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Sharing Employees with Other Institutions of Higher Education

Today's corporate workplaces include workers in nontraditional working arrangements. Companies in many industries are increasingly establishing a core group of employees in many of their business units and supplementing them with other workers under more flexible work arrangements. Higher education has not followed this business trend, but the financial pressures on our industry have invited more careful consideration of this possibility. This information memorandum reviews the legal issues that arise when two schools share one or more employees.

The issues of shared employees cause tremendous confusion and can scare many away from considering the option. Different legal phrases are used in connection with shared employment such as co-employers, leased employees, common law employees, joint employers, general and special employers and borrowed servants. The meaning of these phrases and legal consequences vary depending on the employment area in which the issue arises (e.g. workers compensation, employee benefits, discrimination, etc.) and also on the facts and circumstances of each case. But what these phrases mean originates from a common legal issue: What is the relationship of the individual providing services to the two institutions?

For purposes of explaining these legal concepts, we will use the hypothetical fact situation that University A (UA) has a Title IX Coordinator and an Assistant Title IX Coordinator (the Employees) who have some excess capacity for additional work. University B (UB) wishes to share those Employees to cover the same job functions at its school. The parties want to enter into an agreement which provides for the Employees to work certain days each month at UB under its control and supervision, and that UB will reimburse UA for the pro rata employment costs of the Employees. What are the legal issues that should be considered?

Co-Employment. Generally, the law imposes legal duties on an entity where the facts and circumstances indicate that, for public policy reasons, the entity should have a duty to the employee under one or more employment laws. In the hypothetical, the Employees will be working under the supervision of AU and BU so there will be some co-employment obligations that both schools have to the Employees. These obligations vary depending on the law developed under each of the areas of employment law discussed below.

Workers Compensation. Laws in the various states regarding coverage for workers compensation when there are shared or leased employees are the most developed. Common law in most states have applied the "borrowed servant" doctrine to find that both co-employers can be considered an employer for workers compensation purposes.

The key factors in establishing that the employee is a borrowed servant of the employer who does not have the employee on its payroll (in our hypothetical, BU) is whether BU supervises the work of the Employees and whether the assigned Employees have consented to the arrangement. As a result, the contract which leases or shares the Employees to BU should state that both institutions will maintain

workers compensation coverage for the Employees and that, if a workplace injury occurs, the claim will be submitted to the employer on whose premises the Employee was injured (or upon whose behalf the Employee was working, if off premises). If it is unclear where the injury occurred, the presumption should be that AU will cover the workers compensation claim. The Employees should sign an acknowledgement that includes a provision stating that both AU and BU will provide workers compensation coverage for them for any workplace injury on either's premises.

Employment Taxes and Immigration Law Compliance. The entity that has the employees on its payroll is responsible for paying employee wages and all employment taxes (FICA, federal and state unemployment taxes, etc.). Case law and statutes in some states make both employers liable in the event of a failure to pay the proper taxes.

In the contract between AU and BU, responsibility for payment of all taxes and withholding should belong to AU (although BU can and should be charged for a pro rata portion of employment taxes paid) and AU should indemnify BU for any claim against it for these payments and withholdings.

The same allocation of responsibility would apply to I-9 verification that employers must undertake under the Immigration Reform and Control Act to ensure that the employees are authorized to work in the United States. Since BU does not have the Employees on its payroll, the responsibility for compliance with the Act should be allocated to AU, which would indemnify BU for any claim for noncompliance.

Employee Benefits. With very limited exceptions, no law requires employers to provide retirement, health or other employee benefits to its employees. But if an employer offers retirement, health or other benefits, the issue arises as to whether a shared employee might be eligible for those benefits under both employers' benefit plans. The answer is "potentially" so both employers should take action so that the answer is clear.

In our hypothetical, the Employees would presumably be covered under AU's benefit plans since they are considered full-time employees of AU even though their services are being contracted to BU for some of their work hours. AU should review its benefit plan provisions to make sure there is nothing in them that would disqualify the Employees from eligibility. The contract between AU and BU, and the acknowledgment that the Employees sign, should state that any benefits provided will be pursuant to AU's benefit policies and that the Employees would not be eligible for benefits under any benefit plan at BU. Again, BU can pay AU for the prorated cost of such benefits. Importantly, BU should review its benefit plan provisions and amend them, as necessary, to make it clear that any shared or leased employee not on its payroll is not eligible for benefits. AU should be sure its plan adequately cover the arrangement as well.

Finally, §414(n) of the Internal Revenue Code comes into play. This provision was enacted to thwart an arrangement where an employer put most of its employees on a staffing company's payroll so that the remaining high level management team could have lush benefit plans that avoid the coverage tests under the Code designed to prevent employers from giving richer benefits to highly paid executives. Section 414(n) requires employers to treat any employees providing services to them on a long-term basis as an employee who is counted when applying the coverage tests. This means that BU will have to include the Employees in its coverage tests. To be clear, the section does not say that the leased employee has any right to benefits under the BU's benefit plans nor does it characterize BU as a co-employer or common law employer of the leased employee; it simply requires the employee to be counted under the coverage tests.

Title VII and ADA Claims. Most case law in the United States has held employers in the position of BU in our hypothetical liable for discrimination or disability claims that the employee suffered while engaged in work on its behalf. In these cases, courts conclude that there was joint employment based on the facts that (1) although wages were paid by one employer, the other employer reimbursed it for its labor costs for the employees; (2) each of the employers supervised and controlled the employees while working on its behalf; and (3) each of the employers retained control over whether the employees could or could not continue to work for it.

The contract between AU and BU should provide for indemnification for any discrimination, harassment or disability claim made by an Employee for actions that occurred while working under the supervision of the indemnifying institution.

Some consideration should be given to the directions given to the Employees regarding how they should report any workplace impropriety, including discrimination or harassment, given that there are two institutions involved. The Employee's acknowledgement should provide some guidance on this point to the Employees. It is important that an Employee report any workplace impropriety; over-reporting is not the issue, so some level of redundancy may be a good thing in this area.

FLSA. If the shared employees are hourly workers, careful attention must be paid to the Fair Labor Standards Act (FLSA) with regard to how overtime will be computed. In January 2020, the Department of Labor released a rule clarifying when "joint employment" exists for FLSA purposes. If two institutions sharing employees are considered joint employers, the hours worked at each institution must be aggregated for the purposes of computing whether overtime is due.

Factors that will indicate joint employment focus on whether the employee is doing work for both jointly, whether there is a mutuality of purpose for both employers in the work being done by the employees, and whether the employers are not "completely disassociated" in the sharing of the control over the employees.

This analysis is very fact-specific so analysis of how hours are counted for FLSA purposes must be done on a case-by-case basis.

Exempt employees entail less issues, provided the salary basis and duties tests are both satisfied.

FMLA, Paid Sick Leave and Disability Leave. The employer upon whose payroll the employees reside, as the primary employer, is responsible for giving required notices to the employees under these leave laws. The secondary employer must cooperate in accommodating the leave and restoring the job of an employee returning to the leave. It can be held liable if it interferes with an employee's exercise of Family and Medical Leave Act (FMLA) rights or if it retaliates against an employee for taking allowed leave.

The contract between the institutions should provide for appropriate adjustment in reimbursement from BU to AU in the even an Employee is out on leave and payments for sick leave or disability leave cover the employee's wages while out of work.

Labor Relations. If either of the employers are unionized and the union covers workers of the type shared, there may be responsibilities to negotiate under the collective bargaining agreement to allow for the sharing of employees.

Similarly, if an employee's rights are violated under the National Labor Relations Act by either employer, the employee has a right to file an unfair labor practice charge – and it may be filed against either or both employers. The contract's indemnity provision should include potential liability based on an unfair labor practice charge based on actions taken by the indemnifying employer.

Confidentiality. The Employees should be required to sign confidentiality undertakings agreeing not to disclose confidential information about their work to the other institution or to anyone else. The undertaking should provide that, in the event of a court-ordered requirement to disclose confidential information, the Employee should alert the school affected by the potential disclosure so that it can consider legal action to prohibit the disclosure. There is no clear judicial authority on whether actions by an Employee at one institution that are covered by a confidentiality undertaking can be deemed to be relevant in a case against the other institution involving the Employee's work. Again, this would be a facts and circumstances determination, but some compelling facts would have to exist to require the disclosure.

Policies and Procedures. The two employers should also compare policies and procedures and be clear if there are significant differences. For instance, if there are different recognized holidays, the employee acknowledgement should be clear as to which should be followed. Employees should be clearly directed to a responsible supervisor of the primary employer in the event he or she has any questions regarding policies and procedures.

There can be significant cost savings, efficiency, and business justifications to institutions in sharing employees. As overviewed in this article, there are numerous issues to be considered in sharing employees, and these can be planned for an addressed if the arrangements yield benefits for the parties.

If you have any questions about shared employees, please contact Gail Norris or the attorney at the firm with whom you are most regularly in contact.

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