issue paper
American Staffing Association
277 South Washington Street, Suite 200 ▪ Alexandria, VA 22314-3675 ▪ 703.253.2020 ▪ 703.253.2053 fax ▪ americanstaffing.net

Online Health Care Job Platforms—Worker Misclassification Risks

June 2022

By Gerald L. Maatman, Jr., Esq.
Partner, Seyfarth Shaw LLP
233 S. Wacker Drive, Suite 8000
Chicago, IL 60606-6448
gmaatman@seyfarth.com
seyfarth.com
312-460-5965

Stephen C. Dwyer, Esq.
ASA Senior Vice President, Chief Legal and Operating Officer
703-253-2037
sdwyer@americanstaffing.net

Brittany Sakata, Esq.
ASA General Counsel
703-253-2038
bsakata@americanstaffing.net

Edward A. Lenz, Esq.
ASA Senior Counsel
703-253-2035
elenz@americanstaffing.net

I. Introduction

Online health care job platforms are increasingly classifying nurses and nurse aides placed through their platforms as independent contractors instead of employees—and issuing Forms 1099 to those workers instead of W-2s. This allows the platform to provide those caregivers to health care facilities at a much lower cost by not providing employee benefits or paying payroll taxes and other labor costs. This poses significant legal risks for unwary facilities, which could end up getting stuck with those costs.

While some platforms may legitimately claim that the workers placed through their systems are independent contractors with respect to the platform, the end users of the services generally cannot make the same claim because they exercise supervision and control over the work performed by the workers at the work site. Hence, health care facilities using such services could face claims that they are employers of the workers and owe payroll taxes, overtime wages, and other employment-related costs and benefits.

The financial perils of misclassification can be severe. A federal court in Virginia recently fined a health care staffing agency $7.2 million in back overtime wages and damages for misclassifying 1,105 certified nurse aides, licensed practical nurses, and registered nurses as independent contractors. In a news release, the U.S. Department of Labor, which sued the agency, said the ruling sends "an unequivocal message to healthcare industry employers" that the department "will not hesitate to bring legal action, pursuing all available remedies, when it finds that an employer has willfully violated the law." This is but one example. Plaintiffs' class action lawyers have increasingly targeted this issue in lawsuits against employers.

To address the problem, ASA has created a "coalition against worker misclassification," made up of the nation's leading health care staffing agencies, to educate online platform users about the risk of using workers misclassified as independent contractors and their potential obligations as employers. This paper is part of the coalition's education and outreach effort.

II. Employer Obligations

If a worker is an employee, the employer must pay federal and state payroll taxes (FICA, FUTA, SUTA) and withhold federal and state income taxes. Employers also may have obligations to offer retirement and health insurance benefits, vacation and sick pay, and workers' compensation insurance. In addition, employers are responsible for complying with myriad federal and state regulations regarding wages and working conditions of employees that do not apply to independent contractors.

The legal rules governing worker classification are varied, complex, and highly fact specific. In the great majority of cases, workers assigned to health care facilities by online platforms will be employees of the facilities because they work under the facilities' supervision and control. *Hence, it would be a rare case in which a nurse or nurse aide could be lawfully classified as an independent contractor.*

III. Employment Tests

Common Law

Various tests—under different laws—are used determine whether workers are independent contractors or employees. For federal employment tax and benefits purposes, the U.S. Internal Revenue Service and courts examine multiple factors, generally referred to as the common-law "control" test. The more factors that are present in an entity's relationship with its workers, the more likely the workers will be employees and not independent contractors.

Historically, the IRS relied on a list of 20 factors based on court decisions to determine employee status for federal employment tax purposes (Revenue Ruling 87-41, 1987-1 C.B. 296), which the U.S. Supreme Court subsequently reduced to 13 factors.[1] The IRS later modified Rev. Rul. 87-41 for training purposes in its "Worker Classification Training Guidelines: Employee or Independent Contractor" (October 1996). The guidelines prescribe three broad standards—behavioral control, financial control, and relationship of the parties—for determining a worker's status.

Although legislation has been introduced over the years at the federal level to modify the classification criteria, none has passed, and the IRS continues to rely on the common-law standard focused on the right to control the means and details of the work. The IRS website (*irs.gov*) contains additional helpful guidance on how to apply the factors.

Economic Reality—Application to Online Platforms

In addition to the common-law test for determining employer status for federal employment tax purposes, the federal Fair Labor Standards Act imposes minimum wage, overtime, equal pay, payroll record-keeping, and child labor obligations on any business on which a worker is dependent as a matter of "economic reality."

Federal courts generally follow a six-part economic reality test for determining whether a worker is an employee under the FLSA, including (1) the degree of control that the employer has over the manner in which the work is performed, (2) the worker's opportunities for profit or loss dependent on his managerial skill, (3) the worker's investment in equipment or material, or his employment of other workers, (4) the degree of skill required for the work, (5) the permanence of the working relationship, and (6) the degree to which the services rendered are an integral part of the employer's business.[2]

In 2019, DOL issued an opinion letter applying the six-factor economic reality test to workers providing services to customers through an "online and/or smartphone-based referral service." On the facts considered in the opinion letter, the DOL found that the workers were independent contractors under the FLSA because they could "maximize their profits" by choosing between different jobs and competing platforms and by negotiating prices with clients. Notably, the DOL opinion focused on whether the workers were economically dependent on the platform company—and did not consider the workers' relationship with the end users of their services.

At the state level, Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah have passed laws codifying the independent contractor status of workers who receive job assignments through online platforms. These laws incorporate many of the criteria used

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[1] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)
[2] See, e.g., *McFeeley v. Jackson St. Entm't LLC* , 825 F.3d 235, 241 (4th Cir. 2016).

to determine IC status under existing legal principles. For example, the platforms cannot dictate the workers' hours, where they work, or supervise their work. Critically, however, the laws apply only to the relationship between the workers and the online platforms, not the relationship between the workers and the end users of their services.

Note that the 2019 DOL opinion letter does not apply to independent contractor determinations under state law. Nor do the state laws discussed above apply to issues covered under federal law.[3]

Potential Liability of Online Platforms and Their Health Care Clients

Nurses and nurse aides, whether assigned by traditional staffing agencies or through online platforms, generally perform their work under the direct supervision and control of the personnel of the health care facility to which they are assigned. Such workers, especially nurse aides, typically do not exercise the degree of independent judgment or control necessary for independent contractor status.[4]

If an online or app-based job platform exercises sufficient control over the workers, it also may be viewed as an employer; and if the platform fails to pay payroll taxes and other employee-related costs, the end users may be liable for those costs as *joint employers* due to the control they exercise over the work performed. For example, federal regulations recognize that a client is a joint employer of the workers assigned to them by a staffing agency if it "exercises sufficient control over their terms and conditions of employment by closely supervising their work and controlling their work schedules."[5] Practically speaking, joint employment is an inherent aspect of the staffing agency/client relationship under a broad spectrum of labor and employment laws.[6]

To protect their health care clients and comply with applicable laws, staffing agencies operating on the W-2 model should consider sending clients a letter alerting them to their potential liability if the clients use the services of nurses, nurse aides, and other health care workers through an online platform and the workers are classified and paid as independent contractors. The sample letter provided below is designed to encourage clients to ask questions to determine whether a platform is properly classifying workers and to dissuade them from using platforms whose practices are questionable.

IV. Sample Client Letter

Dear Client,

One of the many advantages of using a staffing agency is that you don't have to worry about employer costs like workers' compensation, unemployment insurance, liability coverage, and payroll taxes and withholdings for the temporary workers assigned to you. That's because staffing agencies generally are the employers of the workers and take care of those obligations.

You should be aware that some job placement services operating through online or app-based platforms may classify the workers assigned to you as "independent contractors" and therefore not pay payroll taxes

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[3] Note that many states have their own tests for determining independent contractor status some of which, like California and New York, make it extremely difficult to establish such status.
[4] Certain professionals, such as physicians and nurse practitioners with advanced degrees, can and do meet those criteria.
[5] 29 C.F.R. §791.2.
[6] For a comprehensive overview of joint employment obligations in the staffing industry, see *Co-employment: Employer Liability Issues in Third-party Staffing Arrangements* (9th Ed.) American Staffing Association, 2019.

and other employer costs. The danger is that while the workers may be independent contractors with respect to the platform, you are likely to be viewed as their employer because you supervise their work. So you could be on the hook for the payroll taxes and other employee-related costs, including back pay for unpaid overtime.

If you're considering using an online platform provider, you should verify whether it is an employer by asking whether it does the following:

- *Provide workers' compensation insurance*
- *Withhold and pay federal and state payroll taxes*
- *Offer minimum health insurance coverage as required by the Affordable Care Act*
- *Issue W-2s at the end of the year for the amounts paid to the workers*

If the platform provider says it doesn't assume these obligations because its workers are independent contractors, you should ask whether it

- *Has the power to hire and fire the workers*
- *Establishes the workers' pay rates*
- *Decides where and when the workers provide their services*
- *Pays the workers from its own accounts*

If the answers to these questions are yes, then the platform likely is an employer, and you may be liable as a joint employer under IRS regulations and court rulings for the employer costs the platform failed to pay. If the answers are no, the workers may be independent contractors with respect to the platform, but you may be liable for those costs as their employer based on supervision and control.

We want you to use staffing services with confidence. We hope this information will help you choose your service provider wisely.

Yours truly,
[NAME]

Jerry Maatman is a senior partner and litigator at Seyfarth Shaw LLP, an ASA legal sponsor and one of the nation's premier law firms specializing in labor and employment matters. Maatman has long represented ASA and its members on staffing industry issues and is editor of *Employment Law for Staffing Professionals* and *Co-Employment*, published by the association.

Stephen Dwyer is ASA senior vice president and chief legal and operating officer

Brittany Sakata is ASA general counsel

Ed Lenz is ASA senior counsel