Know Your Liabilities When Hiring Temporary Workers

The importance of the temporary worker has increased in the last ten years due to gaps in staffing caused by downsizing, mergers and acquisitions. A temporary worker can be hired to fill in for an employee on leave or they can be used to augment a company's permanent staff during seasonal fluctuations. Regardless of the reason for their employment, any business owner who hires temporaries should understand that they are entitled to certain considerations even though they will only be with you for a short time.

That entitlement rests on the answer to an important question of whether or not the temporary is an "employee" or an "independent contractor". This is especially relevant when it comes to the area of discrimination. The Equal Employment Opportunity Commission (EEOC) says that temporaries are covered employees under the federal and state anti-discrimination laws if the right to control the means and manner of their work performance rests with the hiring company, rather than with the temporaries themselves.

It's important to note that even though the staffing agency pays the temporary based on the number of hours reported by the business owner; it is the hiring company that oversees the temporary's work. Moreover, the temporary uses the hiring company's supplies and equipment and works on-site. In this instance, the liability for providing a discrimination free environment is not transferred to the staffing agency, as most companies would believe. The EEOC says the liability is shared by both the staffing agency and the hiring firm.

The issue of safety in the workplace is another area of vulnerability when it comes to hiring temporary workers. The Occupational Safety and Health Review Commission has taken the stance that companies employing temporary workers are primarily responsible for compliance with the Occupational Safety and Health Act with regard to those workers' safety. The rationale for this position is again based on the fact that the hiring company controls the means and manner of their work.

Employing temporary workers also has ramifications for the hiring company when it comes to the Family and Medical Leave Act (FMLA). This law requires employers with 50 or more employees to allow any eligible employee to take up to 12 weeks of unpaid family and medical leave in any 12 month period, while still maintaining the employee's health insurance benefits and usually, to restore the employee to the same or equivalent position upon his/her return. While the hiring firm does not grant FMLA leave to temporaries, they do have to count temporary workers as part of their contingent when determining if they meet the 50 or more criterion. They must also allow a temporary employee returning from FMLA leave to continue working at their site, even if that means letting another temporary worker go who was hired to replace the worker on leave.

The National Labor Relations Board considers hiring companies and staffing agencies to be joint employers for purposes of the National Labor Relations Act (NLRA) when both make determinations that affect the terms and conditions of the temporary worker's employment. An important consequence of this joint employer determination for the hiring company is that it may be held liable for the staffing agency's unfair labor practices toward the temporary worker it has hired.

And finally, hiring companies must include most temporary employees in their employee headcounts to see if their benefit plans qualify for a favorable tax treatment under the Internal Revenue Code. However, several courts have ruled that there is no provision in either the Internal Revenue Code or the Employee Retirement Income Security Act that hinders hiring companies from excluding temporary workers from their benefit programs.