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Recently Hired Former Temps and the FMLA

By Jerilyn Jacobs

Many businesses take advantage of temporary staffing agencies to meet workforce needs. An agency does the initial vetting and verifies eligibility for employment, and the arrangement is designed so that companies can easily disengage the services of those workers who do not make the grade. Some arrangements allow the business to make an offer of employment to a temporary worker, oftentimes after a period of time stipulated by contract with the staffing agency.

But what about the situation where the former temporary employee, shortly after being hired - and well within a year after the initial hire date - comes to the employer to request extended leave for medical reasons. Can this employee qualify for leave under the FMLA despite the fact he or she has only been an employee for a few months?

As most employers are aware, the federal Family and Medical Leave Act ("FMLA") entitles "eligible" employees to certain leave. In order to qualify for FMLA leave, an employee must have been employed for at least 12 months by the employer and have worked for at least 1,250 hours in the 12 months preceding the leave request. But what about newer employees who previously had been placed with the employer by a temporary staffing agency? Can these employees aggregate the time spent on the temporary job assignment and the subsequent employment by the now-employer to meet the FMLA's coverage requirements?

Several federal courts around the nation have faced this very issue, and most have found that the employee in that scenario is an eligible employee for purposes of the FMLA. In one of the more recent instances, *Miller v. Nordam Group, Inc.*, the United States District Court for the Northern District of Oklahoma held that a joint-employer relationship existed between the temporary staffing agency and the employer that subsequently hired the former temporary employee.

The plaintiff in that case, Sharon Miller, was hired by a temporary staffing agency, Aerotek Aviation, on October 6, 2010, and placed at the Nordam Group, Inc. Three months later, Nordam ended its relationship with Aerotek and engaged the services of another temporary staffing agency. Ms. Miller made a seamless transition from Aerotek to the second staffing agency, and her assignment at Nordam continued without interruption.

In July 2011, nine months after the beginning of her initial assignment, Nordam hired Ms. Miller as a permanent employee. Barely three months later, on October 20, 2011, Ms. Miller requested a 30-day leave of absence due to the death of her father. Nordam instructed Ms. Miller to return to work within 11 days, but Ms. Miller did not return to work on the date designated by the employer. Nordam classified her as a voluntarily resignation and separated her employment.

Ms. Miller filed an FMLA interference claim, alleging Nordam was a joint employer with her former temporary staffing agencies and arguing her combined time as a temporary worker and a Nordam employee qualified her for FMLA leave. She then moved for partial summary judgment on the issue of whether Nordam was, as a matter of law, her joint employer along with her staffing agencies.

The court agreed with Ms. Miller. The court noted that although the FMLA itself does not contain any language specifically addressing the joint-employment concept, Congress authorized the U.S. Department of Labor ("DOL") to promulgate rules for the enforcement and application of the FMLA. One of those regulations, 29 CFR § 825.106, discusses the joint-employment concept and provides that the following factors are considered when determining if a joint employer relationship exists:

- Whether there is an arrangement between the employers to share an employee's services or to interchange employees;
- Whether one employer acts directly or indirectly in the interest of the other employer in relation to the employee; and
- Whether the employers are not completely disassociated with respect to the employee's employment because one employer controls, is controlled by, or is under common

control with the other employer.

Most importantly, the regulation expressly states: "For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer."

The *Nordam* court noted that this was not a bright-line rule and that it would take into consideration the totality of the circumstances. Indeed, 29 CFR § 825.106 itself states that a joint-employment relationship is not to be determined by any single factor and that the entire relationship should be viewed in its totality. Nevertheless, the *Nordam* court found no reason to deviate from the "normal rule" that a temporary staffing agency and the employer at which a worker is placed are joint employers because Nordam did not present facts or evidence that would suggest that its particular situation fell outside of this normal rule. Nordam did not dispute that it had directed Ms. Miller's work, set her hours, evaluated her work, and had the power to terminate her at any time, while the temporary staffing agencies issued her paychecks and otherwise controlled her employment.

Further, the fact that Aerotek and Nordam's written employment agreement expressly identified Ms. Miller as an employee of Aerotek during the period of her temporary assignment and prior to being hiring by Nordam did not persuade the court to find otherwise, as it noted that "[c]ontractual language is generally not controlling as to the issue of joint employment."

District courts in Illinois, Iowa, New York, Oregon, along with the Sixth Circuit (covering Michigan, Ohio, Kentucky, and Tennessee) have made similar rulings. While the courts, along with the regulations, suggest there is a way businesses can utilize temporary workers without creating a joint-employer relationships, businesses should be mindful of courts' rulings on this issue. These cases also serve as a reminder that just because a worker is - or was - from a temporary staffing agency, an employer's legal obligations under employment laws can still apply. Further, issues can become more complicated when a worker transitions from a temporary agency to an employee status.

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