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Hospitals May Risk Penalties with Use of “Gig” Nurses

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As health care entities around the country face staffing shortages, hospitals have started to turn to apps to fill nursing shifts. New apps allow hospitals to engage nurses as independent contractors to fill open shifts, allowing nurses to bid on shifts and select hours that match their schedule. Apps allow nurses to work as independent contractors and engage directly with the hospital as opposed to employees of the hospital or a nursing staffing agency that then engages on their behalf to staff the hospital. The *Wall Street Journal* recently reported on these apps, crediting their rise to nurses retiring or leaving the field after burn out from the COVID-19 pandemic, from which hospitals are still struggling to recover. But, these apps have existed for several years, and employment issues such as correct calculation of wages and tracking work time are something Epstein Becker Green has previously spotted.

Unfortunately, in the years since the apps’ adoption, state laws have not caught up with this latest innovation. Due to state laws and federal agency proposed rulemakings regulating the scenarios where employers can engage workers as independent contractors versus employees, hospitals and other facilities who seek to use these platforms may risk violating these laws if they engage workers as independent contractors who should be classified as employees instead.

States have had varying approaches to classifying independent contractors from employees. For example, California law requires health care workers to be engaged as employees as opposed to independent contractors, with few exceptions. In 2019, California codified the “ABC” test – a three-part test employers are required to use to determine whether a worker can be an independent contractor – in AB-5. Notably, the law specifically exempts health care professionals such as physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians, but does not exempt nurses. Cal. Labor Code § 2783(b). At least one lawsuit is pending in California against a nursing gig app for misclassification of a nurse as an independent contractor[1]. Other states are following California’s lead. For example, Michigan also just introduced a similar bill, HB 4390, which establishes a three factor “independent contractor” definition. Importantly, the bill would also create a standalone violation of Michigan’s Payment of Wages and Fringe Benefits Act for the misclassification of an employee as an independent contractor that includes a civil fine of note more than $10,000.

States are not alone in their focus on ensuring proper worker classification. As Epstein Becker Green previously blogged, the Department of Labor published a Notice of Proposed Rulemaking at the end of 2022 that would rescind and replace the 2021 rule to determine an individual's employment status from the economic reality test to a "totality of the circumstances" test – a more stringent test that favors a presumption of employee status. Likewise, the National Labor Relations Board solicited briefs at the very end of 2021 to reconsider its standard on independent contractor classification that, if the *McLaren Macomb* decision is any indication, would track the NLRB's expansive view of the definition of a covered "employee" under the National Labor Relations Act. For more information on the *McLaren Macomb* decision, please look to Epstein Becker Green's previous blog post. Healthcare Employers whose nurses are covered by a collective bargaining agreement would need to check whether any provisions in such agreements prohibit or limit the use of such outside contractors or would apply the terms of the agreement to them if they are found to be employees.

In addition to labor and employment issues, it is unclear how these apps mitigate health care regulatory concerns such as ensuring a nurse has the appropriate scope of practice, training, and education to bid for a shift. Nurses must provide proof of licensure, but whether there are any controls in place to ensure a nurse with experience in cardiology is appropriately staffed in a hospital's cardiology ward, for example, may be left to hospitals or health care entities engaging gig nurses to police. From a compliance perspective, it may also be difficult to ensure gig nurses are fully aware of a particular hospital or health care entities' policies and procedures on billing and coding, charting, and patient and building safety with such short engagements. While staffing shortages continue to cause pain to health care entities, these issues may not be top of mind when faced with unfilled shifts.

Health care employers must stay abreast and remain wary of apps that purport to help staff nurses as independent contractors. State and federal law continues to develop in this context and the enforcement agencies are homing in to ensure that workers are properly classified. It is important to remember that workers employed as independent contractors may be just as confused about worker classification as employers, if not more so, and can frequently hold themselves out as independent contractors without taking the steps necessary to be so (e.g., apply for a tax identification number, register a business name, open a separate business checking account, etc.). Often employers are not aware of any issue with worker misclassification until a worker who holds themselves out as an independent contractor files for unemployment insurance, spurring an audit of the employer's worker classifications. Similarly, health care employers can run into unexpected hurdles during transactions if they are not aware of how nurses or other health care workers are engaged. Epstein Becker Green will remain vigilant to keep employers up to date on changes to the employee classification legal landscape.

FOOTNOTES

[1] *Suttle v. Care.Stat! Inc*., No. 21CV383162 Cal. Super. Ct.

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