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WORKER MISCLASSIFICATION ISSUES—HOW ARE HOSPITALS AT RISK?

Members of today's workforce generally fall into one of three classifications: employers, employees and independent contractors. Recently, federal and state agencies have zeroed in on employee/independent contractor classifications and have increased their enforcement efforts as a way to increase agency revenue. For example, the Government Accountability Office estimates that unpaid taxes stemming from employee misclassification may amount to more than $2.7 billion annually.

Hospitals are particularly at risk because it is fairly common for hospitals to have both employees and independent contractors as members of their workforce (e.g. medical staff members) providing the same or similar health care services.

Unfortunately, bad things happen when hospitals misclassify the members of their workforce. And by "bad things," we mean class and collective action lawsuits, steep penalties, monetary damages, retroactive tax liability and increased exposure to employment liability claims.

FEDERAL & STATE AGENCIES INCREASING ENFORCEMENT

Federal agencies, such as the Internal Revenue Service ("IRS") and Department of Labor ("DOL"), are prominently stepping up their enforcement efforts of worker misclassification. These two federal agencies signed a Memorandum of Understanding ("MOU") in September 2011 to share information with the goal of reducing the incidence of employee/independent contractor misclassification. Since 2009, the DOL has recovered more than $29 million in back pay for over 29,000 employees. Also, the IRS embarked on an employment tax audit initiative involving nearly 6,000 employers, selected at random, for the purpose of catching and correcting worker misclassification and fringe benefits issues.

States are also increasing their worker misclassification enforcement efforts, with fourteen states having entered into collaborative MOUs with the DOL. These MOUs enable participating states to coordinate enforcement efforts with the DOL in order to ensure that employees receive protections under both state and federal law (e.g. overtime, minimum wage and unemployment insurance). Plainly put, a misclassification issue at the local unemployment office can now make its way up to the DOL and IRS with disastrous consequences.

HOW DOES THIS APPLY TO HOSPITALS?

As we pointed out previously, hospitals are particularly susceptible to worker misclassification issues because they have both employees and independent contractors—often physicians—providing the same or similar health care services. The typical scenario involves an independent contractor physician who is a member of the hospital's medical staff.

As a result, it is essential that hospitals conduct a "self-audit" of their workforce from time to time. Hospitals should also review their medical staff bylaws to assess the level of control that is being exerted over the members of their medical staff.

Ultimately, a misclassification issue arising in the hospital medical staff context can significantly impact hospital operations in the medical staff arena as well as in the areas of tax and benefits, wage/hour and anti-discrimination laws. For example, a New York hospital fought a *thirteen-year court battle* and went to trial on a sexual harassment lawsuit filed by a female physician previously on staff as an "independent contractor" at the hospital. The parties fought tooth and nail over whether the physician was properly classified as an independent contractor (not protected by sexual harassment laws) or an employee (protected by such laws). Ultimately, the hospital all but lost the war because the court concluded that it was for the jury to determine whether or not the physician was actually an employee of the hospital. (You can find our detailed analysis of the case here.)

HOW TO DETERMINE IF AN INDIVIDUAL IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

There is no one-size-fits-all test to determine whether an individual is an employee or independent contractor. For example, for federal tax purposes, the IRS looks to three broad categories focusing on the entity's control over the worker, as indicated here on the IRS website. For most federal anti-discrimination laws, the courts use a different multi-factored "control" test. And for wage/hour purposes, the DOL analyzes the "economic realities" of the arrangement between the parties. Stay tuned for subsequent blog posts on these tests and more information regarding worker misclassification.

For additional information on this topic, please contact Dana E. Stutzman at 317-977-1425 or dstutzman@hallrender.com or your regular Hall Render attorney.

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Reference: *Salamon v. Our Lady of Victory Hospital, (W.D. N.Y. April 3, 2012).*