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Better Watch Out: How To Avoid Holiday Hiring Pitfalls

By **Braden Campbell**

Law360, New York (November 9, 2017, 3:58 PM EST) -- For retailers and other employers that need to add workers to handle a seasonal surge in business, the most wonderful time of the year can seem like a nightmare.

Each year, thousands of employers struggle to meet the increased demands of the holiday season. These demands are felt most strongly by retailers, who need more bodies to ring up extra shoppers and restock rapidly depleting shelves. Restaurants may also struggle as their regular staff takes time off and more people eat out.

And with unemployment at a lower rate entering this holiday season than it's been in more than a decade, employers looking for temporary help may feel the crunch more than usual this year.

"There are hundreds of thousands in our holiday season in the U.S. that are hired ... in retail and retail support businesses," Morgan Lewis & Bockius LLP employment partner Carrie Gonell told Law360. "They're having a hard time, already, locating those folks."

One option for businesses facing seasonal challenges is to spread extra hours among existing workers. But this solution to potential recruiting challenges can be costly, as regular employees may rack up a lot of overtime hours between November and December, and some employers may just not have enough workers to meet demand.

An employer can solve some of these problems by hiring a staffing company that specializes in their area of need. But this opens its own can of worms, attorneys say, and there are a few things businesses should keep in mind if they take this route.

Staffing companies introduce a host of potential legal and compliance issues, and an employer's best bet for preventing issues and staving them off if they arise is a strong contract.

Businesses that tap a staffing company will want to keep an especially close eye on these workers, though this can be a double-edged sword, said Epstein Becker Green hospitality team leader Jeffrey Ruzal.

"It supports a theory of joint employment when you have your own supervisors supervising a third-party employee," Ruzal said. "But without that supervision, you're definitely at risk for potential wage-and-hour compliance issues, which would cause problems for the employer down the line."

"You want you have a very ironclad agreement with the vendor that allows there to be representations and warranties that provide for full compliance with wage-and-hour laws," he added.

A good contract includes provisions ensuring workers do not perform off-the-clock work, that their hours are being properly recorded and that non-overtime exempt workers are paid correctly for every extra hour worked. Employers will also want to make sure that their staffing company agrees to indemnify them in the event of a suit, and that the company has the cash to ensure this agreement is worth more than the paper it's printed on.

Vetting a staffing company and drafting a strong contract require time, which few employers have with the holidays already here. For this reason, if an employer doesn't have a relationship with a staffing company before hiring season approaches, it may be best to wait until next year.

"You need to make sure that, way before the season is upon you, you're already screening that hiring company and you're comfortable with their practices, because they'll ultimately become your practices," said McDonald Carano LLP labor and employment practice group chair Pat Lundvall.

Another headache for employers, especially during the holiday crunch, is training novice workers who will only be with the company a short time. But whether temporary workers are hired off the street or through a staffing agency, lawyers say, it is crucial that they receive the same training and treatment under the law as regular employees.

Just as it does for year-round workers, the Fair Labor Standards Act requires that seasonal workers be paid minimum wage and overtime.

And Title VII of the Civil Rights Act, which bars workplace discrimination on the basis of age, sex and other characteristics, also applies with equal force to temporary workers. Businesses should ensure their management staff knows to treat temporary workers just as they would any employee.

"Sometimes, there's a little bit of the mindset ... these employees are only going to be with them for a short period of time, so they can use and abuse them," Lundvall said. "They have to treat [temporary workers] no differently than their regular workforce, and afford them all of the same protections."

Temporary employees can themselves invite claims by discriminating against co-workers, so an employer shouldn't slack on distributing its anti-harassment policy just because workers will only be there a short time.

Employers that take on a lot of seasonal workers can streamline the process and mitigate their legal risks by drafting and distributing to temporary employees an "onboarding plan" that explains timekeeping practices and policies on harassment and discrimination. Time-keeping errors are common this time of year, because employers are tracking many more employees than usual, and these workers may not be familiar with the employer's timekeeping system.

"You really do have an increased likelihood for a lot of people to make errors in your timekeeping system, because they don't know how to use it properly, or to violate company policy because they're less familiar than the regular workforce," Gonell said. "Those are things you can address in onboarding plans."

And, attorneys say, the many employers that turn to workers under 18 to fill their holiday needs

should be cognizant of state and local rules for employing younger workers.

--Editing by Rebecca Flanagan and Aaron Pelc.

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