

Medical Staff Member Deemed Independent Contractor, Not Eligible for Title VII Protection

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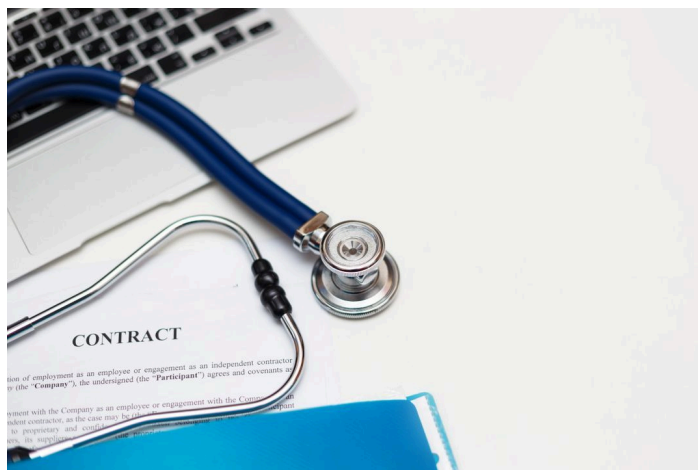
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When assessing potential exposure for their employer-clients under federal labor and employment statutes, employment and health care attorneys often must start with the basics. That determination of employment status becomes even more important in medical facilities, such as hospitals, which have multiple and complex levels of workers with varying levels of skills and responsibilities. This is especially true with independent medical staff members who may have other contractual relationships with hospitals—such as recruitment agreements or administrative services contracts—which can complicate these questions.

The Ninth Circuit recently confronted such a situation when deciding whether an independent member of the medical staff, who had a separate recruitment agreement as well as an on-call services agreement, was an employee or independent contractor. This decision is important for the litigants, because independent contractors ordinarily are not covered by Title VII.

In *Henry v. Adventist Health Castle Medical Center*, the physician, Dr. Henry, believed he was a victim of race discrimination under Title VII. Henry, who is Caucasian, alleged that a discriminatory intent motivated certain decisions affecting his clinical privileges and the review of his professional services. Specifically, he alleged that the level of control exercised by the hospital over the performance of his services rendered him an employee and also entitled him to the protections of Title VII.



Henry claimed that his recruitment agreement and on-call coverage arrangement supported his status as an employee. Among other things, Henry also alleged he was subjected to mandatory professional standards as

additional evidence of the extent of control exercised by the hospital. As further evidence supporting his argument that he was an employee, Henry also noted that the hospital provided him with both the staff and the equipment needed for his surgeries. Henry also argued he was subjected to the requirements and standards set forth in the medical staff bylaws and regulations in order to work at the hospital, as well as other various policies and procedures. The level of quality of his professional services were also a factor that Henry identified.

The court rejected all of these concerns and examined the level of control that the hospital exerted over his professional services. The court also used what has come to be known as the *Darden* test, set forth by the U.S. Supreme Court in 1992. Most employment tests balance a number of factors, and *Darden* is no exception. The factors analyzed by the Ninth Circuit in this case included:

- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hired party is in business for himself;
- the provision of the employee benefits; and
- the tax treatment of the hired party.

Applying all of these factors, the Ninth Circuit determined that Henry was not entitled to protection under Title VII. The court observed that Henry was free to conduct his own independent medical practice and that only approximately 10% of his revenues came from either hospital assistance or hospital compensation for on-call services. He was also free to conduct his own medical practice and perform surgeries and retain the revenue from those surgeries. Additionally, the court minimized the concern over the quality control through the medical staff credentialing and peer review processes. Citing the Fourth Circuit's decision in *Cilecek v. Inova Health System Services*, the Ninth Circuit stated that "[i]f the Hospitals did not insist on such details in the performance of professional services by doctors at their facilities, they would be exposing themselves to recognized professional liability." The Ninth Circuit also minimized the impact given the realities of modern day hospital and surgical care. Physicians typically will be provided with nurses, technicians and all of the equipment necessary to perform surgery. And, as the court noted, the days of a physician carrying his tools in his "black satchel" are long gone.

In a curious twist, however, the Ninth Circuit emphasized the characterization of the arrangement by the parties as an independent contractor relationship. Many courts discount this factor as one of the weaker pieces of evidence concerning worker status. In fact, most courts would look at the obligations and responsibilities of the parties and focus on control. Here, however, the Ninth Circuit also looked at the form of compensation and

recognized that the doctor was compensated for his on-call services, which was reflected on an IRS 1099 Form. Most experienced practitioners will look beyond the form or the documentation of the arrangement and the form of compensation as not particularly strong factors, and focus instead on other issues, such as the degree of control, and whether the worker is engaged in independent trade or business. These two factors are frequently identified by courts as key points in the analysis.

Decisions regarding the status of a worker have enormous implications under most employment statutes. Title VII is no different, as it could subject an employer to a variety of damages, including backpay, declaratory relief, possible mandatory (injunctive) relief, as well as compensatory damages, which includes punitive damages up to certain caps. The determination that an individual is an employee as opposed to an independent contractor also may pose significant benefit implications if the worker had not been participating in health and welfare funds or the employer's retirement plans.

Henry reaffirms precedent in many of the circuits concerning the status of independent members of medical staffs of hospitals. Generally, the unique nature of the relationships between hospitals and independent medical staff members results in a finding that the practitioners are not employees entitled to the protections of Title VII. That said, it is important to note that this decision will have no impact on the status of employed physicians. They certainly have the protection of Title VII, as well as other employment statutes.

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