Bloomberg Law®

BNA's Health Care Daily Report™

VOL. 23, NO. 15 JANUARY 23, 2018

Employment Issues

Health-Care Employers Lack Clarity on Joint Employee Issues

Health-industry employers hoping for clarification on liability issues with respect to employees they share with others have been disappointed.

The U.S. Supreme Court Jan. 8 passed on reviewing a decision in which the U.S. Court of Appeals for the Fourth Circuit said that DirecTV may be held liable as a joint employer of technicians hired by an intermediary. The technicians claimed they were misclassified as independent contractors and stiffed on overtime pay. They won their case against DirecTV under the Fair Labor Standards Act, and DirecTV sought Supreme Court review.

Individuals who technically are employed by one company but are contracted out to do work for another are referred to as joint employees. The rules governing these workers are in a state of flux, and, while the DirecTV case involved the telecommunications industry, a decision would have had implications for health-care industry employers as well.

The joint employee issue ''absolutely is an issue of paramount concern'' for health-care providers, Adam C. Abrahms, a member of Epstein Becker & Green's Labor and Employment and Health Care and Life Sciences practices, told Bloomberg Law. The issue will become more prevalent as industry collaboration and consolidation grow, and more work is shared between related and unrelated providers, he said. Abrahms is in the firm's Los Angeles office.

Hospitals, for example, often have doctors who technically are employed by independent physician practices. Locum tenens physicians and nurses, as temporary workers are known in the industry, are commonly found in health-care settings. Some providers ''lease'' nurses to others, Timm Schowalter, a partner-shareholder and member of Sandberg Phoenix & Von Gontard PC's labor and employment and health-care services teams, said.

Everything Stays the Same Health-care employers had been hoping for guidance on the joint employer question under the Fair Labor Standards Act and other laws, Abrahms said. The ''lack of clarity is problematic,'' he said.

Two entities, such as a hospital and a physician practice, often contract with one another to ensure adequate staffing at the provider's facility. Outsourcing of tasks to an outside entity also is common. It is important for both parties to understand their rights and liabilities with respect to people who work for both, Abrahms said.

The Supreme Court's decision means everything ''stays the same,'' Abrahms said. The Fourth Circuit applied the FLSA's broad definition of employment to the technicians. That is, Schowalter told Bloomberg Law, the court said a worker could be considered an employee for FLSA purposes if the purported employer had indirect control over that person.

Indirect control may be found where the purported employer retained the right to control the worker—for example, if the purported employer had the right to insist the worker adhere to its policies and practices or required the worker to meet its particular qualifications. It can be contrasted with the direct control test, which requires proof that the purported employer routinely exercised direct, substantial control over essential employment terms of another entity's employee.

Some element of control always has been a main factor in determining joint employment, Schowalter said. Every appeals court, however, has its own variation on the rule. Following the Supreme Court's refusal to review the DirecTV case, the confusion for health-care employers will persist.

Other Laws, Other Tests Another complication for these entities is that there isn't a single standard for every employment-related law, Abrahms said. The FLSA contains one test, but the National Labor Relations Board, which handles workplace complaints and union organizing, recently established its own new test, reversing course from a broader standard established during President Barack Obama's administration.

The NLRB had used the direct control test for 20 or 30 years, Schowalter said. It jettisoned that standard in 2015 in *Browning-Ferris Industries*, 362 NLRB No. 186. In its place, the board adopted an indirect control test like the one used by the FLSA in the DirecTV case.

Adding to the confusion, the board recently reversed *Browning-Ferris*, holding on Dec. 14, 2017, in *Hy-Brand Industrial Contractors Ltd.* that direct and immediate control is a prerequisite to a finding of joint employer status.

The Department of Labor also recently withdrew an Obama-era guidance that adopted an indirect control standard, Schowalter said. These moves also bring into question how the Internal Revenue Service will engage in joint employer analyses to determine income tax liability, Schowalter said.

In determining whether a worker is an employee, courts also usually apply some form of the economic realities test, Schowalter said. Four factors predominate in this analysis: which employer has the power to hire and fire employees; which employer has the right to (di-

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rectly or indirectly) supervise and control the employee; how the employee is being paid or by whom; and which employer maintains the employment records.

The Fourth Circuit added two more elements, Schowalter said. It analyzed the duration of the employment—that is, was the employment temporary or long term and whether the shared employees were overseen by a centralized management.

Vicarious Liability Although a decision clarifying joint employer standards wouldn't have had any direct application, it might have influenced how state courts approach vicarious liability issues. States have different tests for determining which entity is the employer for purposes of assigning tort liability. Doctors often are independent contractors, though there is a growing movement toward employed physicians in hospitals.

The question of whether the hospital may be held vicariously liable for an independent contractor doctor's alleged malpractice, for example, often turns on items like the degree to which the hospital holds the doctor out as its employee. State courts have differed on whether a provision in a consent form notifying patients the doctors are independent contractors relieves a hospital of potential liability.

'Increasingly Difficult' ''It is increasingly difficult for employers to identify the applicable standard'' based on the law or place where a case has been brought, Abrahms said. The standards are ''related,'' but ''there is no single test,'' he said.

There was some hope the DirecTV case would help employers determine ''where the lines are drawn,'' Abrahms said. He said he wouldn't read much into the Supreme Court's denial of review, however, because of issues that made it a less-than-optimum test case.

Unfortunately, Abrahms doesn't see any other cases on the near-horizon that could give employers the clarity they need. There also don't appear to be any legislative fixes in the offing, he said. ''Most employers will be living with uncertainty,'' at least for the time being, he said.

To help head off potential issues, Abrahms said entities should start by clearly defining their roles in their contracts. They may need to take a closer look at their potential liabilities and include stronger indemnification clauses. Under these clauses, the staffing agency or outsourcing company would agree to reimburse the provider for any liability associated with the employee. They are standard, but Abrahms said providers might not want to rely on provisions typically found in form contracts.

Schowalter counseled against relying too much on the contract. Courts routinely disregard contract terms and apply the economic realities tests in their stead, he said.

As for entities that have facilities in multiple states or jurisdictions, Schowalter advised knowing the rules of every location where employers have workers. Normally, courts apply the law of the place where the worker is located, but an employer may be able to use a contractual choice of law provision to get around that, he said. Choice of law provisions require the parties to try the case under the law in effect in a predetermined place.

Abrahms said health-care employers need to ensure labor and employment lawyers are called in to review any transaction that could result in a joint-employment situation, as well as to review contracts between staffing agencies or independent contractors and providers. Transactional lawyers may not be focusing on the types of issues in which labor and employment counsel are expert, he said.

Schowalter told Bloomberg Law employers should ''stay tuned,'' and ''keep the Batline to employment counsel open.''

BY MARY ANNE PAZANOWSKI

To contact the reporter on this story: Mary Anne Pazanowski in Washington at mpazanowski@bloomberglaw.com

To contact the editor responsible for this story: Peyton M. Sturges at psturges@bloomberglaw.com