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WASHINGTON, DC

MEMORANDUM

BY EMAIL

TO: Private Care Association

FROM: Russell Hollrah
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DATE: July 27, 2018

RE: Field Assistance Bulletin No. 2018-4

The U.S. Department of Labor (“DOL”) provided detailed guidance on how a caregiver registry can structure an independent-contractor relationship with caregivers that will be respected for purposes of the Fair Labor Standards Act (“FLSA”). The guidance was issued on July 13, 2018, in the form of Field Assistance Bulletin No. 2018-4 (the “FAB”), which is available at: https://www.dol.gov/whd/FieldBulletins/fab2018_4.htm.

The FAB represents a dramatic departure from DOL’s prior guidance, which was contained in recently withdrawn Administrator’s Interpretation No. 2015-1 (Jul. 15, 2015) (withdrawn June 7, 2017). The withdrawn Administrator’s Interpretation set forth an expansive reinterpretation of the “economic realities” test and included the remarkable assertion that “most workers are employees under the FLSA.”

By contrast, the FAB states:

Consistent with WHD’s longstanding position, a registry that simply facilitates matches between clients and caregivers—even if the registry also provides certain other services, such as payroll services—is not an employer under the FLSA.

(Emphasis added).

DOL’s new guidance represents a restoration of the traditional interpretation given the “economic realities” test, which attaches significant weight to the “right of control” factor. This is evidenced by a general observation in the FAB that:

A registry that *controls the terms and conditions* of the caregiver’s employment activities may be an employer of the caregiver and therefore subject to the requirements of the FLSA.

(Emphasis added).

This memorandum is divided into four sections. Section I outlines the specific guidance contained in the FAB, with commentary in *bold italics* font. Section II discusses additional guidance that we believe can be inferred from the FAB, and Section III outlines previously issued DOL guidance concerning caregiver registries that the FAB indicates will remain in effect. The memorandum concludes with Section IV, which contains recommendations on how a caregiver registry can utilize this guidance when structuring an independent-contractor relationship with caregivers.

I. Outline of Specific Guidance Contained in the FAB

The FAB provides a detailed analysis of ten different practices to be considered in analyzing a caregiver registry’s relationship with caregivers for purposes of the FLSA. But the FAB also emphasizes that these are not the only practices that can be considered, and that other facts can be relevant to the analysis. The FAB characterizes specific practices as either “not indicative of an employment relationship,” or “indicative of an employment relationship.” Each of the practices the FAB discusses is outlined below.

Factor # 1: Conducting Background and Reference Checks

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry conducting basic background checks of caregivers consisting of –
 - collecting *objective* information concerning the caregiver, such as the caregiver’s:
 - criminal history,
 - credit report,
 - licensing, and
 - other credentials.
 - background-check requirements set by state or local laws.
 - background-check requirements set by the Centers for Medicare and Medicaid Services (“CMS”).

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry conducting background screening that evaluates *subjective* criteria, e.g.,
 - interviewing a prospective caregiver to evaluate subjective factors that the registry values (such as whether the registry finds the caregiver likeable).

- interviewing a caregiver's references *to assess whether the caregiver would work well with a particular client.*¹

Commentary: *The FAB distinguishes between objective and subjective background-screening criteria; but it also indicates that any background-check criteria required by state or local laws or by CMS will not be indicative of an employment relationship. It is not clear whether interviewing a caregiver's references to evaluate the caregiver's work history generally, and not for the purpose of assessing whether the caregiver would work well with a particular client, would be indicative of an employment relationship.*

Factor # 2: Hiring and Firing

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry informing its client that a potential caregiver meets the client's threshold parameters and preferences, and then introducing the two.
- Provided that:
 - the registry does not further participate in the hiring process;
 - the client is free to accept or decline services from the referred caregiver;
 - if the client hires the caregiver, the registry has no right to alter or terminate the terms and conditions of the caregiver's employment; and
 - the ultimate termination decision is the client's.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry playing a more active role in hiring or firing caregivers, e.g.,
 - interviewing or selecting a caregiver *at the request of the client*.
 - firing a caregiver for failing to comply with requirements and standards established by the industry, the client, or the law.²

Commentary: *It is not clear whether a registry interviewing a caregiver as part of its general background screening, rather than at the request of the client, would weigh in favor of an employment relationship.*

Factor # 3: Scheduling and Assigning Work

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry facilitating initial communication between the caregiver and the client, so long as the caregiver and the client thereafter independently determine the work schedules and assignments.

¹ **FAB Rationale:** Such actions imply that a registry is pre-selecting caregivers for the client, rather than performing basic quality control and verification checks. The client should be responsible for performing such additional, subjective screening after receiving a referral from the registry.

² **FAB Rationale:** Such a registry may control the permanency of the relationship, and the caregiver may economically depend on the registry to obtain and/or keep his or her job. A registry's exercise of control over hiring or firing decisions indicates that the registry is an employer of the caregiver.

- Examples of permitted actions by a registry include:
 - posting to an online message board or sending a text or email to all qualified caregivers asking them to contact a particular client if they are interested in working for the client.
 - narrowing the offer to a subset of caregivers screened by objective criteria, such as those whose availability matches the needs of the client or who can work in a home with a smoker or pets.
 - providing a client with access to its entire list of vetted caregivers or a list of caregivers who satisfy the client's criteria.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - offering work assignments to a subset of caregivers *based on the registry's own discretion and judgment*, e.g., if a registry offers the assignment to a subset of caregivers whom the registry believes would do a better job or are more likeable.
 - directly assigning specific caregivers to individual clients.³

Factor # 4: Controlling the Caregiver's Work

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry seeking information concerning the type of care the client needs for matching purposes.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- After the referral, a registry monitoring or managing the caregiver's methods or work habits, e.g.,
 - instructing caregivers on how to care for clients or how to provide caregiving services.
 - providing training.
 - monitoring or managing the caregiver's methods or work habits.
 - monitoring or supervising caregivers in clients' homes.
 - visiting the client's home to *monitor a caregiver's behavior*.
 - evaluating caregivers' performance.
 - conducting performance evaluations of the caregiver.
 - disciplining a caregiver for his or her performance.
 - setting policies that require a caregiver to provide services in a particular manner.
 - requiring a caregiver to accept jobs with specific clients.
 - setting policies for a caregiver's time off from work.
 - requiring a caregiver to call only the registry, instead of the client, if the caregiver will be late or miss a shift.

³ **FAB Rationale:** A registry's exercise of control over the caregiver's work schedules and assignments may indicate that the registry is an employer of the caregiver, and the caregiver may economically depend on the registry's preferences and decisions.

- limiting the number of clients to whom a caregiver may provide services.
- limiting the caregiver's hours.
- prohibiting a caregiver from registering with other referral services.
- prohibiting a caregiver from working directly with clients outside of the registry.

Commentary: It is not clear whether visiting a client's home for a purpose other than to monitor a caregiver's behavior would be indicative of an employment relationship. An inherent risk in any home visit is the factual issue that can arise as to the actual purpose of the visit.

Factor # 5: Setting the Pay Rate

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - informing either the client or the caregiver about typical pay rates in the area to serve as a benchmark for negotiations.
 - acting as a *liaison* that merely relays communications, offers, or counteroffers between the client and caregiver.
- Provided that: the registry does not determine a caregiver's rate of pay, and the client instead negotiates the rate of pay with the caregiver. Alternatively, Medicaid or another government program may determine the actual hourly wage rate if they are funding the services.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry setting a caregiver's rate of pay without the caregiver making the ultimate determination, e.g.,
 - when a registry designates a set wage range.
 - when a registry offers tailored direction concerning what a caregiver should charge for specific services that a client needs (as opposed to merely informing him or her of the general market rates in the geographic vicinity).

Commentary: The FAB permits a registry to function as a liaison that assists a client and caregiver in negotiating a caregiver's pay rate and to inform both caregivers and clients about market rates; but it reaffirms the important of a registry not setting a caregiver's pay rate.

Factor # 6: Receiving Continuous Payments for Caregiver Services

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - charging clients a one-time, upfront fee for the service of matching a caregiver and client.
 - performing and charging fees for administrative or ministerial functions (like processing payroll or producing tax documents).

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry charging fees that fluctuate based on the number of hours that a caregiver works for the client.⁴

Commentary: While the FAB indicates that charging a referral fee based on the hours worked by a referred caregiver is indicative of an employment relationship, it permits a registry to charge fees for administrative or ministerial functions on an ongoing basis so long as the registry provides such services. This provides a registry with relatively broad latitude to develop a fee that is consistent with an independent-contractor relationship.

Factor # 7: Paying Wages

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry performing payroll-related functions for its clients, e.g.,
 - calculating the amount of wages owed based on the hours worked and the previously determined rate of pay.
 - making the appropriate tax deductions.
 - administering benefits that the caregiver has requested and for which the caregiver pays.
 - issuing a check or electronic deposit.
- Provided that: the client provides the funds directly or via an escrow account.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry's direct payment of its own funds to the caregiver, *regardless of whether the registry typically receives reimbursement from the client.*⁵

Commentary: The FAB treats a registry operating with an escrow account as equivalent to a client paying a caregiver directly, which is very helpful. It is not clear whether a registry's direct payment of its own funds to a caregiver would be indicative of employment if the caregiver were required to repay an amount that the client fails to pay.

Factor # 8: Tracking Caregiver Hours

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - performing payroll services after the client or caregiver submits time records.

⁴ FAB Rationale: Such a registry may have an ongoing interest in the employment relationship, including in the number of hours the caregiver works and whether those hours are tracked accurately. The registry's fees are based on the ongoing caregiver relationship, not the registry's initial referral or administrative efforts. The caregiver's pay then depends, in part, on the amount the registry charges.

⁵ FAB Rationale: The registry may be effectively guaranteeing the payment even if the client does not ultimately pay. The caregiver may be economically dependent on the registry, which indicates that the registry is the caregiver's employer.

- collecting time sheets from caregivers.
- offering an electronic time verification system.
- requiring the correct completion and submission of certain time sheets for purposes of payroll processing.
- Provided that the client (not the registry) is the one actually verifying and adjusting the timekeeping information for accuracy.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - actively creating and verifying time records of a caregiver’s hours worked.
 - tracking and independently verifying time worked by caregivers.⁶

Commentary: The FAB confirms that a telephony system is not problematic, so long as the system assists the client in managing the client’s home-care relationship, as opposed to assisting the registry in managing a client’s home-care relationship. It follows that a telephony system can be offered to a client so long as the system reports the information to the client. The client needs to be the ultimate decision maker on accepting a caregiver’s reported hours worked and authorizing payment for those hours.

Factor # 9: Purchasing Equipment and Supplies

ACTIONS NOT INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry investing in:
 - office space.
 - payroll software.
 - timekeeping systems.
 - other products to operate its businesses.
- A registry providing caregivers with an option to purchase discounted equipment or supplies from either the registry or a third party.

ACTIONS INDICATIVE OF AN EMPLOYMENT RELATIONSHIP

- A registry:
 - purchasing equipment and supplies directly for a caregiver.
 - directing the caregiver to purchase specified equipment and supplies.
 - investing in a caregiver’s training.
 - paying for a caregiver’s licenses, insurance, or medical supplies.

Factor # 10: Receiving EINs or 1099s

IRRELEVANT ACTIONS

- Caregivers acquiring an employer Identification Number (EIN).

⁶ FAB Rationale: Tracking and independently verifying time worked is generally a form of supervision on which the caregiver depends to ensure proper payment.

- A registry
 - requiring a caregiver to obtain an EIN, insurance, or a bond to comply with applicable state law.
 - calling a caregiver an “independent contractor” or issuing the caregiver an IRS Form 1099.

II. Guidance Inferred from the FAB

The FAB reiterates several times that the determination of whether a registry is an employer of a caregiver requires an analysis of multiple factors and that “no one factor is dispositive.” This indicates that it is not necessary for all of the FAB practices to weigh decisively in favor of independent-contractor status in order for a registry’s independent-contractor relationship with a caregiver to be respected for purposes of the FLSA (but a registry’s FLSA risks will increase to the extent that its business model deviates from this guidance).

The FAB describes the scope of its guidance as applying to “home care, nurse, or caregiver registries,” which the FAB refers to collectively as “registries.” The separate references to home care, and to nurses and caregivers, arguably suggests that the guidance is intended to apply equally to a registry that makes referrals to a home, for home care, and to a registry that makes referrals to venues of all types, including those outside of a home, e.g., to a facility.

The FAB defines “caregivers” as including “nurses, home health aides, personal care attendants, or home care workers with other titles.” This definition arguably suggests that the guidance is intended to apply equally with respect to all caregivers, regardless of their skill level. This could reflect a recognition by DOL that the referral services a caregiver registry provides remain the same without regard to the skill level of a specific caregiver who utilizes the registry to gain access to client opportunities.

One aspect of a caregiver referral the FAB does not address is the duration of a referred caregiver’s home-care relationship with a client (i.e., whether it be live-in or hourly). This arguably suggests that the duration of a home-care relationship is not determinative. This could reflect a recognition by DOL that the referral services a caregiver registry provides remain the same without regard to the duration of a referred caregiver’s home-care relationship with a client.

III. Previously Issued Guidance that Remains in Effect

The FAB reaffirms the continued validity of an example concerning a registry, and a certain Wage and Hour Opinion Letter, that are discussed in the Preamble accompanying the regulations, *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,453 (Oct. 1, 2013) (amending 29 C.F.R. Part 552).

The registry example discussed in the Preamble states that a caregiver who does business with a registry “is likely not an employee of” the registry if the caregiver operates under the following arrangement:

1. The registry provides potential direct care workers
2. The registry conducts a background screening and verifies credentials of potential workers

3. The registry assists clients by locating direct care workers who may be able to meet a client's needs
4. The registry informs a direct care worker of the opportunity to work for a potential client
5. If the direct care worker is interested in the opportunity, the worker is responsible for contacting the client for more information
6. The direct care worker is not obligated to pursue this or any other opportunity presented
7. The direct care worker is not prohibited from registering with other referral services or from working directly with clients independent of the registry
8. The registry does not provide any equipment to the direct care workers
9. The registry does not supervise or monitor any work the direct care worker performs
10. The registry has no power to terminate the direct care worker's employment with a client
11. The registry processes the direct care worker's payroll checks according to information provided by clients
12. The registry does not set the pay rate

Fed. Reg. 60454, 60484 (Oct 1, 2013).

The Preamble also makes reference to a certain Wage and Hour Opinion Letter, 1975 DOLWH LEXIS 81 (July 31, 1975) (the "1975 Opinion Letter"), in which DOL found a registry to be the employer of a caregiver for purposes of the FLSA.

In the 1975 Opinion Letter, DOL states, by way of background: "**It has been our position that the ordinary employment agency that refers a nurse to a potential employer is not an employer of the nurse.**" DOL then points out that the registry at issue therein does not appear to be that of a normal employment agency. The principal findings concerning that registry are that:

- The registry maintains a log of assignments showing the shifts worked
- The registry establishes the rate which will be charged
- The registry exercises control over the nurse's behavior and the work schedule
- The registry exercises a form of discipline

DOL explained that the foregoing facts describe a registry that is more of a temporary help agency (in which case there is an employment relationship) than an employment agency.

IV. Utilizing the FAB in Structuring a Registry's Relationship with Caregivers

A strategy for using this guidance when structuring a caregiver registry's independent-contractor relationship with caregivers is to ensure that (i) the Preamble factors are satisfied, (ii) the adverse factors in the 1975 Opinion Letter are avoided, and (iii) the favorable practices in the FAB are satisfied and the adverse practices in the FAB are avoided.

One way to accomplish this for an existing registry is to compare the current business model against the guidance contained in items (i), (ii) and (iii), and identify those aspects of the business model that deviate from the guidance. For each identified aspect, try to develop a modification to the business model that would conform to the FAB while maintaining the registry's viability. Strive for 100% conformity.

For purposes of creating a new caregiver-registry business model, the guidance provides a relatively clear set of instructions for how structure the business.

A caregiver registry would be well advised to carefully examine its business model (including its website, marketing materials and relevant documents and agreements) to ensure that it conforms to this guidance as much as possible. To maximize certainty, consideration should be given to requesting an opinion letter from DOL on whether the business model constructed creates an independent-contractor relationship with caregivers for purposes of the FLSA.

* * *

If you have any questions or comments regarding the foregoing, please let us know.

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