

Calling an employee a temp doesn't make it so

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Staffing and hiring during the pandemic are especially chaotic. Many employers who do not traditionally use temporary staff seek to fill short-term gaps in their workforce or simply want employees for a short time because it is unclear what business structure will be once the pandemic business issues have shifted. Employers may seek to utilize temporary staff to avoid paying benefits and similar items, however, temporary is not always temporary in the eyes of the law.

What is a temporary employee?

Typically, a temporary employee is a person who is hired for a limited period for a specific project with a specific end date. However, many employers hire staff calling them “temporary” with an open-ended end date or in a “temp to hire” circumstance. The longer an employee remains employed the less likely the law will consider them to be temporary.

What about hiring temps through an organization or agency?

Many employers, particularly those who have extremely short term needs such as the need for temporary nurses or CNAs hired through pool staff or a fill-in during FMLA leave, are not anticipating that these temps are actually employees of the company. However, the issue of joint employment can be quite complicated. Even if you hire through a temporary staffing agency, it is possible you could also be held as the employer of that temp.

Generally, when you contract with an agency you want to be clear in that contract that they will:

- Bear the burden and expense of running background checks, (including appropriate licensure debarred provider and SING checks for healthcare employees)
- Carry the workers' compensation
- Indemnify you as the company hiring the temp for unpaid wages and other issues and concerns

However, as has been noted before, whether or not you can also be held liable for certain problems like failure to pay overtime can depend on how much control you exercise over the temp. The more control you have over the temp, the more you direct and supervise their actions, and the longer they stay with your company, the more likely they will be considered a joint employee rather than an employee of the agency from which you contracted.

What about benefits?

- Health insurance: Frequently employers hire temporary or part-time staff with the idea that they will not be required to offer health insurance. However, the Affordable Care Act (ACA) generally covers employees working at least 30

hours per week or 130 hours per month.

- Retirement and other plans: Employees who complete 1,000 hours of service in 12 months are eligible to participate in any retirement plan that is offered to other employees. If they work for 12 months, this applies to both full-time and part-time employees as well as temporary employees.
- Unemployment compensation: In general, if a person has been an employee and has worked for the employer in the last 18 months it is possible the employer could be obligated to pay benefits for unemployment compensation. To be eligible to apply for unemployment compensation the employee must:
 - “Be totally or partially unemployed through no fault of his or her own”
 - Earned wages of at least \$1,660 in one quarter and at least \$830 in a different quarter
 - Have total base period wages of at least 1.2 x the wages earned in the highest base period quarter
 - Be able and available for work

What about paid time off and benefits the employer provides?

In general, in Iowa, the employer can determine how paid time off is accrued, and if an employee in a specific category such as temp or part-time is eligible for paid time off benefits. You should ensure consistency in classes of employees to avoid questions of favoritism or potential discrimination.

Federal contract employers may be required to provide paid sick leave for certain classes of employees according to Executive order 13706. Federal contractors should work with legal counsel to determine how these policies should operate.

The Big Picture

Amid extreme uncertainty, employers may turn to temporary employees, but they should pay careful attention to the circumstances in which the law’s definition of temporary will impact an employer’s obligations. Simply calling someone temporary doesn’t make them temporary when they work for an extended period.

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