

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Employment Agencies and Joint Employer Liability for Unpaid Wages

Companies often contract with employment agencies to supply temporary workers – sometimes called leased employees – on a fluid basis. A tech company may need 20 software engineers one month, then 70 the next month, and 60 the following month. Rather than handle the payroll, immigration and other human resources issues itself, the contracting company pays the employment agency to handle those issues. Workers receive their paychecks directly from the agency. But what if the agency fails to pay the worker? Having paid for the worker’s services, is the tech company off the hook? Companies need to know that both entities can be held liable for employment law violations under a theory of “joint employer” liability.

This bulletin will examine when a court or administrative board is likely to find “joint employer” liability and what companies might do to better protect themselves. The ramifications are huge, due to the cost and frequency of employment law claims, including class actions. A company found to be a “joint employer” can be liable to the worker in claims of harassment, discrimination and unpaid compensation.

The Right to Control

In evaluating whether a company will be ruled a joint employer in a given case, the emphasis is placed on the amount of control exerted by the employer over the working conditions. The courts will look at all the circumstances but with specific focus on the nature and degree of control over employees; the day-to-day supervision of employees, including discipline; the authority to hire and fire employees and set conditions of employment; and control of employee records and payroll.

While all these factors should be considered, public policy and practical concerns lead to the conclusion that the factors cannot be sliced too finely. In claims of workplace discrimination and harassment, courts often rule that each employer bears responsibility for the offending actions. In a leading California appellate case, the court found a temporary agency and its corporate client were joint employers in a sexual harassment case. The court found the purpose of the California Fair Employment and Housing Act (FEHA) is to safeguard an employee’s right to hold employment without discrimination. According to the court, that purpose is best served by a finding of joint employment.

The same policies apply when courts determine whether a contracting business should incur liability for unpaid wage claims. Even if the temporary agency is issuing the paychecks directly, where the contracting business has the right to control the work environment, and especially where the business has the right to terminate the worker at any time, the business will likely be ruled a “joint employer.”

Companies and agencies will often use detailed contracts to try to address these issues and allocate responsibilities between them. However, as with the typical analysis of whether any worker is properly classified as an employee or independent contractor, the contractual terms and parties’ intentions are relevant but not conclusive. The key is the right to control.

Unfortunately, there is no bright line test to determine when an entity has sufficient control to be held liable. The cases require a “significant” amount of control, and that the business has the ability to effect the terms and conditions of the worker’s employment. But that does not offer much guidance and, frankly, it is difficult to imagine a case when a contracting company will NOT be exerting control over its workplace.

Consider the recent case of *Cervantez v. Celestica Corp et al.* (2009) 618 F.Supp.2d 1208, decided by the federal district court in Los Angeles. There, defendant Adecco was a temporary staffing agency that supplied employees to co-defendant Celestica Corporation. Plaintiffs were paid by Adecco and assigned to work at Celestica’s facility, under a contract between Adecco and Celestica.

Plaintiffs brought a class-action suit against both Adecco and Celestica based on failure to pay overtime, failure to provide itemized wage statements, and failure to provide meal and rest breaks.

The facts showed that, before plaintiffs could enter the Celestica facility, they had to pass through security screening, a measure required by Celestica. After passing through security, plaintiffs clocked in at one of the time clocks within the facility. At the end of their shifts, plaintiffs clocked out at one of the time clocks within the facility and passed through another security screening, as required by Celestica, before they could leave work.

Plaintiffs moved for summary judgment on a number of issues, including whether or not Celestica was their “employer.” The court held that Celestica failed to raise a triable issue of fact that it was not the plaintiffs’ employer. Plaintiffs were, therefore, entitled to a summary finding that Celestica was one of their employers.

To reach this result, the court first looked to the definition of “employer” under the California Code of Regulations (CCR). There, an employer is defined as anyone who “directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.” (CCR, Title 8, Section 11010(2)(F)).

The court went on to examine the “control” facts, in terms of wages, hours, working conditions and performance of employment duties.

Plaintiffs argued Celestica was their employer because it controlled their work hours and working conditions as follows:

- Adecco provided temporary employees to Celestica;
- Celestica had the contractual right to approve employees’ base pay rate;
- Celestica determined employee schedules and work hours;
- Plaintiffs worked in the Celestica warehouse and used Celestica equipment;
- A Celestica facilities manager was responsible for security, interior fencing, and providing data lines for plaintiffs’ time clocks;
- Celestica supervisors were required to supervise plaintiffs;
- Plaintiffs were required to comply with Celestica’s production specification requirements.

By the above showing, plaintiffs met their initial burden to show that Celestica was an employer. The burden then shifted to Celestica, which relied on the following facts:

- Adecco employed the plaintiffs, not Celestica;
- Adecco employees believed that only Adecco was their employer;
- Celestica did not access or control Adecco’s time keeping practices;
- The service agreement between Celestica and Adecco stated that Adecco employees shall not, for any purpose, be considered employees of Celestica;
- Celestica was not required to verify employment eligibility or identification of new employees under the service agreement;

- Celestica was not responsible for paying wages and did not determine wage rates of Adecco employees;
- Adecco employees never received a paycheck from Celestica;
- Some plaintiffs thought Celestica was not their employer;
- Adecco employees did not know anyone in Celestica's Human Resources Department and always went to Adecco managers with any concerns.

The court found that, even viewing this evidence in the light most favorable to Celestica, neither the services agreement nor the plaintiff class members' subjective perceptions as to the identity of their employer raised a genuine issue of material fact.

Celestica further argued that it was not an employer because it neither had access to nor controlled Adecco's time keeping practices. This argument also failed; whether or not Celestica exclusively controlled one aspect of Adecco's employment practices does not bear on the question of whether or not Celestica "employs or exercises control over the wages, hours or working conditions of any person" under the regulation cited above.

Recommendations

Companies using employment agencies should consider each of the bulleted facts above, and the overall issue of control, to determine whether any practical changes can be made in the workplace to minimize the potential for "joint employer" claims. Companies should also do whatever they can to pre-qualify the agencies since, as a practical matter, it may be very difficult to prove lack-of-control in cases brought by employees. Companies will want to tender defense and seek indemnification, and possibly insurance coverage, from the agencies responsible to pay these workers.

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