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Legal Considerations & Best Practices for Employers Utilizing Temporary Employees

By Bruce Garrett & Hannah LaChance

Employers often utilize temporary employees to fulfill labor needs for short-term projects or busy periods or to backfill for permanent employees who are on leave. No matter the reason, employers in these situations should be mindful of the applicable laws as well as best practices for avoiding employment disputes.

At the outset, employers should be cautious about hiring temporary workers as independent contractors (i.e., on a 1099 basis). While hiring an employee for a defined period or project are factors that may cut towards an independent contractor status for the worker, they are not determinative. Importantly, the furnishing of tools or equipment, and the business' ability to fire, direct, or control the workers' work are factors that generally indicate an employer-employee relationship. When workers are hired to perform duties that do not require a special skill, such as remedial labor, the workers should generally be classified as an employee rather than an independent contractor.

The first important step for an employer hiring temporary employees is to set clear expectations that employment will be on a temporary basis. The application materials should conspicuously state that the employee is being hired for a defined period or project, and the applicant should be reminded of this fact during the interview process. Moreover, the employer should provide the employee with a job description and offer letter that reference "temporary" in the job title, e.g., "Temporary Groundcrew Member," "Temporary Dishwasher," etc. If a business is utilizing temporary workers for longer than expected, the employer should notify the employee in writing that their temporary employment is being extended.

As a general rule, employers are permitted to condition certain benefits on employees' permanent or temporary status. However, employers who do this should consult with their benefits administrator or employment counsel to ensure that they are not violating the rules in their benefits policies or running afoul of federal law, such as the Affordable Care Act. Employers should also have a regularly updated handbook that explains which categories of workers are eligible for benefits.

If an employer elects to keep a temporary employee on a permanent basis, then the employer should go through standard hiring procedures and give written notice to the employee (larger employers with human resource departments should process a personnel action form).

Several state and federal laws specifically address situations when employees are hired on a temporary basis:

- **Oregon's Sick Time Law:** Temporary workers are eligible for Oregon sick leave on the same basis as permanent, part- or full-time employees. After being employed for 90 days, temporary workers must receive one hour of sick leave for every 30 hours worked. Temporary employees should be considered in the employee count when determining whether an employer must offer paid or unpaid sick leave.

- **Workers' Compensation:** Employers are generally required to provide workers' compensation coverage to temporary employees. The rules are more complicated when employers lease employees through staffing agencies and temporary employees in these situations may or may not have coverage. Temporary employees are considered in the employee count when determining whether an employer is subject to the workers' compensation reinstatement or reemployment laws. However, a temporary worker who is hired to replace a permanent worker who is on workers' compensation leave may not be eligible for reinstatement after sustaining their own work-related injury.
- **Family Medical or Safety Leave:** Oregon law requires employers to inform workers of their temporary status when they are hired to replace an employee who went on leave for family medical or safety leave. Employers who utilize temporary workers to backfill for employees who are on family medical leave can apply to the Oregon Employment Department for grants of up to \$3,000 to apply towards the cost of hiring the temporary worker. Under the Oregon Family Medical Leave Act and the federal Family Medical Leave Act, temporary workers are generally counted towards the employee count to determine whether an entity is a covered employer. Determining if a temporary worker is eligible for leave under these two laws can be complicated when the employee has worked multiple stints for the employer in a short period of time, and in these situations, employers should consult with employment counsel before determining the employee's eligibility.
- **Wage & Hour Law:** Like other types of employees, temporary workers must be paid at least minimum wage for all hours worked and they must be paid overtime pay for any hours that exceed 40 in each workweek.

State law provides special rules that apply to seasonal, farm, state and county fair employees, or employees leased through staffing agencies, and employers in these situations should consult with employment counsel prior to onboarding to ensure compliance with these nuanced laws. Moreover, the National Labor Relations Act has numerous rules that govern the use of temporary employees for unionized employers, which we did not address in this article.

Temporary employees can be useful for employers, however, as we have seen, utilizing them can complicate human resource matters. It is prudent for employers who utilize temporary employees to consult with employment counsel to ensure that their policies, documentation, and practices are compliant with federal and state law and to minimize the likelihood of employment law disputes.

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