



Harry Franzheim—an HR/OD Practitioner for over 30 years—has published this newsletter to bring you careful insight into reducing costs and unlocking employee potential.

AT ISSUE

You can't stick your head in the sand and ignore the facts and laws about temps anymore. Temps are the joint responsibility of both the employer and temp agency, and must receive the same treatment as full-time employees.

EEOC Equal Treatment, Even for Temps?



HR Fact:

EEOC Funding

On January 16, 2014, the Senate passed an appropriations bill providing \$364 million to the EEOC for 2014. That was down \$9 million budgeted by the Obama Administration. As a result, there is more pressure to get a bigger bang for the investigative buck, meaning more and more class action suits to find all possible employees that were "harmed" by a single poisoned boss or employer. If you have a rogue HR manager, you are probably soon to be a target of an EEOC class action investigation.

The following is an actual email and phone conversation that took place this year.

CLIENT EMAIL Hello, this is Mr. HR at Acme, Inc. We got a complaint from one of our employees that one of your employees, John Smith, is sexually harassing her. Please end John Smith's assignment and please ensure that he does not work as a temp for Acme, Inc. in the future.

AGENCY EMAIL Hello, Mr. HR. How are you? Was there an investigation completed? If so, may we see the documentation? If not, can we suspend John pending an investigation? Temps are people too and deserve due process. I can be on site first thing in the morning to assist if needed.

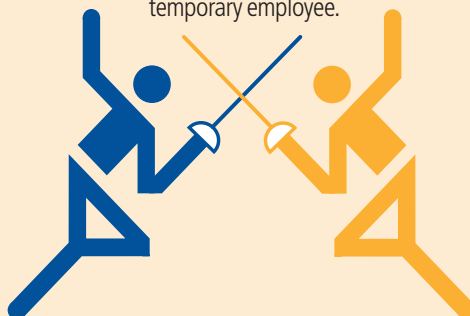
CLIENT EMAIL Hello, I will be in at 7:00 am and I do not share my documentation. I will, however, tell you the general details. I will tell you also that we make the determination of who will work as a temp for Acme,

Inc. and Mr. Smith is not to return. I understand and appreciate that he is an employee of yours. My priority is my employees, specifically the employee that came forward.

AGENCY EMAIL Hello again. Is there a number where I can reach you? I think it would be best if we talk!

No Jousting Necessary!

OSHA and EEOC have made it clear that the client and temp agency have joint responsibility for the temporary employee.



The next morning via telephone:

CLIENT PHONE CALL Hello. So apparently all of your employees are talking about what happened with John Smith last night and while they can do what they want on their lunch and breaks, it better not interfere with their work.

AGENCY RETURN CALL Good morning to you too! Can you tell me what happened regarding John Smith last evening?

CLIENT It has happened twice now. Once last week and then again last evening. Mr. Smith gets Diane alone and has these very sexually explicit conversations. He is gross and we don't want him around us anymore.

AGENCY You said it happened twice, last week? What was done?

CLIENT Nothing, Diane did not report it until last night. She just tried to ignore it.

AGENCY Did she tell Mr. Smith to stop?

CLIENT No, she just wanted him to go away.

AGENCY What happened last night?

CLIENT Same thing, only this time she made a complaint.

AGENCY Did you investigate, were there any witnesses?

CLIENT No, it boils down to a he said, she said.

AGENCY Did you speak to Mr. Smith?

CLIENT No, he is your employee and your problem. That is for you to deal with.

AGENCY So there have been two events. One complaint about unwanted sexual conversations. No witnesses. Your employee never told Mr. Smith to stop. There is no investigation. You never spoke to the accused. And you won't share your documentation. Is that correct?

CLIENT Our in-house counsel has advised us accordingly.

AGENCY Your in-house counsel has this wrong. Can I do an investigation on my own? Will you grant me access to your employee?

CLIENT No. She was uncomfortable talking to me. She would be uncomfortable talking with you.

AGENCY Without your documentation and a thorough investigation, how can I proceed with Mr. Smith?

CLIENT That is your problem. He is your employee.

AGENCY Yes, it is true that we are his common law employer, but with regards to employment decisions we share the responsibility. Mr. Smith deserves the opportunity to tell his story. The adverse employment action you have taken exposes Acme, Inc. to claims of discrimination. In the absence of due process and discovery, Mr. Smith may feel that his ended assignment is for some other reason, like race or age discrimination. The EEOC has made this very clear, there is joint employment and co-employment liability.

CLIENT We will take the risk of the exposure and until I get a letter from the EEOC, this is how it is going to be.

AGENCY What would you have done if Mr.

Smith was one of your own full-time employees? Would you have fired Mr. Smith without talking to him?

CLIENT That would be different.

AGENCY Hmmmm. How so?

CLIENT Mr. Smith is your employee!

Circular logic does not get any clearer the more times you go around. It is time for a little education, and a new mindset needs to emerge if clients and agencies are going to ever get this right.

What Laws Does the EEOC Cover?

- Title VII of the Civil Rights Act of 1964
- The Pregnancy Discrimination Act
- The Equal Pay Act of 1963 (EPA)
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title I of the Americans with Disabilities Act of 1990 (ADA)
- Sections 102 and 103 of the Civil Rights Act of 1991
- The Genetic Information Nondiscrimination Act of 2008 (GINA)

Joint Responsibility

OSHA is making it clear that the client and the agency have joint responsibility for employee health and safety, but they firmly place the controlling client (host) company responsible for ALL worker health and safety (temporary or otherwise). Staffing agencies must inquire about the client's safety program and the inclusion of the temporary employee. If the agency discovers that the client does not include "temps" in its health and safety programs, then the agency has two choices: fill in the gaps with its own programs or find another client.

The Equal Employment Opportunity Commission (EEOC) has also made this clear to employers that use temporary workers and to staffing agencies, that neither party can make employment related

decisions based on anything other than employment related conduct. The EEOC is clear that a client cannot discriminate against a temporary worker or one of its own on the basis of a protected class. The commission is clear that both the client and the agency can be held liable for allowing such unlawful employment decisions.

Don't Be Naive; Clients Have Liability

Staffing arrangements do not shield clients from liability under civil rights laws, and clients can be held liable for unlawful discrimination under Title VII of the Civil Rights Act of 1964. This means that clients generally have the same obligation to temporary workers as they do to their internal employees—they cannot unlawfully discriminate. Clients cannot reject temporary employees based on their race, gender, age, national origin, religion or other protected traits under federal and state civil rights laws. Clients can be liable if their internal employees subject temporary workers to unlawful harassment, such as a hostile work environment or quid pro quo sexual harassment.

Similarly, the EEOC has issued guidelines confirming that staffing firms and clients generally have joint employer obligations under the Americans with Disabilities Act. Both are obligated to provide a reasonable accommodation needed on the job, absent undue hardship.

Temps Are People Too!

Once again, there are many excellent reasons to use a staffing agency, but using temps and thinking that a temporary employee is less protected or less deserving of a safe, fair, dignified, respectful work environment than your full-time employees is so yesterday!

Temps are people too! Yes, Mr. HR, you do get to make the determination of who will work as a temp for Acme, Inc. I am glad you acknowledge that because with that comes all of the liability for mismanagement! **ne**



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