



USDOL Field Bulletin Reiterates That Third-Party Structures Are Often A Mixed Bag

Insights

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On July 13, 2018, the U.S. Department of Labor (USDOL) issued a [Field Assistance Bulletin](#) to its enforcement administrators addressing how to determine if and when a home health caregiver referred to a client by a “home care, nurse, or caregiver registr[y]” has an employer-employee relationship with a *registry* under the Fair Labor Standards Act (FLSA). The bulletin explains that “[a] registry is an entity that typically matches people who need caregiving services with caregivers who provide the services, usually nurses, home health aides, personal care attendants, or home care workers with other titles. . . .” The bulletin further clarified that it will apply the “economic reality test” when making such determinations. Although the bulletin itself may have limited application, the factors set forth in the bulletin give insight into how the USDOL under President Trump’s administration may tackle independent contractor determinations moving forward.

The USDOL began its analysis with the common practice of conducting background and reference checks. The USDOL noted that, so long as a registry conducts only basic checks (e.g. confirming the caregiver is properly licensed and possesses the requisite skills, checking criminal background, credit, and any additional checks required by state or local law), this does not establish an employment relationship. However, to the extent the registry expands its role to include determining, for example, whether the caregiver’s personality would be a good fit for the client, or otherwise making subjective decisions as to whether to offer the caregiver a particular assignment, that can lead to a conclusion that the registry is engaged in employer-like activities. The USDOL also noted that, in order to avoid creating an employment relationship, the caregiver: (i) must be free to accept or reject the assignment; and (ii) must be free to accept assignments from other registries.

In addition, while the registry may act in a payroll function, and may receive a fee from the client for performing that function, it should pay the caregiver based upon hours reported by the client, and at a rate mutually agreed-upon by the caregiver and the client (and not a rate dictated by the registry).

The USDOL went on to examine the factors that could result in finding that a home health caregiver is an employee of the registry *after* the caregiver goes to work for a client. Those factors include: (i) requiring a caregiver to accept a job with a particular client; (ii) instructing a caregiver on how to perform his or her duties for the client; (iii) visiting the client’s home to monitor a caregiver’s performance and otherwise evaluating a caregiver’s performance; (iv) issuing discipline to a caregiver; and (v) requiring a caregiver to adhere to the registry’s policies for time off from work. The USDOL also made clear that to the extent a registry provides a caregiver with tools and supplies

necessary to do the job, that factor tends to tip the scale in favor of an employment relationship. The bulletin states that no single factor is dispositive, and instructs investigators to weigh the above factors when determining whether an employment relationship between the assigning agency and the caregiver exists. The USDOL reminded us that simply calling someone an “independent contractor” does not make it so; rather, it is the “economic reality” of the relationship that the USDOL will analyze, including the factors set forth here.

The Bottom Line

It would behoove registries (and similar entities) to align independent contractors with the USDOL factors to the extent possible. Further, if faced with a mixed bag, some consideration should be given as to whether the favorable factors are ones that might backfire down the road (for example, lack of oversight with respect to hours records) if the factors on the whole were found to support an employment relationship.