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EXCLUSION OF TEMPORARY EMPLOYEES FROM COMPANY BENEFITS PLANS

Kimberly J. Korando
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
Raleigh, North Carolina
919.821.6671
kkorando@smithlaw.com

There are a variety of steps employers can take to defend against claims for retroactive benefits by temporary employees. These measures generally fall into one of two broad categories: (1) steps to bolster the employer's temporary employer classification in the hiring process and general personnel policies, and (2) steps to amend plan documents and related employee communications (SPDs, benefit summary materials, etc.) to make plans more impervious to such claims, even if temporary employees are later reclassified as "regular employees." In the wake of the Microsoft litigation, many employers have adopted a combination of these measures to help guard against both potential reclassification of temporary employees as well as claims by temporary employees (whether or not reclassified) seeking retroactive benefits.

I. Options for Bolstering the Temporary Employee Classification

Companies may want to take one or more of the following steps to bolster their classification of temporary employees:

- Informing temporary employees, in writing, of their status as "temporary employees" and their exclusion from the employer's benefit plans, even if they are later reclassified, as well as requiring temporary employees to execute agreements acknowledging such exclusions as part of the hiring process. (While requiring such agreements of temporary employees hired going forward would seem reasonable, consideration should be given to whether requiring current temps to sign such acknowledgements might cause such employees to question their temporary classification and/or seek retroactive benefits.)
- Adopting a "Hiatus Policy" requiring workers classified as temporary employees who have been on the job for a certain period of time (*e.g.*, 12 months) to either be hired as a regular employee or sever their employment with the company for a minimum period of time (*e.g.*, 6 months) before they can be rehired as a temporary employee. Such a policy could be made more or less restrictive by varying both the maximum length of service allowed before a break is required

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as well as the length of the break itself. Policies can also be varied by altering the method used to calculate maximum service periods. For example, an employer could calculate the maximum service period by aggregating a temporary employee's total service with the company so that temps are required to take a hiatus immediately upon attaining a total of 12 months (or other period) of service or a company could simply require a break after 12 continuous months of service. While there are no "magic," bright-line numbers for such time periods, obviously the shorter the employment period and the longer the required break the better from an employment and benefits perspective. A more conservative alternative, for example, might include simply capping the service allowed by temporary employees (e.g., a maximum of 12 months) after which time the individual must either be hired by as a regular employee or prohibited from all further temporary employment. As a general rule, we would advise against adopting a formal Hiatus Policy that allows more than 12 continuous months of employment without a break.

- Requiring express approval and/or reevaluation of a temporary employee's employment with the Company in order for the employee to stay on the job longer than a set period of time (e.g., 6 months) even if the hiatus policy would allow for longer service without requiring a break. (This would simply provide Company another opportunity to review and emphasize the temporary classification of such employees.)
- Establishing a more traditional "pass through" arrangement in which all payroll and other administrative duties related to temporary employees is handled by a staffing firm, employee leasing firm or similar temp agency (While such a measure would add another layer between the employee and the company's benefit plans, if the company exercises the requisite control over the temporary employees such that the employees are still considered common law employees of Company, it may not make a great deal of difference how the temporary employees are paid.)

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II. Making Plans More Impervious to Claims for Retroactive Benefits

As you know, companies can generally carve out or exclude temporary and other specific classes of employees from coverage under their ERISA welfare benefit plans (e.g., medical, life insurance, disability, etc.). (ERISA pension plans, however, are subject to different rules which generally prevent such service-based exclusions as discussed below.) In addition, companies wishing to exclude temporary employees should also be sure to review their plan documents to be sure such exclusions apply if temporary employees are later reclassified as regular employees by the IRS or the courts and thus potentially eligible for retroactive benefits. Such steps might include:

- Amending plans to expressly define and exclude “temporary employees,” even if later reclassified as common law employees, from the plan’s definition of eligible employees.
- Amending any plans which do not expressly provide the Plan Administrator (or Plan Sponsor) full and complete discretionary authority with respect to interpreting plan provisions and making final, binding benefit determinations, particularly eligibility and participation determinations, under the Plan.
- If the company elects to adopt a Hiatus Policy as part of its general personnel policies, reviewing and amending its welfare plans to coordinate with the Hiatus Policy or otherwise ensuring temporary employees covered by the policy are excluded from the plans. (Note, a plan’s broad exclusion of all “temporary employees as designated by the employer” or similar provisions may provide the employer more flexibility than attempting to incorporate or track the exact provisions of its Hiatus Policy.)
- Amending plans to ensure that each welfare plan is consistent in its references to, and exclusions of, “temporary employees” no matter how the company ultimately elects to define or distinguish among such employees.
- Reviewing and revising all Plan-related materials (benefit summary sheets, SPDs, employee handbook references, etc.) to be sure that all expressly and consistently provide for the exclusion of “temporary employees.”
- Amend all benefit plans (except those in which temps may not be excluded by law) and all related SPDs and Benefit Summaries to define and provide for an **express exclusion** of temporary employees.

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- Amend all Plans, SPDs and Benefit Summary Sheets, etc. to **consistently** provide for the definition and exclusion of all temporary employees as designated by the Company regardless of whether such employees are later reclassified as regular or common law employees of the Company, or similar language. Also, amend plans and SPDs as needed to be sure Company is given maximum legal discretionary authority to make eligibility determinations.
- Require all temporary employees to sign an agreement formally acknowledging their status as temporary employees and their exclusion from Company's welfare benefit plans.
- Adopt a formal "hiatus policy" requiring a break in service for temporary employees working more than a set period of time or, alternatively, prohibiting temporary employees from further temporary service with the Company after working a maximum period.
- Require temporary employees to undergo review and reevaluation of their temporary status after a certain period (e.g., 6 months) even though the Company's hiatus policy may not necessarily require a break in service.