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JOINT EMPLOYERS

Avoiding joint employer status and joint employer liability

by Lauren E. Moak

When multiple businesses interact with an employee — for example, a temporary staffing agency and its employer client with a temporary worker — the businesses may be considered joint employers for purposes of enforcing employment statutes. When two businesses operate as joint employers, they may both be held liable for any violation of the law. For businesses to avoid joint employer liability, they should carefully structure the employment relationship to avoid ambiguities and limit control to the business that intends to accept liability for the employee.

Facts

Jason Scott is an employee of Kelly Services, a temporary staffing agency. He was assigned to work for one of Kelly Services' clients, UPS Supply Chain Solutions, for approximately 10 months. During that time, he was repeatedly counseled for being late and warned that a failure to improve his attendance might lead to the end of his assignment with UPS. In September 2009, his managers believed he had falsified his time card and asked Kelly Services to end his assignment. Kelly Services agreed to end the assignment but retained Scott and assigned him to other clients.

Scott later filed a lawsuit against UPS alleging that his employment with UPS was terminated because he is gay. His allegations were based on a single statement that included a gay slur, supposedly made by his immediate supervisor at UPS. UPS asked the court to dismiss Scott's discrimination claim, asserting that it was not his employer within the meaning of Title VII of the Civil Rights Act of 1964 or the Delaware Discrimination in Employment Act. The court granted UPS's request.

Who is an employer?

Liability for employment discrimination generally is limited to employers. Who is an employer? Well, that question is harder to answer than it seems. In the end, the question is one of control. Factors to consider include:

- The source of instrumentalities or tools used to perform the work;
- The location of the work;
- The duration of the working relationship between the parties;
- Who has the right to assign work;
- The discretion to assign hours and the location of work;
- Who compensates the individual;
- Provision of benefits; and
- Tax treatment.

In this case, the court determined that UPS didn't exercise sufficient control to establish an employment relationship. Among the factors that the court found persuasive were:

- Scott applied for work and filed a job application with Kelly Services.
- He signed multiple written acknowledgments indicating his understanding that he was employed by Kelly Services, not UPS.
- His rate of pay was set by Kelly Services, which issued his paychecks.
- His performance was supervised and corrective action was issued by Kelly Services.
- He didn't have access to UPS's building but had to be buzzed in by a receptionist like other visitors.
- He continued his employment with Kelly Services after his assignment to UPS was terminated.

In light of those facts, it's clear that Kelly Services worked carefully and effectively to isolate its clients from any liability for employment-related claims. By placing all control of its workers' employment with its managers, Kelly Services was able to circumvent joint employer liability. In many staffing agency assignments, the lines aren't always so clearly drawn, and a court can easily hold a staffing agency jointly liable under discrimination laws.

Bottom line

Joint employer liability can be an issue for a variety of employers, not just temporary staffing agencies. Business owners with multiple small business entities often share employees between the entities, leading to joint liability. If your business practices put you at risk for joint employer liability, you should think carefully about revising your practices to limit exposure. Considerations should include:

1. Which business entity is authorized to assign work to employees;
2. Which business provides benefits to and pays the employees; and

3. Which business supervises the employees' work.

Limiting these areas of control to a single business entity and applying practices consistently may help limit your exposure to liability.

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