

Does your business use temps? What you need to know about a recent court decision

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The Fourth Circuit Court of Appeals issued a significant employment law decision on July 15, 2015 that creates a blueprint for all federal courts in West Virginia, Virginia, Maryland and the Carolinas to determine joint employer status between a company and a temp agency for purposes of discrimination law. The Court established a 9-part test to determine if the customer company had sufficient control over the temp agency employee so that the customer was potentially liable for damages to the temp agency's employee.

The plaintiff was employed by a temp agency and assigned to work every day at the customer's facility. According to the court's decision, the customer's foreman repeatedly made sexually charged remarks and gestures towards the plaintiff, even after she complained to the temp agency and to the customer's management. One day, the customer's foreman assigned her to work on a particular machine; she refused, saying she was tired from working too much overtime. She was then told to go home if she wouldn't work the machine and the customer told the temp agency that she needed to be replaced. After this, the customer's foreman allegedly called her and implied he could save her job if she performed sexual favors for him. She filed suit against both companies. The lower court first agreed to dismiss the temp agency from the suit and then dismissed the customer since the company was not her actual employer. The Fourth Circuit disagreed.

After much analysis regarding what factors or tests should be used to determine joint employer status, the Fourth Circuit adopted the "hybrid test" and said – We now articulate a new set of factors for courts in this Circuit to use in assessing whether an individual is jointly employed by two or more entities:

- (1) authority to hire and fire the individual;
- (2) day-to-day supervision of the individual, including employee discipline;
- (3) whether the customer furnishes the equipment used and the place of work;
- (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;
- (5) the length of time during which the individual has worked for the customer;
- (6) whether the customer provides the individual with formal or informal training;
- (7) whether the individual's duties are akin to the duties of the customer's employees;
- (8) whether the individual is assigned solely to the customer; and

(9) whether the parties intended to enter into an employment relationship.

The court added that none of these were dispositive but needed to be reviewed to determine if two separate companies were joint employers. It noted that parties signing a contract attempting to avoid an employment relationship was of minimal consequence. The Court summarized what was most important: control; that is the power to hire and fire, day-to-day supervision and where and how the work takes place, compared to the customer's own employees.

This case is important for many reasons. It appears the customer did not insist the plaintiff be fired; only that the temp agency send someone else in her place. The temp agency appears to have handled its own hiring, firing, discipline, payroll and other employment matters. The temp employees also wore a separate uniform from the customer's employees to denote their different status. Many would have said this evidence undercut any allegation of joint employer status. However, because the customer's employees and the temp agency's employees worked side-by-side under the same supervisors, this day-to-day control was evidence of joint employer status. The Court concluded the customer company had such a substantial degree of control over the plaintiff's employment that it should not have been dismissed as a joint employer under federal laws prohibiting discrimination, a hostile work environment and retaliation.

There are lessons here if your company uses a temp agency. Obviously there are commercially important reasons to continue using a temp agency in one's business model. But, as the customer company you must beware. Your company can still be liable to an agency's employees if your supervisors or management engage in unlawful conduct toward them just as if you had employed them directly. Unless the temp agency is also doing all the supervision and working independent of your employees, you must pay closer attention to your own employees' conduct. The real solution is training and effective investigation and handling of complaints about supervisory misconduct to avoid liability to persons working at your facility.

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