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KD Employment Law Alert: New Joint Liability Standard for Employers under Title VII Has Businesses in a Panic

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Overview

Whether "temporary employees" supplied by a staffing agency to employers can hold both entities jointly liable for violations of federal and state statutes has long been a contentious issue. A recent decision by the U.S. Third Circuit Court of Appeals could have dramatic consequences for employers who rely on staffing agencies to provide them with temporary employees. In Faush v. Tuesday Morning, Inc., 2015 WL 7273268 (3d Cir. Nov. 18, 2015), the Third Circuit held that staffing agencies and their client businesses could be considered joint employers for purposes of establishing liability under Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and the Pennsylvania Human Relations Act ("PHRA").

Facts

Faush was employed by Labor Ready ("Labor Ready"), a staffing firm, and temporarily assigned to Tuesday Morning ("Tuesday Morning"), a retail store client, for ten days. Faush alleges that he and other African American temporary workers were terminated by Tuesday Morning, prompting his filing suit for unspecified race discrimination against Tuesday Morning under Title VII and the PHRA. The U.S. District Court for the Eastern District of PA found against Faush, holding that Labor Ready was the sole employer.

The Third Circuit's Reversal

On appeal the Third Circuit reexamined the same factors established in Nationwide Mut. Ins. Co. v. Darden 503 U.S. 318 (U.S. 1992) ("Darden"), as the lower court did to determine whether an employment relationship existed, including: the method of payment, the role in hiring, the provision of employee benefits, the extent of discretion over when and how long to work and the right to control the manner and means of the work. In an interesting turn of events the Court found in Faush's favor, holding that Tuesday Morning and Labor Ready were joint employers for the purposes of establishing liability under Title VII and the PHRA.

The Court went beyond its traditional Darden analysis factors to determine which of the two entities should be considered the employer for purposes of establishing liability. To that end, the Court sought to "draw a line between independent contractors and employees." Analyzing the facts under that lens, the Court found that Tuesday Morning treated Faush and other temporary workers more like employees than independent contractors.

What Should Employers Do?

While the Court acknowledged that its decision could affect the potential liability of a large number of businesses using staffing agencies, it reasoned that Title VII already applies to businesses with more than fifteen employees. The employee threshold for most analogous state discrimination laws is even lower.

As a result, businesses should be acutely aware that treating temporary employees in a similar manner to regular full or part-time employees potentially creates joint liability with the staffing agency for violations of state and federal law. To this end, staffing

agreements should clearly define temporary workers as independent contractors. Businesses should also treat temporary workers as independent contractors by giving them independence in supervision and daily tasks to complete particular projects. In addition, employers may want to consider drafting a separate agreement with independent contractors, stating that the staffing agency is their employer and they have no expectation of employment beyond the time for which the employer contracted.