FP Florida Healthcare Snapshot: Are Your Home Health Contractors Actually Employees?

Insights
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Welcome to a special edition of our Healthcare Snapshot – this time with a Florida focus. We're taking a deeper dive and examining how the U.S. Department of Labor (DOL) is focusing on whether home healthcare employees are being misclassified as independent contractors, an issue that can be particularly challenging in Florida due to our state's legal quirks.

Recent Scrutiny and Florida Headlines

Have you read or heard about this ramped-up enforcement activity recently? If so, you probably read our Insight about a purported home health contractor whom a Florida federal court determined was actually an employee. If you did, you saw that the "economic realities" test, which is used to determine if a worker is a contractor or an employee under the Fair Labor Standards Act (FLSA), is a complex analysis that involves weighing several different factors. To say the least, that analysis makes legal outcomes notoriously hard to predict.

Florida employers who are relying on the State's nurse registry statute, or are counting on the position that the use of independent contractors is a "standard practice" in home health or other segments of the industry, could be in for a rude awakening. You may be shocked to learn that these justifications will not hold water before the DOL or under federal law in general.

What Is *Your* Company Doing?

It is a poorly kept secret that many home health agencies, nurse registries, and other healthcare providers in Florida often use "independent contractors." Your justification may be that it is hard to find staff and that most want their money up front, as in a gig economy model.

You may hear that using contractors is the way the industry has been doing it for years, especially in home health. But a common industry practice does ***not*** eliminate significant exposure for companies who do not recognize how exacting the applicable "economic realities" test really is. In fact, following a common industry practice that flies in the face of federal wage and hour law significantly ***raises the risks*** of facing audits by the DOL or IRS, or facing collective action litigation under the federal FLSA.

Healthcare employers in this category face major risks for possibly failing to pay overtime (either because a worker was not considered an employee or because the worker was wrongly assumed to be exempt from overtime). Other potential issues include IRS payroll tax implications, the duty to provide FMLA leave to qualified employees, unemployment compensation, participation in certain ERISA plans, workers' compensation and more. These are all risks that must be balanced against the pressures of hiring and retaining qualified staff.

Florida's nurse registry statute has almost certainly contributed to much of this confusion. On its face the law says that several caregiver positions who work for a nurse registry, including nurses and home health aides, are "deemed an independent contractor and not an employee of the nurse registry under any chapter." While this sounds all-encompassing, that declaration of independent contractor status does not change federal law. Several Florida-based nurse registries have been found to be in violation of federal wage and hour law precisely because they misclassified workers. They faced major exposure under federal law for unpaid overtime as a result. Similarly, even written independent contractor agreements are not a cure-all like some healthcare entities once thought they would be.

What Should Florida Healthcare Employers Do?

In view of the long-standing industry practice of classifying many workers as independent contractors, it is easy to fall into this trap. It is not too late to reduce these risks, however. We regularly remind companies that operate under such models to continually re-visit their risk assessments and keep a close eye on legal developments. It is also critical to monitor how your systems are actually operating in day-to-day practice. Evolving case law, potentially huge exposure, and increased government scrutiny along with more private lawsuits over the years should keep this issue on the top of the to do list for all Florida healthcare employers.

And what will *we* do? We will continue to monitor workplace law developments as they apply to healthcare employers in Florida and across the country, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Healthcare Industry Team.

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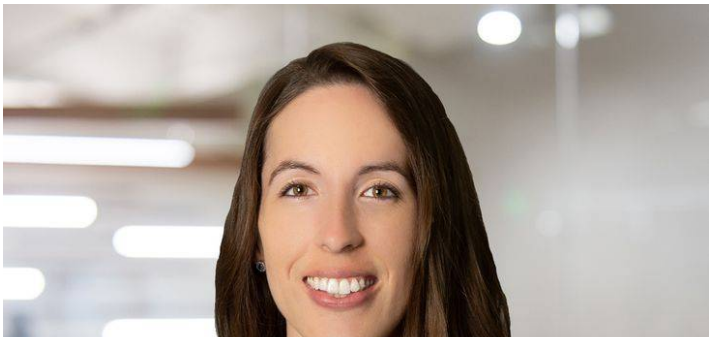

Megan L. Janes
Partner
954.847.4717
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