Physicians as Independent Contractors v. Employees

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A recent administrative decision from the New Jersey Department of Labor, Pennsauken Diagnostics Center, LLC v. NJ Dep't of Labor, Agency Dkt No. DOL 20-022 (Mar. 16, 2023) ("Pennsauken"), highlights the risks a medical practice takes when it treats a professional who provides clinical services to the practice as an independent contractor.

It is not uncommon for a medical practice to contract with a physician for services on an independent contractor basis. The American Medical Association ("AMA") reported in a 2020 survey that 5.8 percent of all licensed physicians were engaged on this basis (AMA Policy Research Perspectives, Recent Changes in Physician Practice Arrangements: Private Practice Dropped to Less Than 50 Percent of Physicians in 2020), and the New Jersey Board of Medical Examiners recognizes this type of business relationship. See NJAC 13:35-6.16 (f)(3) (an "[a]ssociational relationship with other practitioner or professional entity" is an acceptable form of professional practice).

Whether a medical practice should legally treat a provider as an employee or as an independent contractor has long been based largely on how much discretion the physician exercises in determining how to perform his or her professional medical services. The independence inherent with practicing medicine obviously supports an independent contractor classification, but as one federal court noted: "There is nothing intrinsic to the exercise of discretion and professional judgment that prevents a person from being an employee, although it may complicate the analysis. The issue is the balance between the employee's judgment and the employer's

control." Salamon v. Our Lady of Victory Hospital, 514 F.3d 217, 229 (2d Cir. 2008).

This type of analysis, often referred to as the right-to-control test, however, has been supplanted by a number of states for various state law purposes with what is commonly referred to as the "ABC test." The New Jersey variant of this test provides that a service provider is presumed to be an employee unless all of the following exists:

1. The individual has been and will continue to be free from control or direction over the performance of work performed, both under contract of service and in fact; and
2. The work is either outside the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6). The ABC test applies to New Jersey unemployment insurance taxation, and wage payment and wage and hour laws (see Hargrove v. Sleepy's, LLC, 220 NJ 289 (2015); Kennedy v. Weichert Co., 2021 WL 2774844 (N.J. Super. Ct. App. Div. July 2, 2021)), and it was the test at issue in the New Jersey Department of Labor Pennsauken decision.

Pennsauken involved an imaging services group that contracted with a radiology practice to supply radiologists to read the images taken by the imaging services group. The imaging services group paid each radiologist a flat rate per read and reported the payments as 1099 compensation. The State of New Jersey subsequently assessed the imaging services group for unemployment insurance taxes on the compensation paid to the radiologists. An administrative law judge upheld that determination, and the imaging services group appealed the decision to the New Jersey Commissioner of Labor.

The Commissioner concluded that the radiologists should have been classified as employees based solely on prong A of the ABC test (i.e., the right to control test). The imaging services group required the radiologists to log onto its system and to review the scans within 24 hours; the group paid the radiologists directly, not through their radiology practice; the group billed patients and submitted for insurance coverage for the services performed by the radiologists; and the group bore the risk of loss for the services performed by the radiologists. The Commissioner also commented on the other parts of the ABC test. He noted that, under prong B, the work of the radiologists was "a necessary and integral part of the work" of the imaging services provider and the radiologists occasionally read the scans on site at the offices of the imaging services group. As for prong C, the Commissioner noted that, given the close business relationship between the radiologists and the imaging services group, the radiologists' business did not exist independently of the business of the imaging services group.

Pennsauken is not a decision that should be dismissed because of its idiosyncratic circumstances. Under the ABC test, service providers are presumed to be W-2 employees with the burden on the service recipient to overcome the presumption. And, under 2019 amendments to New Jersey's wage payment law, improperly paying a service provider can result in double damages and the payment of the person's reasonable attorney's fees. Particular facts matter, of course, and no New Jersey healthcare business should decide how to compensate a clinician without first carefully applying the ABC test.

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