What Does the DOL's New Guidance on Worker Classification Mean for Healthcare Staffing Agencies in Texas'

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Recently, the Department of Labor ("**DOL**") issued an Administrator's Interpretation ("**Interpretation**") on the standards for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act ("**FLSA**"). According to the Interpretation, "most workers are employees under the FLSA's broad definitions." This may potentially include healthcare staffing agency hires.

The Interpretation's Economic Realities Test

In order to determine whether one is an employee, many courts utilize the "economic realities" test —an analysis which focuses on whether a worker is economically dependent on the alleged employer, rather than in business for herself. A worker who is economically dependent on an employer is suffered or permitted to work by the employer and is therefore an employee. The economic realities test is typically based on six common factors: (1) whether the work is an integral part of the employer's business; (2) whether her managerial skill can affect her profit and loss; (3) the nature and extent of her relative investment in comparison to the employer's investment; (4) whether work requires business skills, judgment, and initiative; (5) whether the relationship is permanent or indefinite; and (6) the nature and degree of the employer's control of the worker. In applying these factors, the Interpretation states the analysis should be guided by the FLSA's statutory directive that the scope of the employment relationship is very broad and that no one factor is determinative of a worker's status. "Ultimately, the goal is not simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or really in business for himself or herself (and thus its independent contractor)."

Interpretation v. Fifth Circuit

In the Fifth Circuit, the economic realities test differs from the Interpretation's in part because the courts typically do not utilize the "integral" factor. Though there are not many Fifth Circuit cases regarding the status of healthcare staffing agency workers, a Texas district court case involving a Home and Community-Based Service provider is instructive for comparing the Interpretation's analysis of the economic realities test to the Fifth Circuit's test.[1] In *Chapman v. A.S.U.I. Healthcare of Texas, Inc.*, the court granted summary judgment to two direct care specialists, who were hired to be with clients in group residences, determining they were employees as a matter of law. In that case, the plaintiffs were interviewed by ASUI, were classified as independent contractors for tax purposes, provided their own uniforms, and typically worked in residents' homes daily from 3 p.m. to 9 a.m., though they were not paid from 10 p.m. to 6 a.m. while clients were asleep.

Profit and Loss

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The court concluded this factor weighed in favor of employee status because plaintiffs' hours and rate of pay were determined by ASUI. This analysis is slightly different than the Interpretation's, which focuses on whether the worker's managerial skill can affect an employee's profit and loss. According to the DOL, this factor is determined not by whether the worker has the potential to work more hours, but instead on whether the worker exercises her managerial skill (e.g., negotiating contracts, deciding which jobs to perform, and hiring helpers to assist).

Relative Investment

The court determined this factor weighed in favor of employee status because the plaintiffs' investment of purchasing uniforms was "negligible" in comparison to ASUI's investment in contracts, management of clients and payroll, and operation of a "Dayhabilitation Center." This analysis is directly in line with the Interpretation's guidance that the relevant inquiry is how the worker's investment compares to the employer's overall business, rather than the employer's investment on a particular job.

Skill and Initiative

Because plaintiffs' jobs required no prior experience and their duties were to cook, clean, and interact with clients, the court concluded this factor weighed in favor of employee status since plaintiffs did not need special training or a unique skill. Though the conclusion would likely be the same, this is somewhat different from the Interpretation in that the DOL focuses on a worker's business skills, judgment, and initiative, not his technical skills, in order to determine whether a worker is economically independent.

Permanency

The court determined this factor weighed in favor of employee status because the plaintiffs worked continuously for ASUI and did not concurrently perform work in a similar capacity for another employer, a conclusion which is likely in line with the Interpretation's note that an independent contractor typically works "one project for an employer and does not necessarily work continuously or repeatedly for an employer." According to the DOL, the key is whether the "lack of permanence or indefiniteness is due to operational characteristics intrinsic to the industry, or the worker's own business initiative."

Control

Finally, the court determined the control factor weighed in favor of employee status because plaintiffs "had little to no control over the meaningful aspects of the business." ASUI assisted plaintiffs in finding clients, controlled their hours, assigned them to houses, and called them to cover other specialists who were absent. Such a determination is directly akin to the Interpretation's control factor guidance. Indeed, the Interpretation's example of the control factor regarding employee nurses on a nurse registry is quite similar to the facts in *Chapman*.

Effect on Healthcare Staffing Agencies

The Interpretation sends a message that the DOL will consider most workers employees under the FLSA, and the *Chapman* court's analysis suggests that many of the factors used to determine whether staffing agency hires are employees in the Fifth Circuit are analyzed in the same manner as the Interpretation. Though it is not clear whether Texas courts will change their worker classification analysis based on the Interpretation, whether a staffing agency hire goes through

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training, has to adhere to staff agency supervision regarding whether she will accept an assignment, can take on other jobs while working for the staffing agency, works on a project short term, and/or has a comparably larger monetary investment than the staffing agency are all factors likely to be considered.

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[1] *Chapman v. A.S.U.I. Healthcare of Texas, Inc.*, No. CIV.A. H-11-3025, 2012 WL 3614187 (S.D. Tex. Aug. 21, 2012), *aff'd sub nom. Chapman v. A.S.U.I. Healthcare & Dev. Ctr.*, 562 F. App'x 182 (5th Cir. 2014).

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