Wal-Mart and the Expansion of Hospital and Medical Group Liability

Might a medical group set up as a partnership of professional corporations or as a PLLC of professional associations be liable for wages owed to an employee of one of the constituent entities?

Might a national medical group operating through independent medical groups, each a separate legal entity, at disparate sites be liable for the obligations of those constituent groups?

Might a hospital be liable for an independent contractor medical groupâ€™s breach of contract claims, malpractice or even fraud?

The answer is becoming â€œeyes.â€

Recent developments illustrate the situation, the issues, and the risks. Although the cases are limited to wage and hour disputes, the concepts underlying their disregard for the sanctity of entity status might soon be applied in other contexts as well.

Wal-Mart

Wal-Mart contracted with Schneider to manage a warehouse and distribution facility. In turn, Schneider subcontracted with other companies (â€œSubcontractorsâ€Â) to provide the actual labor.

A dispute arose over whether the Subcontractors properly paid their employees and whether they violated a number of labor laws. Individuals who were employed by the Subcontractors brought suit against the Subcontractors and against Schneider as so-called â€œjoint employers.â€

The plaintiffs alleged that Schneider controlled many of the terms of performance and therefore should be liable for the Subcontractorsâ€™ failure to comply with legal requirements, *even though the contract between Subcontractors and Schneider shifts all responsibility for legal compliance to the Subcontractor, and declares Subcontractor to be â€œsolely responsibleâ€Â for and â€œthe sole and exclusive employerâ€Â of the workers.*

Then, after suit was filed, and over the objection of Wal-Mart, the court allowed the plaintiffs to add *Wal-Mart* as an additional defendant due to its â€œcontrolâ€ over Schneider.

AT&T

AT&T, the telephony giant, had its bell rung in a recent decision by the United States Court of Appeals for the 2nd Circuit in a case involving security guards working at AT&T stores. AT&T didnâ€™t employ the guards. Instead, they were employed by a separate company that sold security guard services to AT&T. The guard company went out of business and the guards, who claimed that they had been improperly paid, sued AT&T.

The court deemed the subcontractor guard companyâ€™s employees to be jointly employed by AT&T such that AT&T would be liable to them for the subcontractorâ€™s violations.

Subway

Earlier this month, Doctorâ€™s Associates, Inc., the company that owns and franchises the Subway sandwich concept (Iâ€™ll refer to that company as â€œSubwayâ€) entered into a voluntary agreement with the U.S. Department of Labor pursuant to which Subway agreed to take efforts to make its franchisees â€œpromote and achieve compliance with labor standardsâ€ and to â€œexplore ways to use technology to support franchisee compliance, such as building alerts into a payroll and scheduling platform that Subway offers as a service to its franchisees.â€

Subway did not agree that it is a joint employer. But by entering into the agreement itâ€™s almost an admission by Subway that it has significant control over its franchisees â€" control being the factor that has led courts, such as the one in the AT&T case discussed above, to find joint liability. This will likely embolden plaintiffsâ€™ attorneys who seek to impose liability on upstream entities.

Note: Not Alter Ego Theory

You may be familiar with what's known as "alter ego" theory or, more commonly as "piercing the corporate veil." That concept, commonly seen, for example, in situations where the separate legal existence of a medical corporation is disregarded such that it bears liability for its physician shareholderâ€™s actions, is based on factors such as the failure to keep the corporation financially separate, failure to follow corporate formalities, and so on.

The theory in connection with the Wal-Mart, AT&T and Subway examples has nothing to do with any theory that seeks to attack the bona fides of the target defendant entity. Instead, it is based on factors such as the degree of control the defendant has over down-stream, legally separate entities.

In the Wal-Mart case, the court found significant the fact that the Schneider-managed operation was exclusively for Wal-Martâ€™s benefit. Schneider, in turn:

1. Required the Subcontractors to provide enough workers to satisfy Schneiderâ€™s fluctuating needs for the Wal-Mart warehouse.
2. Dictated material terms of plaintiffsâ€™ employment, such as requiring each new worker to undergo detailed pre-employment screening, subjecting them to ongoing supervision, and requiring strict adherence to Schneiderâ€™s performance standards.
3. Reserved Schneiderâ€™s right to request that Subcontractor remove any worker from their assignment at the warehouse.

In the AT&T case, the court used a three-factor test:

1. Did the defendant exercise â€œformal controlâ€Â over a worker?
2. Were the workers truly independent contractors themselves?
3. Last, a six-factor analysis to determine if the defendant exercised â€œfunctional controlâ€Â over a subcontractorâ€™s employees. No one factor is vital; itâ€™s the gestalt that counts.

    (a) Whether the defendantâ€™s premises and equipment were used.

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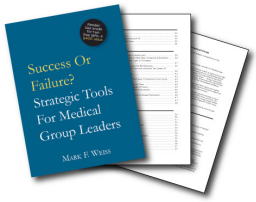

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(b) Whether the subcontractor had a business that could or did shift as a unit from one principal to another.

(c) The extent to which the workers performed a discrete job that was integral to the defendantâ€™s business.

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

(e) The degree to which the defendant or its agents supervised the workers.

(f) Whether the workers worked exclusively or predominantly for the defendant.

Translation Into Your Business

So whatâ€™s all this have to do with hospitals or large medical groups? Itâ€™s simple. Letâ€™s look at the hospital situation for an illustration.

Substitute â€œhospitalâ€Â or â€œhospital departmentâ€Â for warehouse and youâ€™ve got the relationship between most hospitals and physician services contract management companies. Look at the three numbered control factors set out above in connection with the Wal-Mart example and compare them with their hospital contact equivalents.

For example, the average exclusive anesthesia contract:

1. Requires the contract holder to provide enough anesthesiologists/CRNAs to satisfy the hospitalâ€™s fluctuating needs.

2. Dictates nearly every material term of the anesthesiologistsâ€™/CRNAsâ€™ employment, such as requiring each new worker to undergo detailed pre-employment screening (that is, the hospital can reject potential hires), periodic performance evaluations (that is, the providers must meet certain satisfaction and performance indicator criteria), and strict adherence to the hospitalâ€™s performance standards (compliance with the hospitalâ€™s policies and procedures, etc.).

3. Reserves the hospitalâ€™s right to request that the contract holder remove an anesthesiologist or CRNA from the roster.

Similar control issues exist in respect of the relationship between large physician groups and the physicians doing the actual patient care on behalf of intermediary owned or managed entities.

As mentioned, this relatively new theory of liability has arisen in the employment law context. Itâ€™s not difficult to use the same theory to impose other types of liability on the upstream entity.

Will this result in liability for breach of contract claims, malpractice claims and fraud, or even for False Claims Act violations, at the hospital level as a result of the hospitalâ€™s contacts with a contract management company or even with a local medical group? Maybe.

Will this result in employment law claims by physicians employed by sub-group X which is controlled by national group Y? Almost assuredly.

Note that local groups set up as combinations of physician-owned entities (e.g., a partnership of professional corporations) are potentially targets no different from AT&T.

There are, of course, transactional, structuring actions that upstream entities can take to mitigate their risk. They go well beyond concepts such as normal indemnification provisions.

Wisdom. Applied. 92 - How Not To Deal With Performance Problems

As the old bumper sticker says, shit happens.

All Things Personal

I talked to a friend about his businessâ€™ bookkeeper. It turns out that she walked off with hundreds of thousands of dollars of his money.

I asked whether they had run a background check before they hired her. He assured me that they had.

That got me thinking about background checks, not for criminal records and the like, but for exclusion from participation in federal health care programs.

It's safe to bet that your practice or healthcare business vets its prospective employees through the OIGâ€™s Exclusions Database before you hire them. (Make sure to inquire as to any prior names, such as maiden names, and search those, too.)

But do you go back and search again on a quarterly basis through your entire roster of physicians and any other employees who render services that may be billed to a federal health care program to make sure that their names have not popped up on the list? Probably not.

One of the most common fact situations leading to the return of Medicare overpayments to the OIG is that of a medical practice or other health care entity that billed for services performed by an excluded individual. For example, a $1,500 professional fee paid by Medicare for services rendered by a physician who is excluded is a $1,500 false claim that must be returned.

Vet your prospective employees through the Exclusions Database before hiring them, and then again on a regular, periodic basis.

Oh, you're wondering how the bookkeeper did it? One of the oldest tricks in the book: phony invoices from phony vendors.

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Finders keepers, losers weepers. Except in connection with overpayments from Medicare, then itâ€™s a violation of the federal False Claims Act leading to significant liabilityâ€"that is, unless you repay the overpaid sum within 60 days. Read **CMS Resets the Clock for Return Of Medicare Overpayments** published on

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LOS ANGELES OFFICE:
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