Ignorance Is Not Bliss In The Joint-Employment Context

Insights
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Hospitals, residential-care facilities, home-health agencies, and other employers in the healthcare industry often subcontract labor through outside vendors to fill positions like travel nurses, security guards, and janitors. Unfortunately, these outside contractors may not be in compliance with applicable federal and state employment laws, including wage-and-hour laws.

And thanks to the "joint-employment" doctrine, the healthcare facility employer may be on the hook for the contractor's violations. Failure to acknowledge and address this possibility could result in surprise and unforeseen financial responsibility. It's important to understand the issues raised by this legal rule and to have strategies at the ready to proactively address them.

The General Test
The main premise of the joint-employment rule is that an employee may be employed simultaneously by more than one employer. Agencies and courts routinely interpret the term "employer" broadly in favor of employees, and an entity's status as a joint employer may not always be immediately clear from the circumstances. While courts in different jurisdictions apply their own state-specific tests to determine whether a joint employment relationship exists, all tend to focus on the economic realities of the relationship and whether there is some measure of control retained by the entity claimed to be a joint employer.

Whether a joint-employment relationship exists depends on all the facts in the particular case. A joint-employer relationship is often found to exist when one entity (such as a temporary-employment agency) hires and pays a worker, and another entity supervises the work. The joint-employment doctrine is not limited to the relationships formed from contracting out work. It can also occur when entities are affiliated with one another, such as a parent-subsidiary type relationships.

For example, in September 2014, a California Court of Appeal held that the issue of whether a corporation with no employees, but which owned a corporation with employees, was a joint employer of those employees must go to a jury. The court found that if the corporation with no employees (i.e., a parent corporation) exercises some control over the corporation with employees (i.e., a subsidiary corporation), it also may be the employer of the subsidiary's employees.

In that case the evidence showed that the "parent's" structural and management control over the "subsidiary" was substantial in that it was involved in its operations, was the sole shareholder of a

cluster of companies that shared the same corporate address as the "subsidiary," one of which issued the paychecks for the "subsidiary's" employees, and one of the "parent's" employees assisted in recruiting employees for the "subsidiary." Under these circumstances, the courts will likely decide that the joint-employment issue raises so many factual issues that it must be decided by a jury.

Factors that may increase the risk of joint-employer status for a healthcare employer include:

- a contract or other document governing the relationship between the vendor and healthcare facility that include terms assigning the right to control to the facility, such as the right to hire, promote, discharge, and supervise the workers;
- the facility assigning additional projects to the vendor's workers beyond the scope of the agreement with the vendor;
- the facility tracking the vendors' workers hours, determining their rates of pay, paying them, and maintaining their employment records;
- the facility giving instructions to the vendor's workers concerning the manner the workers are to perform assigned tasks;
- the facility providing training, tools or equipment to the vendor's workers;
- the facility's ability to request the vendor to fire one of its workers; or
- whether the vendor has any manager or supervisor at the facility to direct the workers' manner of performance.

Although none of these factors standing alone is determinative, a finding that many of them exist will greatly increase the chances of a finding of joint employment.

State Statutes

In legislation that became effective this year, California now provides that employers who contract for labor through staffing or other labor contractors (deemed "client employers" under the new law) will be responsible for wage-and-hour violations committed by those entities with respect to the employees supplied to the client employer.

The new law defines client employer as "a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor." It does not apply to companies with fewer than 25 workers, companies with five or fewer workers supplied by a labor contractor at any given time, and the state or any political subdivision of the state.

This means that if you are considered a "client employer," you are on the hook for your vendor's wage-and-hour violations, including failure to pay minimum and overtime wages, failure to provide meal and rest breaks, and other violations that could lead to additional costly penalties under the California Labor Code.

Laws such as California's are likely to become more common in other states. The growing tide of both court and legislative action on this issue, cautions healthcare employers to assess and address this issue raised by potential joint employment relationships.

Our Advice?

We encourage healthcare employers to consider taking the following five steps to address this issue:

1. Understand the general principles embodying the joint-employment question, and conduct an audit of policies and practices to determine whether your facility could be considered a joint employer of the employees of another company – even where an agreement or written job description or classification does not on its face imply a joint employment situation.
   The audit should include a review of any current management agreements for provisions that are unnecessary to its ongoing operations, but that may provide sufficient "control" over employees performing services for a finding that it is a joint employer. The audit should allow you to decide whether your company is likely a joint employer and, if so, how to proactively address the liability concerns this raises.
2. Include a provision in the contract allowing you to audit the contractor's records regarding compliance with wage-and-hour laws and workers' compensation insurance coverage.
3. Require the contractor show proof of adequate insurance for its employees. Consider requiring the contractor to purchase employment practices liability insurance and name the healthcare employer as an additional insured.
4. Contract for indemnification from the labor contractor for the labor contractor's failure to pay wages or obtain workers' compensation coverage. The contractor should acknowledge that it is solely responsible for compensating its employees correctly and for providing their workers' compensation coverage and that it will hold the client employer harmless if it fails to do so.
   Pay close attention to whether the contractor is and remains financially viable. Indemnification language will likely be ineffective if you have a contractor that files for bankruptcy. And you will ultimately be left on the hook for their violations.
5. Parent and subsidiary corporations should attempt to maintain separate and independent operations, to the extent possible. Companies who prefer centralized corporate services by the parent company should weigh the risk that efficiency may indicate control over wages, hours, and working conditions and result in a finding of joint employment.

If you would like help in working through these issues in your facility, give us a call.

For more information contact the author at DAmaya@fisherphillips.com or 858.597.9600.

Related People

David E. Amaya
Partner
858.597.9631
Email

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