Legal Matters®
Employment Law
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Contractors, temps may have more rights

Businesses often go to great lengths to avoid treating certain workers as "employees." After all, employees are typically entitled to benefits, minimum wage and overtime, workers' compensation, and unemployment insurance. They can sue for discrimination or other misdeeds. And they can unionize.

Increasingly, though, the federal government and the courts are saying that more workers should be considered "employees," whether employers like it or not.

For instance, the U.S. Department of Labor recently issued a new policy guidance warning that large numbers of workers who are treated as independent contractors or consultants are actually employees. The guidance makes clear that workers can't legally be treated as contractors unless they are truly in business for themselves and are not dependent on the employer.

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David Weil, who runs the Department's Wage and Hour Division, stated that guidance is "fair notice that we intend to use the enforcement tools." He said the Department is coordinating with the IRS to identify and investigate companies suspected of misclassifying workers. And in its most recent budget request, the Department asked to hire 300 new full-time enforcement officers and staff.

In the past, it's generally been assumed that companies don't have to treat workers as employees if they bring them on board via a temp or staffing agency – as long as the agency pays them. In that case, the agency is the real employer.

But that may be changing. For instance, in a recent case, a woman named Brenda Butler signed up with a temp agency in South Carolina. She was assigned to work at an automotive factory, where her supervisor allegedly sexually harassed her.

Brenda complained to both the temp agency and her supervisor's boss, but neither acted to stop the harassment. In fact, the supervisor's boss allegedly told the temp agency that the company didn't need her

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EMPLOYMENT LAW BRIEFS

Employee can't be fired for gossip about possible layoff

LaDonna George drove a route for a vending machine company. She requested several days off the week after her father's funeral. When the company denied her request, she became emotional, scrawled a note to the employer and left.

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When she returned the following week, she mentioned to a fellow driver, Steve Boros, that she had seen an online job posting for a route driver. She wondered aloud to Steve whether their employer had placed the ad because it was about to fire one of its drivers.

Steve, believing *he* was about to be fired, approached the employer about it. The employer responded by firing LaDonna, for (among other things) spreading gossip and suggesting to other workers they were about to be fired.

Was this okay?

No, according to the National Labor Relations Board, which said LaDonna's firing violated federal law.

Federal labor law says that employees have a right to communicate with each other about working conditions, and for "mutual aid and protection." This is true regardless of whether they belong to a union.

According to the Board, talking with a co-worker about job security (including worrying about being fired) comes under this law, just like talking about wages, safety issues, or other workplace conditions. Therefore, what LaDonna did was protected, and she couldn't be fired for it.

Company gets in trouble for confusing timekeeping system

Donna Vitali, a bookkeeper at a property management firm, was supposed to get a paid hour-long lunch break every day. In reality, though, she frequently felt pressure to work through her lunch break.

While Donna's work during lunch breaks didn't automatically qualify as overtime, it counted toward the 40-hour threshold above which hourly employees have to be paid time and a half. So it mattered whether her work during the lunch breaks was tracked.

In this case, the company had an electronic timekeeping system. However, it was apparently very confusing, and had no clear way to capture time spent by employees working during a paid lunch break. Donna's attempts to resolve the issue with the payroll department went nowhere.

Finally, Donna sued under the state's wage law for unpaid overtime.

A judge initially threw the suit out, saying the company didn't know about the overtime because it wasn't reported.

But on appeal, the Massachusetts Appeals Court sided with Donna. It said that the company's instructions on how to report hours worked during lunch were "contradictory, confusing and incomplete." Further, Donna's (and other workers') complaints that they were having trouble reporting such hours should have put the company on notice that many employees were working through lunch.

In general, it's an employer's obligation to monitor the workplace, and employers can't simply turn a blind eye to off-the-clock work or make it unduly difficult to report.

Harassment must be probed even if company is skeptical

A company has a legal obligation to investigate all claims of harassment fairly and objectively – even if the company is initially skeptical and thinks the claim is bogus.

That's the upshot of a recent case involving a Massachusetts hospital.

Michael Saxe was a security guard who claimed he was sexually harassed at work by a female co-worker after he declined to get involved with her. He complained to his boss, and the hospital's HR director conducted an investigation.

But according to Saxe, the hospital simply wouldn't believe that a man could be a victim of sexual harassment. As a result, he claimed, the hospital conducted a biased investigation, refusing to interview witnesses Saxe had suggested or to read the text messages and Facebook posts the female co-worker had allegedly sent to Saxe and his mother.

When Saxe chose not to ask for an extension of the court order he had obtained against the co-worker, the HR director allegedly commented that this was "good news," because "it blows up his whole case."

Saxe was eventually fired. He sued, claiming the firing was illegal because it was in retaliation for bringing the harassment complaint.

A jury awarded Saxe $57,000 for his back pay and emotional distress, and an extra $200,000 to punish the hospital for its conduct. A judge upheld the award, saying the hospital's behavior had been "outrageous."

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anymore.

Brenda sued the company for the harassment, and the company argued that it couldn't be sued because it wasn't her employer.

But a federal appeals court sided with Brenda. It said that in this case, Brenda might have had two employers – the temp agency *and* the automotive company.

Specifically, the court noted that Brenda did the same work as some of the automotive company's regular employees, she was overseen by one of the company's regular supervisors, and the company had the ability to "fire" her by telling the agency not to let her return.

Therefore, even though Brenda was a temp, she could sue.

In another case, Browning-Ferris Industries of California hired a staffing agency called Leadpoint Business Services to provide workers to sort materials at a recycling plant. The Teamsters union wanted to represent the 240 workers at the facility, and Browning-Ferris objected that many of the workers were actually employed by Leadpoint.

The issue went to the National Labor Relations Board, which ruled that Browning-Ferris was a "joint employer" along with Leadpoint – which meant the union could go ahead.

The staffing contract required Leadpoint to hire the employees, discipline them, evaluate them, determine their pay, schedule them and provide job training. Leadpoint also employed an on-site manager and several shift supervisors to oversee its employees at the facility.

Nevertheless, the Board said that Browning-Ferris could be an employer if it had the right to control some of the terms and conditions of the workers' employment. For instance, Browning-Ferris could issue rules for drug tests, shift schedules, and safety and training.

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Importantly, it wasn't even necessary that Browning-Ferris actually control these things – it was enough that it had the *right* to control them.

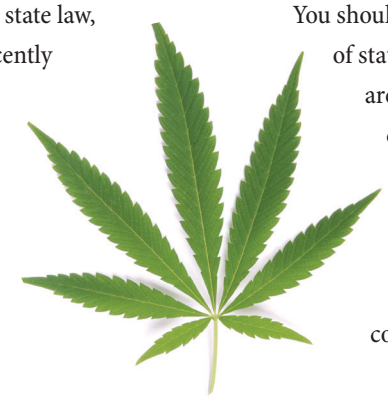
The decision could make it easier for unions to organize many franchise operations, such as fast-food outlets, and other businesses.

The bottom line is that if you work or employ workers through a contractor, staffing, temp or franchise arrangement, you might want to have your contracts reviewed to understand your rights and obligations.

Worker can be fired for medical marijuana use

A Colorado company could fire an employee who tested positive for marijuana use even though he used the drug for medical purposes, and even though marijuana is legal under state law, the Colorado Supreme Court recently decided.

The employee sued under Colorado's "lifestyle law," which prohibits businesses from disciplining employees for lawful activities done on their own time.



But the court said that because marijuana use is still illegal under *federal* law, the "lifestyle law" didn't apply.

You should be aware, though, that a number of states that allow medical marijuana are now revising their laws to ban companies from firing workers who test positive for the drug – so long as the workers don't smoke it, possess it or display its effects in the workplace. So the issue can still be complicated in some cases.

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Are commissioned employees entitled to overtime?

The C&C Salon company recently agreed to pay $800,000 to a group of hairstylists in New York, New Jersey and Connecticut who claimed they had been denied overtime pay. The salon company had originally argued that the stylists were commissioned salespeople and therefore were not entitled to overtime, but a federal judge approved the settlement and said it was fair.

The case is not at all unusual – many businesses believe that commissioned salespeople are not entitled to overtime. And in fact, the rules can be a little hard to follow.

So, when exactly can a salesperson collect both a commission and overtime pay?

Under the federal Fair Labor Standards Act, employers have to pay overtime even to employees who are on commission, *unless* one of the following exceptions applies:

► The employee qualifies as an executive, administrator or professional. In the case of a commissioned salesperson, this usually means that the employee must supervise at least two other employees, and must earn at least $455 per week (although this number is slated to increase dramatically fairly soon).

► The employee's main duty is selling goods or services and he or she spends the majority of the time on the road, away from the employer's place of business. This exception would not cover the typical "inside" salesperson, who has an office at the company's main location and is expected to meet with customers there.

► The employee sells retail goods or services, the majority of his or her income comes from commissions, and the employee's typical compensation is at least one-and-a-half times the applicable minimum wage for weeks in which overtime is worked.

As you can imagine, most hairstylists don't supervise multiple employees and don't spend most of their time on the road. So they have to be paid overtime, unless their compensation already exceeds one-and-a-half times the minimum wage.

Those are the federal rules. Many states have their own, even stricter rules, and an employer has to comply with both. If you have any questions, we'd be happy to advise you.

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