A Tale of Two Cases: The Perils of Using Temporary Workers

Is your business among the many that utilize contract or temporary employees, workers hired through a third-party staffing agency? Did you know that using temporary workers may subject you to liability under federal employment laws as a joint employer of that worker? Two recent federal appeals court decisions highlight the pitfalls of using temporary workers. Continue reading to see if your business is at risk.

The Use of Temporary Workers Has Expanded

Since the end of the Great Recession in 2009, the demand among employers for temporary or contract labor has steadily increased, and staffing companies have been in high demand. The use of temporary workers in the U.S. economy, when staffing agencies nationwide hired more than 14.6 million temporary and contract workers. This represented nearly a thirty-three percent increase over 2013 hiring levels.

Employer Benefits of Using Temporary Help

There are many business advantages in using temporary workers. Foremost, it is far less expensive in most employment situations. Temporary workers allow employers the flexibility to increase or reduce their work force far more readily, which can be helpful in managing payroll costs, particularly in a fluctuating business environment.

Yet with all of these cost savings and other advantages, there are also significant risks that employers face in hiring temporary or contract workers. For one, the federal government, namely the U.S. Department of Labor (DOL), has substantially stepped up its enforcement efforts in the past few years. The DOL is targeting employers who maintain sufficient control over their temporary workers but seek to avoid the obligations of federal employment laws by classifying workers as the employees of a third-party staffing agency, rather than as joint employees of both the employer and the staffing agency. This subjects businesses who do so to potential damages.

Two recent federal circuit court decisions highlighted this potential peril for employers. The Fourth Circuit (VA, MD, NC, SC and WV) in Butler v. Drive Automotive Industries of America, Inc. and the Third Circuit (PA, DE and NJ) in Faush v. Tuesday Morning, Inc. both decided that temporary staffing agency workers were the joint employees of both the staffing agency that hired them initially and the business for whom they performed work as a temporary worker.

The Fourth Circuit’s Decision in Butler
In *Butler*, plaintiff Brenda Butler was hired by ResourceMFG, a temporary employment agency, to work at defendant Drive Automotive, a South Carolina manufacturer of doors, fenders and other automotive parts. During the course of her time with Drive Automotive, Butler claimed that her supervisor had sexually harassed her, both verbally and physically. Ultimately, Butler was terminated by ResourceMFG, at the demand of Drive Automotive, after she had complained to Drive Automotive’s HR department about the alleged supervisor harassment.

Butler filed suit against Drive Automotive, alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII). Drive Automotive defended, in part, on the grounds that Title VII is applicable only to an employer-employee relationship, and Butler was not its employee. The Fourth Circuit, applying a nine factor “hybrid test,” containing elements of both the “common law control test” (used by the Third Circuit) and “economic realities test” (used by the DOL), rejected Drive Automotive’s contention, finding instead that Butler was a joint employee of both Drive Automotive and ResourceMFG. Crucial to the Court’s determination was that Drive Automotive had retained for itself a sufficiently high degree of control over the terms and conditions of Butler’s employment, to make her an employee of Drive Automotive, relying on the following facts:

- Drive Automotive determined Butler’s work schedule;
- It arranged for Butler’s job training;
- Its managers nearly exclusively supervised Butler’s work;
- Butler performed the same tasks on the job as Drive Automotive’s own employees, using the same equipment; and
- The goods she produced were a part of Drive Automotive’s core business.

Combined, these reasons more or less ensured that Drive Automotive exercised substantial control over Butler and her work product, thereby making Butler Drive Automotive’s employee. Drive Automotive, in other words, could be held liable to Butler for employment discrimination under Title VII.

**The Third Circuit’s Decision in *Faush***

In *Faush*, the Third Circuit considered the circumstances of plaintiff Matthew Faush, an employee of Labor Ready, a staffing firm that provided temporary workers to a number of its clients, including defendant Tuesday Morning. Labor Ready hired Faush and sent him to a new, yet-to-open Tuesday Morning retail store in Pennsylvania, where over the course of a month, he unloaded merchandise, set up display shelves and stocked merchandise, in preparation for the store’s grand opening. Faush alleged that during his time at Tuesday Morning he was accused of stealing merchandise by the company’s store manager and was subjected to ongoing race-based hostility.

Faush ultimately filed suit against Tuesday Morning alleging employment discrimination on the basis of race, in violation of Title VII. Tuesday Morning, like Drive Automotive, defended against Faush’s claims on the grounds that he was not its employee, but was Labor Ready’s employee instead, proffering that the company could not be held liable for discrimination in the absence of an employer-employee relationship with Faush.

The Court applied the so-called “common law control test,” a test substantially similar to the Fourth Circuit’s “hybrid test.” The “control test” focuses, broadly, on whether an employer has “paid the employees’ salary, hired and fired them and had control over their daily activities.” The Court, after evaluating a litany of facts, concluded that Tuesday Morning had created a “common law employment relationship” with Faush, i.e. Tuesday Morning had:

- Assumed responsibilities with respect to payment of Faush’s wages;
- Paid Faush and other temporary workers on a straight hourly basis;
• Maintained ultimate control over whether Faush was permitted to work at its store;
• Exercised nearly unfettered control over Faush’s daily activities at the store, including providing training, assigning work, furnishing equipment, directly supervising his work, and verifying the number of hours he worked on a daily basis; and
• Tasked Faush with performing unskilled work that was functionally indistinguishable from that performed by Tuesday Morning’s own employees.

Also persuasive to the Third Circuit was the fact that, under EEOC policy:

[A] client of a temporary employment agency typically qualifies as an employee of the temporary employer during the job assignment, for Title VII purposes because the client usually exercises significant supervisory control over the worker.


**The Takeaway from Butler and Faush**

Given the Courts’ decisions in Butler and Faush - and with the increased vigilance demonstrated recently by the DOL - Virginia business owners have good reason to assume, absent compelling circumstances to the contrary, that the use of temporary or contract workers supplied by a third party staffing agency is likely to create a joint employment relationship for the duration of the work project. With that joint employment relationship comes potentially significant liability under federal employment laws, such as Title VII and the Fair Labor Standards Act (governing minimum wage and overtime pay). Close scrutiny should be paid to whether the relationship with your temporary or contract worker is circumscribed by the factors led to the findings of joint employment in both Butler and Faush. In other words, it is important to ask: Do you have the authority to discipline or fire the worker? Do you exercise significant day-to-day supervision and control over the worker and his or her work product? And do you furnish the worker with the needed equipment and space necessary to do the work? If you do, your relationship with the temporary or contract worker is likely one of employer and employee, with all of the potential pitfalls that go with it.