



“Probationary period” vs. “Introductory Period”

There are basically two reasons to use the term “Introductory Period” as opposed to “Probationary Period” in a company handbook. First, the term “probationary period” can be interpreted by some courts to imply a contract, negating the “at-will” rights employers try so hard to maintain. The implication is that once an employee completes a “probationary” period they will be retained no matter what. It is also very important that you do not call an employee who has completed the introductory period a “permanent” employee. I recommend they become a “regular” employee. The term “permanent” implies that they will always be with the organization. I also suggest that you have in your policies a disclaimer that the transition from the introductory period to a regular employee does not alter the at-will employment relationship in any way. Another good reason not to use the term “probationary” for new hires is that this terminology is often utilized in the corrective action process when an employee is not performing to standards. Having two completely separate periods referred to by the same terminology can be very confusing, or even misleading.

Employee Leasing – the Temporary Work Force of the Future

The changing face of the American workplace begs the question “what is an employee”. Companies regularly turn to temporary staffing/leasing firms to provide employees for their short-term and peak requirements.

While employee leasing offers greater staffing flexibility, fewer administrative burdens, and often lower costs, the once common notion of reduced legal exposure from leased workers has given way to uncertainty and confusion.

Companies using temporary workers should examine several areas where they may face significant potential liability.

Joint or Co-employment Status

The legal relationship between you, the employee and the leasing/temp agency is murky at best. Various laws impose the obligations of an “employer” on a company whenever the facts and circumstances establish a significant connection with a worker.

Temp/leasing agencies and their customers often have sufficient contact with the temp/leased worker so that both will be viewed as “employers” with certain legal obligations. Although the temp firm usually pays the workers, withholds and pays taxes, provides workers’ compensation coverage and has the ultimate right to hire and fire, the customer (you) often supervise and direct the worker’s daily tasks, control the working conditions, and determine the length of the assignment.

In many temp/leased employee arrangements, a “joint employer” or “co-employer” relationship exists. The existence of this joint employer relationship puts a new slant on many of the legal issues that face all employers and the courts and regulatory agencies have provided some surprising results.

Discrimination

A recent court ruling in New York found the employer who used a temp agency to fill a temporary position was guilty of discrimination because he discharged her and failed to hire her on a permanent basis because of her race, sex and national origin. This case clearly establishes that customers can be held accountable for unlawful discrimination against a temporary/leased firm’s employees.

The Americans with Disabilities Act

The Americans with Disabilities Act establishes a similar degree of accountability. The same ADA provisions which prohibit employers from discriminating against their disabled applicants or employees also protect a temp/leased employee from discrimination by a customer. And while the ADA does not specifically address a customer's obligation to accommodate a disabled worker, the EEOC's enforcement of other civil rights laws leaves little doubt that customers who discriminate against a temp firm's employee risk liability under the ADA and may be required to make reasonable accommodations for their temp employees as well as for their own workers. Although the ADA is silent as to who bears the burden of providing reasonable accommodations, most courts have found that the customer, not the temp/leasing agency, is better suited to make the accommodations.

Wage and Hour

Because of this "co-employment" relationship, courts can hold the **customer** partially liable for penalties and fines if a temp employee works more than 40 hours in a week and the temp/leasing agency fails to pay the temp employee his/her overtime pay.

Family and Medical Leave Act

A customer who employs 45 regular full-time workers, but is found to be a joint employer of 10 temporary employees assigned by a temp/leasing firm, would be covered under the FMLA because the customer will be deemed to have 50 or more employees.

The regulations make it clear that the temporary staffing firm generally is considered the "primary" employer of the temps and therefore, is responsible for giving them the required notices, providing leave, maintaining health benefits and job restoration.

Recommendations

These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.

1. It is critical for all companies who utilize temps/leased employees to read and examine carefully the leasing agreement with the temp/leasing firm. Ensure that the leasing agreement contains a broad indemnification clause in which the temp/leasing firm agrees to hold the customer harmless for all employment related liability arising from the leased workers. The indemnification clause also should provide for the payment of costs and attorneys' fee incurred by the customer should it be sued over a matter within the scope of the indemnification.
2. Check your general liability insurance for coverage related to leased employees and make certain that your policies prohibiting harassment and discrimination are given to all your regular employees and your temp/leased employees.

Conclusion

The use of temp/leased workers provides many advantages for a company's short-term business needs including the flexibility of a supplemental work force and the ability to protect regular full-time employees from layoffs. However, the "co-employment" doctrine can create additional unexpected liability. Remember, in a lawsuit, the injured party will put as many defendants' names on the paperwork as he/she can and if he/she thinks your company has deep pockets, you will undoubtedly see your company's name listed as a defendant.

Stay “In The Know” in 2011 –

Educational Seminars

We have a variety of educational seminars planned for 2011. Some will be live from the office of our partner in Campbell. Others will be conducted using “Go To Meeting” web conferencing.

Leavitt Pacific Insurance Brokers
695 Campbell Technology Parkway, Ste 250
Campbell, CA 95008

March Educational Session

OHR’s Quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last

Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for **Thursday, March 31st at 1:00 pm** in Campbell, CA. To register please RSVP for the live session at [Harassment Prevention Training](#)

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