CCM ALERT

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Temporary Employees and Client Liability For Wage and Hour Violations

Clingen Callow & McLean, LLC

Leasing employees from a staffing agency works well for employers. Employers can "test drive" a new employee to see if he is skilled enough to join the company permanently. The practice allows companies to ramp up their work force when demand is great and slim it down when demand is slow. Finally, the practice outsources human resource headaches associated with permanent employees.

Leasing employees is not without its pitfalls, however, as demonstrated by a recent decision from the United States Court of Appeals, Fourth Circuit. Salinas v. Commercial Interiors, Inc., No. 15-1915, 2017 WL 360542, at *10 (4th Cir. Jan. 25, 2017). In *Salinas*, the Fourth Circuit Court of Appeals analyzed whether the employees of a drywall subcontractor named J.I. General Contractors "J.I." should also be considered employees of the general contractor for purposes of the Fair Labor Standards Act ("FLSA"). The Court said "yes," and held that both J.I. and Commercial Interiors, the general contractor, were potentially liable to the drywall employees for wage and hour violations under the FLSA. Both the subcontractor and the general contractor were deemed to be a "joint employer" of the employees who claimed they were owed back wages.

What Test for Joint Employment Did the Court Use?

The 4th Circuit Court of Appeals used a new six-part test to determine joint employment although it cautioned that none of the tests were dispositive or exhaustive. CCM thinks all employers should be aware of this six-part test anytime a potential joint employment situation arises. For employers that rely on staffing agencies, the test looks like this:

1. Do the client and the staffing agency jointly direct, control, or supervise the worker?

2. Do the client and the staffing agency jointly hold the power to hire or fire the worker or modify the terms or conditions of the worker's employment?
3. How long has the client and the staffing agency worked together?
4. Is there shared management or ownership interests between the client and the staffing agency?
5. Is the work performed on the client's site, the staffing agency's site, or both sites?
6. Do the client and the staffing agency jointly handle payroll; provide workers' compensation insurance; pay payroll taxes; or provide the facilities, equipment, tools, or materials necessary to complete the work?

If a client finds itself answering "yes" to more than one of these questions, then it may have potential joint employer liability exposure for the wage and hour violations of its staffing agency.

What Makes this Decision Significant?

We think this decision is significant for three reasons. First, the decision comes from one of the more conservative circuits in the country which is ordinarily pro-employer. If the 4th Circuit rules in this fashion, we expect other less employer friendly circuits to follow. Second, the decision involves liability under the FLSA. As CCM repeatedly tells its clients, the FLSA is the single biggest liability exposure that any employer has. Finally, this decision is significant because of the amount of deference it shows the United States Department of Labor's regulations.

What Should a Client Do that Leases Employees?

There can be no "putting one's head in the sand" when it comes to wage and hour issues and temporary employees. Clients must use reputable temporary agencies. If possible, the contract governing the relationship between the client and the temporary agency should contain a strong indemnification clause in favor of the client. The risk of loss under this scenario is generally not insurable. Finally, clients must keep an eye on

their staffing agency's payroll practices and ensure that their staffing agency is complying with wage and hour laws. Because, a court might later determine these individuals were the client's employees..

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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