Legal Update Article

Labor Department Independent Contractors Guidance Targets Home Care, Nursing, Caregiver Registries

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In its first substantive guidance on independent contractors, the Trump Administration has targeted misclassification in the healthcare industry.

The Department of Labor (DOL) issued Field Assistance Bulletin No. 2018-4 ("Determining Whether Nurse or Caregiver Registries Are Employers of the Caregiver") on July 13, 2018, to provide guidance to Wage and Hour Division (WHD) field staff on determining whether home care, nurse, or caregiver registries are employers under the Fair Labor Standards Act (FLSA).

A registry is an entity that matches people who need caregiver services with caregivers who can provide those services.

Administrator's Interpretations Withdrawn

The Obama Administration DOL issued Administrator's Interpretations (AI) on independent contractors in July 2015 and on determining joint employment in January 2016. Current Labor Secretary Alexander Acosta announced the withdrawal of these in June 2017 in a three-sentence press release. Both AIs were criticized by employers for their significant shift in longstanding wage and hour law and for creating standards without the formal notice-and-comment process. The DOL did not replace these AIs with any other guidance at the time.

Highlights

In Bulletin No. 2018-4, the DOL points out that its current position is "[c]onsistent with WHD's longstanding position" that a registry that simply matches clients and caregivers is not an employer under the FLSA. Additionally, the Bulletin reiterates the traditional "economic reality" test used by the WHD and notes that no single factor about the relationship may conclusively determine whether an employment relationship exists.

The underlying theme of the Bulletin is that registries may avoid being considered an employer by limiting the amount of control they have over the caregiver and by maintaining minimal interference with the caregiver-client relationship. To aid in interpreting what factors are to be considered, the Bulletin lists specific examples that may be relevant to the analysis.

Factors to be considered include:

- *Background and Reference Checks*– Registries often conduct background and reference checks on caregivers, but performing basic or legally required checks does not by itself indicate an employee-employer relationship. On the other hand, if a registry is screening by using subjective criteria to select the caregiver, it may indicate the registry is the caregiver's employer.

- *Hiring and Firing* – If a registry merely introduces a caregiver who meets the parameters and preferences of a client, but does not maintain the ability to hire or fire the caregiver, then the registry likely is not an employer of the caregiver.
- *Scheduling and Assigning Work* – Typically, after a registry has facilitated an introduction, the caregiver and client are left to determine the work schedules and assignments. A registry's exercise of control over the caregiver's work schedules and assignments may indicate the registry is an employer of the caregiver.
- *Controlling the Caregiver's Work* – While the registry may seek information concerning the care the client needs for matching purposes, the registry may not instruct the caregiver on how to care for clients. Indications that the registry is the caregiver's employer is requiring the caregiver to call only the registry if the caregiver will be late or miss a shift and disciplining the caregiver.
- *Setting the Pay Rate* – The caregiver typically negotiates the rate of pay directly with the client rather than with the registry. Alternatively, Medicaid or another government program may determine the rate of pay. In either case, that the registry is not determining the caregiver's rate of pay indicates the registry is not the caregiver's employer.
- *Continuous Payments for Caregiving Services* – The registry may perform and charge for functions such as payroll and producing tax documents, but this does not indicate the registry is the caregiver's employer. If the registry charges based on the number of hours the caregiver works, this indicates an ongoing interest in the employment relationship and may indicate the registry is the caregiver's employer.
- *Paying Wages* – While providing payroll services does not indicate the registry is the caregiver's employer, a registry's direct payment of its own funds to the caregiver may.
- *Tracking Hours* – A registry may collect time sheets. This is not an indication of the existence of an employment relationship, as long as the client is the one actually verifying and adjusting the timekeeping information for accuracy.
- *Purchasing Equipment and Supplies* – Unlike investments in office space or payroll systems, investments in the tools necessary for caregivers to perform their service by the registry may indicate an employment relationship.
- *Receiving EINs or 1099s* – Calling a caregiver an "independent contractor" and issuing an IRS 1099 form does not preclude the caregiver from being an employee for FLSA purposes.

The Bulletin also notes that determining whether a registry is an employer of a caregiver under the FLSA requires a thorough analysis of the registry's business model and operations. The listed factors are helpful, but they are not exhaustive. Additional facts related to the caregiver's relationship with the registry may be necessary for a comprehensive analysis.

Jackson Lewis attorneys are available to answer inquiries regarding the Bulletin and other developments.

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