PUBLICATION

Independent Contractor? Don't Let the Name Fool You

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Flexibility, cost savings, expertise…using independent contractors may be perfect for your business for all these reasons, but beware of the minefields. Title VII and other federal discrimination laws may not protect independent contractors, but that doesn't mean that your company won't be held responsible when allegations of discrimination—either by or against an independent contractor—arise.

First, don't make the mistake of assuming that your temporary workers are necessarily independent contractors. You may not hire them, and they may not be on your payroll, but that does not mean they aren't your employees. Courts look at a number of factors to determine if a temporary worker is actually an employee—including the skill the job requires; who provides the tools and equipment; where the work occurs; the duration of the relationship; and whether the worker provides services to others—but the key factor is the extent of control over the worker's schedule and manner of work.

With careful thought, employers can structure their relationship with temporary workers to make it more likely that the workers qualify as independent contractors. Just remember, however, the EEOC's long-time enforcement position is that for federal discrimination purposes, workers from a staffing agency qualify as a company's employees "in the great majority of circumstances."

Second, even if your worker truly is an independent contractor, your company may still have exposure under the discrimination statutes, either for what an independent contractor does, or for what he claims someone else does to him. Two recent cases illustrate the risks on both sides of the equation.

In one, *Halpert v. Manhattan Apartments, Inc*. (decided September 10, 2009), the Second Circuit looked at the issue of whether an employer may be held liable for its independent contractor's discriminatory bias against an applicant.

The applicant in *Halpert* alleged that he interviewed for a position with MAI showing rental apartments to potential customers, and was told by his interviewer that he was "too old" for the job. The applicant then filed suit under the Age Discrimination in Employment Act. MAI moved for summary judgment, arguing that the person who interviewed the applicant was an independent contractor, and that MAI thus could not be held liable for his actions.

The district court granted MAI's motion, relying on a case in which the Second Circuit had held that the ADEA does not cover claims brought by independent contractors.

The Second Circuit reversed, emphasizing that the issue instead was whether an employer "can potentially be held liable for discrimination by an independent contractor…who acts for the employer." The answer to this question, said the court, is "yes."

The relevant inquiry in this particular case was whether the interviewer was actually authorized to make hiring decisions on behalf of the company or whether the company had created apparently authority in the interviewer through its words or conduct. Because issues of material fact existed as to this issue, summary

judgment was not appropriate. *Halpert* thus joins the multiple cases recognizing that employers can be liable for discrimination and harassment by their independent contractors during all stages of employment.

In *Brown v. J. Kaz, Inc.* (decided September 11, 2009), the Third Circuit addressed the issue from the other side. In *Brown*, the plaintiff, who was black, was chosen to participate in a training program conducted by Craftmatic. She completed three days of training, and on the final day signed an independent contractor agreement to do sales work for Craftmatic. Later that day, the plaintiff entered into a heated exchange with Craftmatic's recruiting manager. According to the court, "for reasons that are unclear," the plaintiff refused to shake the recruiting manager's hand. The parties disputed what happened next, but according to the plaintiff, the recruiting manager directed several racial slurs at her.

The recruiting manager then told Craftmatic's owner that he did not want the plaintiff to be a sales representative for the company. Afterwards, the owner decided that Craftmatic would not use the plaintiff as a sales representative and released her from her agreement.

The plaintiff sued, alleging race discrimination under Title VII, the Pennsylvania Human Rights Act, and Section 1981. The district court granted Craftmatic summary judgment on the Title VII and PHRA claims, reasoning that the plaintiff was an independent contractor and thus outside the protection of those laws. The Third Circuit agreed.

The district court also considered whether an independent contractor can maintain a discrimination claim under Section 1981, which protects individuals from racial discrimination in connection with making and enforcing contracts. The district court determined that Section 1981 does protect independent contractors, and the Third Circuit again agreed.

The Third Circuit reasoned that Section 1981 provides that "all persons" have the same right to make and enforce contracts as do white citizens. Thus, its scope is not limited to employers, but covers anyone who enters into a contract, including independent contractors.

Halpert and Brown serve as reminders that an independent contractor relationship—and its repercussions—may not be as straightforward as it appears. Baker Donelson can assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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