



Jerome D. Pinn.....

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HIRING WITH TEMP AGENCIES AND STAFFING FIRMS? – GUIDELINES AND CHALLENGES FOR REASONABLE ACCOMMODATION UNDER THE ADA

Many employers using temporary workers from temporary staffing agencies assume that, if a temporary worker has some physical or mental limitations or is unable to work for a period of time due to a health problem, they can safely end the worker's assignment and ask the staffing agency to place another worker. Such an assumption could prove costly. Although the Family and Medical Leave Act of 1993 is unlikely to apply in such situations, because its job

protections do not commence until a worker has been employed for at least 12 months, the Americans with Disabilities Act (ADA) does apply in such situations. The ADA requires reasonable accommodations to be made when needed by a qualified worker who has a disability. Both temporary agencies and the employers that use them are covered by the ADA, provided that they have at least 15 employees.

is significant difficulty or expense in providing a specific accommodation. The ADA also prohibits employers from denying employment opportunities to qualified employees with disabilities because of the need to provide a reasonable accommodation.

Where a staffing firm and its client are joint employers of a temporary worker with a disability, both are legally obligated to provide a reasonable accommodation that the worker needs to perform the job, if one exists, absent undue hardship. If it is not clear what accommodation should be provided, both entities should engage in an informal interactive process with the worker to clarify what s/he needs and to identify the appropriate reasonable accommodation.

Some temporary assignments, as opposed to "temp-to-hire" assignments, may be of a short-term nature. Some temporary jobs become available on short notice and last for only a brief period of time, during which certain tasks must be completed. In such cases, a staffing firm or client can establish undue hardship by showing that the work assignment had to be filled on short notice and that the accommodation could not be provided quickly enough to enable the staffing firm worker to timely begin or complete a temporary work assignment.

In "temp-to-hire" scenarios, the undue hardship defense is less likely to be available to either the staffing firm or its client when a temporary employee reports a need for reasonable accommodation. For example, if a temporary worker is typically hired as a regular employee of the client at the 180-day mark, if a temporary indicates approximately 180 days into an assignment that he will need back surgery and an 8-week leave of absence, it may not be safe for the employer to simply end the worker's assignment. It may be necessary to provide the worker the leave of absence. In another example, if a temporary employee who has been assigned "regular" type of work (rather than work of a purely short-term nature) has a

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DRUG TESTING POLICIES, PROCEDURES AND ISSUES

– ARE YOU TESTING FOR ILLEGAL OPIOIDS?



Mary Celeste Moffatt.....

“[I]t is now more important than ever before for employers to have effective and up-to-date policies and procedures in place which address this costly problem.”

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Tennessee Drug-Free Workplace Act

Tennessee employers may elect to become a certified drug-free workplace under the Tennessee Drug-Free Workplace Act, Tenn. Code Ann. §50-9-101 et seq. (“the Act”). An employer begins implementation by developing a written policy pursuant to specific requirements of the Act, including requisite notices and training and procedural requirements as outlined in the Act and the applicable Rules of the Tennessee Department of Labor (“the Rules”). As an incentive, once certified, employers receive certain benefits, such as a 5 percent premium discount on workers’ compensation insurance. Implementation and certification resources are available through the Tennessee Bureau of Workers’ Compensation at <https://www.tn.gov/workforce/injuries-at-work/employers/employers/drug-free-workplace-program.html>.

Employees must be given 60 days’ notice before an employer can begin testing under a newly implemented policy, and the Company policy must be posted in a conspicuous location and distributed to individual employees. The Act requires at least one hour of employee training for all employees within 60 calendar days of program implementation or within 60 days of hire. Supervisors must receive an additional two hours of training. The Rules provide suggestions for training topics, such as general information about addiction and

recognition and documentation of signs of substance abuse. The training does not have to be repeated each year, but must be provided to every employee at least once; each year thereafter the employer must obtain in writing from each employee (and supervisors) acknowledgment of the Company’s drug-free policy. However, we recommend employers include drug policy training for supervisors as part of annual training.

Employers must utilize a certified lab and a Medical Review Officer (MRO), who is a licensed physician with knowledge of substance abuse disorders, laboratory testing procedures, including chain of custody requirements, and who verifies positive test results.

The current Rules require testing for the following drugs:

- *Alcohol-Not required for job applicant testing
- *Amphetamines
- *Marijuana (cannabinoids)
- *Cocaine
- *Opiates
- *Phencyclidine
- *6-Acetylmorphine (heroin)
- *MDMA (ecstasy)

However, the Act itself defines the term “drug” as “any controlled substance subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation. A covered employer shall test an individual for all such drugs in accordance with this chapter.” Thus, although the current Tennessee Rules still only refer to “opiates” on the required panel of drugs to be tested, with the 2017 DOT Final Rule, employers should strongly consider updating their written Drug Testing Policy to include “opioids” which is different than the term “opiates.” *Opioids* include synthetics, such as fentanyl and oxycodone; examples of *opiates* include morphine and codeine, which are considered natural rather than synthetic.

Of course, testing must be conducted in accordance with other applicable employment laws, such as the Americans with Disabilities Act. Where an employee’s drug use is confirmed by the MRO to be legally prescribed, employers must be careful not to treat these results the same as illegal use of drugs. Employers must maintain drug and alcohol testing results and related information as confidential, except as required or permitted by law. Release of such information under any other circumstances may only be

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done pursuant to a written authorization from the employee or applicant.

The Act requires the following types of drug tests: job applicant (post conditional offer); reasonable suspicion; routine fitness for duty (with certain limitations for public employers); follow up drug or alcohol (post EAP); and post-accident. An employer is not prohibited from any other drug or alcohol testing of employees which is otherwise permitted by law, but employees should be provided adequate notice of such testing. Random testing is neither required nor prohibited under the Act, but if implemented, such testing should be truly random. The Rules provide that for public employees, any testing under the Act is “limited to the extent permitted by the Tennessee and Federal Constitutions” and certainly public employers are advised to consult with counsel prior to implementing random testing in the workplace.

Policy Requirements

The written policy under the Act must contain several specific provisions, such as a statement identifying the types of drug and/or alcohol testing required, the actions that may be taken on the basis of a positive screen, and a list of all classes of drugs, including alcohol, for which the employer will test, described by brand name or common names, as well as by chemical name. In addition, employers must create and maintain documentation to support a reasonable suspicion-based test for at least one (1) year.

Post-Accident Testing

In a final rule published in 2016, the Occupational Safety and Health Administration (OSHA) amended 29 C.F.R. 1904.35 to address OSHA’s concerns regarding retaliation against employees for reporting workplace injuries. The final rule initially appeared to place serious limits on post-accident testing absent some evidence of drugs/alcohol as a factor. OSHA later clarified that the final rule does not prohibit employers from post-accident testing, so long as there is an objectively reasonable basis for testing and further stated that testing pursuant to state

or federal law, such as a workers’ compensation law, does not violate the OSHA rule, which is another incentive for becoming a certified Drug Free Workplace under the Act. However, employers may want to exercise caution before requiring automatic drug testing in response to injuries such as a bee sting, or a repetitive strain injury, where drugs were not likely to be involved.

Federal Law and Other State Laws

Other state statutes and regulations may have unique requirements which should be considered by employers operating outside Tennessee, such as for example, laws pertaining to the employee use of medical marijuana. In addition, federal employers and contractors must consider applicability of laws such as the Federal Drug-Free Workplace Act of 1988 (FDFWA), which requires that covered federal government agencies and contractors, as well as federal grant recipients, comply with this law. The FDFWA requires employers to implement good-faith efforts to maintain a drug-free workplace, including publication of a policy statement prohibiting the unlawful use, possession, manufacture, or distribution of controlled substances in the workplace.

U.S. Departments of Defense (DOD) and Transportation have detailed rules and regulations regarding implementation of drug-free workplaces. Employers subject to these regulations must have written policies in place that fully explain their drug testing programs. A full discussion of the FDFWA, DOD and DOT procedures is beyond the scope of this article but the attorneys at Wimberly Lawson would be glad to discuss these programs with you.

Conclusion

The risks and costs of substance abuse in the workplace are too great to ignore. Likewise, there are risks associated with drug testing, and employers implementing such a policy should seek counsel to ensure compliance with all applicable laws and regulations.



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heart attack or stroke, it would not be legally safe for either employer to simply end the assignment. Rather, a leave of absence of reasonable length might be required to comply with the ADA.

That is not to say that every temporary employee who needs time off to deal with a medical issue is entitled to take a leave of absence. There will be situations in which the client employer may be able to ask a temporary agency to end a worker’s assignment if he/she will not be able to maintain regular and predictable attendance while on a temporary assignment expected to be of limited duration.

In a recent case, *Punt v. Kelly Services* (10th Cir. 2017), a temporary employee (Kristin Punt) employed by Kelly Services and assigned to work at GE Controls Solutions, filed suit under the ADA after Kelly ended her temporary assignment at GE when she missed numerous shifts after receiving a cancer diagnosis. Kelly had assigned Punt to GE as a temporary receptionist for approximately two and a half months. According to GE, the essential functions of the receptionist job included being physically present at the reception desk during business hours in order to greet and direct all visitors. During the time of her assignment as a receptionist at GE, Punt never worked a full 40-hour work week. She was absent on six occasions, late to work on three occasions and left work early on three occasions. In her absence, Kelly had to have another temporary employee take over the receptionist duties as well as her own responsibilities. Punt attributed her absences to her recent breast cancer diagnosis.

When Punt informed both employers that she would not be able to come to work for a week and possibly longer due to her medical issues and potential surgery, GE asked Kelly to end Punt’s assignment, because she was not fulfilling the needs of the position. Kelly informed Punt of this decision, but Punt never asked Kelly if the agency could assign her to work with another employer. The court found that Punt’s request for accommodation in the form of at least a full week off was not reasonable because

she was essentially asking to be relieved from an essential function of the receptionist position, being at work. Punt had also violated Kelly’s policy by not contacting Kelly to inform it that she was available for other assignments.

The court explained that a reasonable accommodation is one that “presently, or in the near future,” will enable the employee to perform the essential functions of the job. An employee must inform the employer of the expected duration of the impairment, which Punt did not do. She essentially requested an ongoing leave of absence of unknown duration, which the court found was not reasonable under the facts regarding her assignment. In addition to the vague nature of Punt’s request for leave, the court focused on her unique role as a temporary receptionist. The court noted that the ability to report to work is especially critical for short-term assignment temporary employees. The court found that Punt’s request would have meant either letting the receptionist job sit vacant, or filling it with a “super-temporary employee” who would sporadically fill in. The court held that the ADA did not require such burdensome arrangements.

The *Punt/Kelly* case does call into question whether a leave of absence is reasonable for a temporary employee, especially when an assignment was expected to be short-term and there was no one else readily available to fill in when the employee was absent. As can be seen, each situation involving a temporary employee who needs an accommodation to do a temporary job must be evaluated case-by-case. Variables affecting the outcome of what may be required under the ADA include the nature of the temporary assignment, its expected length, the number of individuals in such positions, reasonable accommodation(s) that may be available (identified through the interactive process and/or requested by the employee), and its impact on the client employers’ operations. Because the issues can be complex, it may be advisable to consult with legal counsel in such situations.

A WORD TO THE WISE:



Many claims employers face are *insured*. These can include workers’ compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. **When a claim is filed**, ask for us. We are on many panels. **When you renew your coverage**, specify in the policy that you can use our Firm. Many insurers are open to this. **When you are considering new coverage**, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.