the employment of the same employee by two employers is to be considered joint employment or separate and distinct employment. See § 825.106(a). The determination depends upon all the facts in the particular case. Generally, a joint employment relationship will be considered to exist where:

1. there is an arrangement between employers to share an employee's services or to interchange employees;
2. one employer acts, directly or indirectly, in the interest of the other employer in relation to the employee; or,
3. the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Using these principles, the Department of Labor believes that a joint employment relationship ordinarily exists, for purposes of the FMLA, where a temporary agency supplies employees to a client employer. Employees who are jointly employed by two employers must be counted by both employers, whether or not maintained on only one of the employer's payroll in a record-keeping sense, in determining employer coverage and employee eligibility under the FMLA. See § 825.106(b) and (d).

Determination of FMLA coverage would depend upon all the circumstances in the individual case.

Based on the principles stated above, the following general examples are provided. In each example we assume, based on the limited information provided, that the routine temps work each day of the week for the client employer:

Example One: The temporary service agency provides the client firm with five day laborers in addition to the five or six routine temps. The same five day laborers work for the client company all week. In this example, the client firm would count the 42 full and part time regular employees, the five or six routine temps, and the five day laborers, as the day laborers are jointly employed by the client employer each working day of the week and there remains a continuing employment relationship with the client employer for the week.

Total employees for the week: 52 or 53. This week would be counted toward the 20 workweek threshold.

Example Two: In addition to the client firm's regular employees and the five or six routine temps, the temporary service provides three day laborers each day, but not the same three workers.

Your client would count the firm's regular employees and the five or six routine temps as in Example One above. The day laborers in this example need not be counted, as no day laborer worked for the client employer each day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. This week would not be counted toward the 20 workweek threshold for the client employer.

Example Three: The client firm needs six day laborers one day and three each of the following three days, in addition to the 42 regular employees and five or six routine temps. In this case, the client firm would count its 42 regular employees and five or six routine temps. The day laborers need not be counted as no day laborer worked for the client employer each working day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. As in Example Two, this week would not be counted toward the 20 workweek threshold for the client employer.

Also, courts have ruled that that in the case of an employee from a temporary help agency who is subsequently hired by the employer, all of the time from the date that the employee is first assigned to work at the client's facility, must be used in determining the employee's eligibility requirements. (Miller v. Defiance Metal Products, Inc.)

Employment Application Limits Employer's Liability

In the case, Thurman, v. Daimler Chrysler, the Sixth U.S. Circuit Court of Appeals (covering Ohio, Kentucky, Michigan, and Tennessee) has held that an employee effectively waived the statutory limitations period for filing a civil lawsuit for discrimination by signing an employment application with a shorter limitations period. The plaintiffs, a husband and wife, sued the employer under state and federal law based on sexual harassment the wife allegedly experienced.

In *Thurman*, the plaintiff, Mrs. Thurman, completed an employment application for DaimlerChrysler. The application contained a clause which said "I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of it's subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any staturt of limitations to the contrary."

This statement was preceded by the words "READ CAREFULLY BEFORE SIGNING" in bold, capitalized letters. The trial court dismissed this complaint because it was not filed within six months of the alleged employment action, as required by the limitations period in the application. The Sixth Circuit affirmed this decision, finding that the application had not expired and had become part of Mrs. Thurman's employment record.

Although this ruling is enforceable in the 6th Circuit, other courts may soon follow their lead. Employers may want to consider including a similar provision in their employment applications. It should be "clear and unambiguous." Employers should meet with legal counsel regarding issues of enforceability.