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NEW YORK FEDERAL COURT FINDS HOSPITAL LIABLE FOR OVERTIME COMPENSATION AS A JOINT EMPLOYER OF A NURSE WHO WORKED FOR SEVERAL NURSING AGENCIES

The United States District Court for the Southern District of New York recently issued an opinion in Barfield v. New York City Health and Hospitals Corporation and Bellevue Hospital Center, holding a hospital liable under the overtime provisions of the Fair Labor Standards Act ("FLSA") for the overtime wages of a nurse who had been referred to it by several different agencies simultaneously, resulting in her working more than 40 hours per week at the hospital. The opinion (i) outlines several criteria the courts within the Second Circuit Court of Appeals, which include the federal courts within Connecticut, New York and Vermont, apply in determining whether a company that outsources work should be considered a joint employer of the workers it obtains from agencies and (ii) serves as a warning to hospitals that call upon nurses through agencies, to monitor and restrict the number of hours such nurses work each week, even if each nurse comes from multiple agencies, in order to avoid liability for overtime wages.

Factual Background

Plaintiff was an independent nurse who worked for several agencies registered with various hospitals including Bellevue (the "Hospital"). Within a fifteen-month period, Plaintiff worked more than 40 hours per week at the Hospital for at least 16 weeks. During those weeks, Plaintiff was referred and paid by as many as three different agencies but was not owed overtime compensation by any of the agencies because she did not work for more than 40 hours in a week for any one of them.

Legal Controversy and Analysis

Plaintiff alleged that the Hospital violated the overtime provisions of the FLSA, 29 U.S.C. § 216(b), by employing her but failing to pay her for work hours in excess of 40 per week. The Hospital denied that it employed Plaintiff and asserted that even if it did, she was not eligible for overtime pay. Plaintiff attempted to have her action certified as a "collective action" under the FLSA, so that other "similarly situated" agency nurses could join in her lawsuit or "opt-in" as plaintiffs. The court

refused to allow other parties to join in her lawsuit because Plaintiff did not establish that the Hospital had a widespread practice or policy of contracting from multiple nurse agencies any nurse to work for the Hospital in excess of 40 hours per week.

After the court refused to allow others to join in the lawsuit, Plaintiff asked the court to grant her summary judgment. The court granted Plaintiff summary judgment and awarded her overtime pay because it found that she was employed more than 40 hours per week at the Hospital and was not paid overtime compensation. It also awarded liquidated damages because the Hospital did not establish that it took affirmative actions to determine whether its actions complied with the FLSA.

The court analyzed whether the Hospital was Plaintiff's employer under the FLSA, to determine whether the FLSA overtime provisions applied to the time she worked at the Hospital. The court recognized that the agencies paid Plaintiff's hourly wages, so she was, in that sense, employed by the agencies. However, because the FLSA has an expansive definition of "employ," and the federal regulations under the FLSA permit an individual to be employed by multiple employers, the court reviewed six factors enunciated in an earlier Second Circuit Court of Appeals opinion to determine whether circumstances dictated finding that the Hospital was a joint employer of Plaintiff. Specifically, the court reviewed the following:

1. Whether the Hospital's premises and equipment were used for Plaintiff's work

2. Whether the agencies had a business that could or did shift as a unit from one putative joint employer to another

3. The extent to which Plaintiff performed a discrete line job that was integral to the Hospital's process of production

4. Whether responsibility under the contracts could pass from one subcontractor to another without material changes

5. The degree to which the Hospital or its agents supervised Plaintiff's work

6. Whether Plaintiff worked exclusively or predominantly for the Hospital

The court found that all of these factors suggested that the Hospital was a joint employer of Plaintiff. Moreover, in concluding that the Hospital had functional control over Plaintiff and was her joint employer, the court noted that the Hospital regularly evaluated the performance of agency nurses and could prohibit an agency nurse from working at the Hospital if it believed that the nurse violated a rule or if it was otherwise dissatisfied with the nurse's performance. It rejected the Hospital's argument that Plaintiff was not entitled to overtime wages because at least one of the agencies informed her it would not pay overtime. The court found that the Hospital itself never having told Plaintiff that she should not work there more than 40 hours per week was more relevant than what any of the agencies told her. The court also noted that the Hospital told her only that the agencies were responsible for her overtime, without clarifying that it would not pay time she worked at the Hospital in excess of 40 hours per week.

The court also rejected the Hospital's argument that Plaintiff prevented it from determining how many hours she worked by signing in through multiple agencies. The court found that the Hospital reviewed time

records for agency nurses and cross-referenced them against supervisor verification forms in order to pay the agencies the designated fees for the hours worked by referred nurses of each agency. The court found that although the Hospital did not determine how many hours particular agency nurses worked on a weekly basis, it regularly reviewed documents that could have revealed how many hours Plaintiff worked in excess of 40 per week at the Hospital and that this constructive knowledge, even in the absence of actual knowledge, sufficed to incur overtime pay liability. Furthering its determination that the Hospital had constructive knowledge of the overtime Plaintiff worked, the court cited evidence that the Hospital encouraged Plaintiff to work shifts additional to those she was scheduled in advance, and at least one Hospital employee who was responsible for verifying agency sign-in sheets acknowledged that, although she did not look for agency nurses who worked for more than one agency, she sometimes noticed when that occurred.

Legal Ramifications

If the district court's application and interpretation of Second Circuit law here accurately reflects the law of the Second Circuit, hospitals must be aware that they may be considered joint employers of nurses obtained from agencies. The first, third and fifth factors noted by the court for determining whether the Hospital was a joint employer would regularly suggest that agency nurses are employees of hospitals, given the nature of the work such nurses would perform for hospitals is generally on the hospitals' premises, is integral to the hospitals' business of providing healthcare and is scheduled and supervised. It would similarly be difficult for hospitals to effectively obtain nurses from an agency and put them to work with minimal on-the-job training if the job functions were not standardized. Accordingly, the fourth factor, whether one contractor could be substituted for another, would appear to favor a finding of an employer-employee relationship over a contractor relationship in most circumstances.

The second factor, whether the agency could shift its business as a unit from one putative employer to another, is subject to an agency's means of and strategy for doing business, and is largely, if not entirely, out of hospitals' control. A hospital may have its best chance of disproving an employment relationship with agency nurses by preventing nurses from working at it exclusively or predominantly, by imposing weekly work-hours restrictions. Unfortunately, imposing such restrictions may increase the chances that a court finds the hospital exhibited control or supervised the nurses' work pursuant to factor 5. Accordingly, if this decision is or becomes the law of federal courts in New York, hospitals will be at a decided disadvantage in disproving claims that they are joint employers of the agency nurses.[1]

Bottom Line

The decision instructs that an unwary hospital may incur overtime liability even if it has no intention to have an agency nurse work overtime or actual knowledge that overtime is being incurred. Hospitals should assume that there is a risk they will be found joint employers of the nurses they obtain from agencies and take preventative measures to avoid overtime liability for such nurses. First, they should inform agencies and agency nurses that the nurses are not to work more than 40 hours per week at the hospital, regardless of how many agencies refer them. Second, they should develop and impose a policy for monitoring and restricting the hours

[1] As of the time this alert was printed, the Hospital still may appeal the decision to the Second Circuit Court of Appeals. This decision also has not yet been cited in the opinion of any court.

of agency nurses to ensure that no nurse works for them more than 40 hours per week through one or multiple agencies. Also, although it was not a problem in this case, if various units within hospitals have authority to request agency nurses, the units must share information about and coordinate their requests, to avoid requesting any nurses work more than 40 hours per week. Third, hospitals should consult legal counsel if they suspect that any agency nurses have worked for them more than 40 hours per week, so that counsel may evaluate the risks of liability and, if required, help determine how to compensate an agency nurse whom it had never previously paid directly or treated otherwise as an employee.

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If you have any questions regarding this decision, please contact Michael F. McGahan at mmcgahan@ebglaw.com, Donald S. Krueger at dkrueger@ebglaw.com, or Beth Essig at bessig@ebglaw.com. Messrs. McGahan and Krueger, and Ms. Essig may also be reached in EBG's New York office at (212) 351-4500.

Terence H. McGuire, an Associate in EBG's New York office, assisted with the preparation of this alert.