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Can Family Leave Obligations Be Outsourced?

Businesses are often responsible for benefits for temporary workers

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Conventional wisdom holds that use of temporary or leased workers from a staffing agency is a leading economic indicator – that increased hiring of such employees is a harbinger of coming growth in permanent payrolls. This increasingly looks to be the case in the current "Great Recession."

While other indicators of economic health remain stagnant or have only just begun to point in positive directions, an April 2 Bureau of Labor Statistics report indicates that employment in "temporary help services" – the bureau's catch-all category for workers who receive their pay from a staffing agency but perform their work for a client of the agency – has increased 18 percent cumulatively since September 2009.

While many of those adopting these "flexible staffing arrangements" are presumably hoping to ratchet up production gradually while incurring less of the administrative and legal expense associated with regular full-time employees, not all such employer burdens can be easily outsourced. In particular, client employers need to be aware that using employees from staffing agencies can create obligations for the client employers under both the federal and Connecticut Family and Medical Leave Acts (FMLA) — perhaps the opposite of the flexibility employers anticipate when they embark on these arrangements. Moreover, federal and Connecticut law differ in the way they parcel out these obligations between the client employer and the staffing agency when the agency is a "professional employer organization," potentially leaving the client employer with conflicting or uncertain obligations.

Two broad questions are important in analyzing these obligations: (1) Do the leased employees count toward the qualifying threshold of total employees that determines whether an employer is subject to the FMLA? (2) If the employer is subject to the FMLA, what are its obligations to leased employees?

Qualifying Threshold

Under either regime, the answer to the first question is relatively straightforward. Whenever an employee is jointly employed by two employers – such as by a staffing agency and one of its employer clients – *both* employers must count that employee toward their respective qualifying thresholds for FMLA coverage. 29 CFR § 825.106(2)(d); Regs. Conn. State Agencies § 31-51qq-4(d).

So, for example, a client employer with 40 permanent employees on its own payroll and 40 leased or temporary workers from an agency exceeds both the federal 50 employee threshold and the Connecticut 75 employee threshold and is a covered employer under both statutes. Federal regulations explicitly state that a client employer need not, however, count toward its own total employees who work solely for the agency itself or for the agency's other clients. Hence, a client employer with 35 permanent employees of its own and five employees from an agency is not a covered employer, even though the agency may have another 40 employees who work for other clients. Connecticut regulations do not make this latter point as explicitly, but it can be inferred from the same rule that requires counting by two employers where employees are "jointly employed."

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Who Is 'Primary Employer'?

Assuming that both a client employer and the agency that supplies it are covered employers, who holds the responsibility for furnishing FMLA benefits to a leased or temporary employee? Under both Connecticut and federal FMLA, answering that question requires determining who is the "primary employer," because "in joint employment relationships, only the primary employer is responsible for giving required notices to its employees [and] providing FMLA leave…" 29 CFR § 825.106(2)(c); Regs. Conn. State Agencies § 31-51qq-4(c).

It is here that the approaches taken by the

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two systems begin to diverge and can create potentially confusing responsibilities. Both use identical language to describe the balancing test involved in identifying the joint employer: "Factors considered in determining which is the 'primary' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits."

With respect to temporary employees, both regimes also assume this authority or responsibility will normally be vested in the placement agency and therefore that the agency will be the primary employer. With respect to employees obtained from a "professional employer organization" (the type of organization that supplies employees generally referred to as "leased" rather than "temporary"), however, federal regulations conclude that "the client employer most commonly would be the primary employer," while Connecticut concludes that "the placement agency most commonly would be the primary employer."

The federal distinction between temporary employees from a traditional staffing agency and leased employees from a professional employer organization was adopted as recently as Jan. 16, 2009 (74 FR 2863), and has not yet been well addressed in case law, so it is not yet clear how often differing determinations as to the identity of the primary employer under federal and Connecticut law will actually arise.

The U.S. Department of Labor's published commentary at adoption suggests that the "economic realities" of each individual situation, not the label applied to the staffing agency, should control this determination, and this may signal the path to reconciling the differing presumptions in individual cases.

In light of the ambiguity, however, a client employer that obtains employees from a staffing agency that identifies itself as a professional employer organization, or a client employer whose relationships with agency employees suggest "leased" rather than "temporary" status – e.g., lengthy assignments in which the employees are assigned and supervised by the client and generally integrated into its regular workforce – should expect that it, not the staffing agency, will bear the primary FMLA responsibilities toward those employees. In practice, this means the same responsibilities as if the employees were on the employers' regular payrolls.

Secondary Employers

Even when a staffing agency is clearly the primary employer, the client retains meaningful FMLA obligations as a "secondary employer." In the case of giving a returning employee his or her job back, this can sometimes look substantially similar to the obligations of the primary employer:

"The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer." 29 CFR § 825.106(2)(e); Regs. Conn. State Agencies § 31-51qq-4(e).

The secondary employer must also refrain from general FMLA-related "prohibited acts," such as interfering with an employee's exercise of FMLA rights and retaliating against an employee for opposing a practice that is illegal under the FMLA.

In short, as the numbers of leased and temporary employees continue to grow along with the economic recovery, caution in the family and medical leave arena is warranted. Employers hoping to take advantage of the convenience of such arrangements should be aware that FMLA obligations cannot necessarily be contracted out along with payroll. ■