

SEASONAL HIRING TIPS: USING TEMPORARY EMPLOYEES, SUMMER INTERNS, AND VOLUNTEERS

Many businesses have busy periods during the year when they need to hire temporary employees. Often, due to the nature of the company's products or services, these periods are seasonal and can last several months. Other organizations bring interns aboard during the summer months as part of a recruitment program. Some businesses attract individuals who want to volunteer time to the enterprise to gain experience. The use of such non-traditional "seasonal workers" often raises questions for employers. Must they pay their interns? Can temporary workers file for unemployment benefits when they leave? What are the risks associated with volunteers? This edition of the *Employment Law Advisor* discusses the answers to these and other questions, and offers some practical guidance concerning seasonal hiring.

TEMPORARY EMPLOYEES: FOLLOW YOUR NORMAL HIRING PRACTICES

Generally, businesses should follow the same steps in hiring temporary employees that they do for regular employees, including conducting interviews and checking references. Although a temporary worker who turns out to be a "bad hire" may have only a short-term negative impact on the company (due to the limited duration of employment), taking the time to screen candidates will help ensure a successful experience. (Note that we are focusing on the direct hiring of temporary workers by employers. Obtaining temporary help from agencies or professional employer organizations raises separate considerations that are beyond the scope of this article.)

Employers should understand that the laws prohibiting employment discrimination apply with the same force to temporary employees, so the hiring and interview process for temporary employees should be conducted with the same laws in mind. Similarly, employers should consider whether the hiring of temporary employees will increase the company's total number of employees such that certain state and/or federal laws will become applicable (*e.g.*, the Family and Medical Leave Act).

The protection of confidential information is another issue that is sometimes overlooked by businesses when hiring temporary employees. If the temporary employee will have access to confidential or proprietary information of the company, then a non-disclosure/confidentiality agreement should be considered despite the limited duration of employment. There may also be special situations where other restrictive covenants (*e.g.*,

noncompetes) should at least be considered. If such agreements are used, they should be carefully drafted so they are not later found to be unreasonably restrictive.

BE CLEAR ABOUT THE LIMITED TERM OF EMPLOYMENT AND INELIGIBILITY FOR BENEFITS

It is critically important when hiring temporary employees to be clear about the limited duration of employment and that temporary employees are not eligible to participate in benefit plans that the company offers to its regular employees.

The term of employment should be explicitly stated in an offer letter, which also should provide for early termination without cause or notice. In other words, while the temporary employment will end on a set date, the company should reserve its right to treat the employment as "at will" during the term and to terminate the temporary employee without cause or notice (unless, of course, the company has decided to restrict its right to terminate at will). The offer letter should also specify expectations for performance and state that the temporary employee must abide by all company policies. Supervisors should be trained about temporary employment status so they do not make inconsistent promises to temporary employees, particularly with regard to potentially dangerous promises about "temp to perm" possibilities.

Regarding employee benefits, the eligibility and exclusion provisions in plan documents should be drafted to exclude temporary workers, whenever possible, where the employer does not intend to cover them. Moreover, offer letters, employee handbooks and company policies should state that temporary employees are not eligible for benefits. Furthermore, care should also be taken to ensure that ineligible temporary employees are not inadvertently enrolled in benefit plans designed for regular employees. In some circumstances, such as where an ineligible employee is allowed to participate in a 401(k) plan, mistakes may result in violations of employee benefit/tax laws, requiring complicated and costly corrective measures.

UNEMPLOYMENT BENEFITS

Employers generally are not exempted from unemployment benefit obligations simply because an employee is hired for a temporary period, and wages paid to a temporary employee will be considered as part of any benefit calculation if the temporary employee receives unemployment benefits after the completion of employment. An exception to this general rule exists for "seasonal employers" who -- because of seasonal weather conditions or the nature of the product or service -- need to hire temporary workers for a seasonal period lasting up to 16 weeks. Seasonal employer status is obtained by applying

to the Division of Unemployment Assistance at least 60 days prior to the hiring season. If seasonal employer status is granted, the employer may be relieved of some of the unemployment benefit charges that may be incurred as a result of hiring temporary seasonal employees.

EXEMPTION FROM STATE OVERTIME LAW FOR SOME SEASONAL BUSINESSES

The Massachusetts overtime law (which requires employers to pay time and one-half the regular rate of pay for work in excess of 40 hours in a given workweek) specifically exempts seasonal businesses that are only open for 120 days in any year. Employers must file waiver applications with the Massachusetts Department of Labor.

HIRING INTERNS: TO PAY OR NOT TO PAY

The principal question raised by hiring interns is whether they must be paid. Generally, this depends upon whether the intern falls under the “learner/trainee” exemption to the payment of minimum wages and overtime under the federal Fair Labor Standards Act (“FLSA”). The following are the U.S. Department of Labor’s criteria for determining whether the exemption applies (the regulations do not use the term “interns” but rather refer to “learners/trainees”):

1. The training, even though it includes actual operations of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the student.
3. The student does not displace a regular employee, but works under the close observation of a regular employee or supervisor.
4. The employer provides the training and derives no immediate advantage from the activities of the student; and on occasion, the operations may actually be impeded by the training.
5. The student is not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the student understand that the student is not entitled to wages for the time spent training.

The absence of one or more of these criteria is not necessarily

determinative of “learner/trainee” status. In general, though, the internship must look substantially more like training/learning than actual work in order to justify classifying the position as an unpaid internship.

The U.S. Department of Labor (“DOL”) has stated that it will not consider students to be employees when they are involved in education or training programs that are “designed to provide students with professional experience in the furtherance of their education and training and are academically oriented for their benefit.” In one opinion letter, the DOL determined that students who received college credits for performing an “internship...which involved the student in real-life situations and provides the students with educational experiences unobtainable in a classroom setting” would not be considered employees.

VOLUNTEERS: USE CAUTION IN ALLOWING INDIVIDUALS TO “DONATE” THEIR SERVICES

The FLSA and its requirements for the payment of minimum wage and overtime apply whenever an employer “suffers or permit[s] [an individual] to work.” As a result of this very broad definition, individuals who “volunteer” their time to a private, for-profit employer generally are entitled to wages and overtime under the FLSA -- even if the volunteer agrees beforehand that no compensation will be earned. The DOL recognizes an exception under the FLSA for volunteers. However, the volunteer exception only applies to individuals who volunteer or donate their services to non-profit organizations for civic, charitable, or humanitarian objectives.

In the past several years, several on-line entertainment companies have become embroiled in ongoing FLSA class-action litigation brought by disgruntled former volunteers who spent substantial time serving as on-line volunteers. At bottom, businesses should be cautious in allowing volunteers to donate their time, and attempt to evaluate the risk of future claims.

A FINAL NOTE CONCERNING CHILD LABOR

The FLSA and similar state laws set wage, hours, and safety requirements for individuals under age 18 working in particular jobs. The rules vary depending upon the particular age of the minor and the particular job involved. As a general rule, the FLSA sets 14 years of age as the minimum age for employment, and limits the number of hours worked by minors under the age of 16. Given the myriad rules and significant penalties for violations, employers should consult with counsel prior to employing minors.

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