STATE OF CALIFORNIA GRAY DAVIS, Governor

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May 17, 2000

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Re: *Contract Management Services v. State of California*
Request for Advisory Letter on whether registered nurses who contract with a nursing registry are independent contractors or employees of the nursing registry.

Dear Mr. Vote:

This letter is in response to your request for an advisory opinion as to whether registered nurses who enter into contracts with your client, Contract Management Services, Inc. (hereinafter "CMSI") to perform nursing services for various hospitals, are employees of your client or independent contractors. You have provided a copy of the RN Contractor's Agreement, as well as copies of various court and agency decisions in support of your position that the nurses are independent contractors. Based on the information provided by you, together with the relevant case law, it is the conclusion of the Division of Labor Standards Enforcement ("DLSE") that under California law the nurses are employees of your client and not independent contractors.

Under common law the principal test in determining an employment relationship was whether the person to whom the service was rendered had the right to control the manner and means of accomplishing the desired result. Tieberg v. Unemployment Insurance Appeal Board (1970) 2 Cal.3d 943, 946. The distinction between service by an independent contractor and that of an employee arose at common law for the purpose of

limiting vicarious liability of the employer. Thus, under common law, control of details was the critical test in determining the extent of the employer's liability.

In the landmark case of S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, the California Supreme Court rejected a rigid application of the common law control test. Although acknowledging that the right to control work details is the most significant consideration, Borello held that other factors reflecting the nature of the service relationship also should be considered. Those factors include: (1) The employer's right to discharge at will without cause; (2) Whether the employee is engaged in a distinct occupation; (3) Whether the occupation is the type that is performed with or without supervision; (4) Whether the employer supplies the employee with the instrumentalities or tools to do the work and the place to work; (5) Whether payment is by the time or job; (6) Whether the work is a part of the regular business of the employer; and (7) Whether the parties believed they were creating an employer-employee relationship. Borello, Id. at 350-351.

These factors are not separate individual tests; but rather, are interrelated with their weight dependent upon the particular combination of factors. Borello, Id. 350-351. An employer-employee relationship may be found even where complete control or control over details is lacking if the employer retains pervasive control over the operation as a whole, the employee's duties are an integral part of the business, the employee's work does not require detailed work, and the remedial purpose of the statute is satisfied by finding an employment relationship. Borello, Id. at 356-357.

As Borello aptly noted, the concept of "employment" embodied in a remedial statute is not limited by common law principles. The definition of the employment relationship must be considered in light of the history and fundamental purpose of a remedial statute, the class of persons intended to be protected, and the relative bargaining position of the parties. Borello, Id. at 351, 353-354. Although the Borello case involved workers' compensation coverage under Labor Code § 3700 *et seq.*, the analysis is equally applicable to labor laws governing minimum wage and hour statutes. Borello, Id. at 359.

Under the California Industrial Welfare Commission ("IWC") Orders, an "employer" is defined as "[A]ny person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."[1] The RN Contractor's Agreement (hereinafter "Agreement"), a copy of which you provided, not only states that the RN is contracting to work for your client, but provides your client the right to exercise direct control over the wages, hours and working conditions of the RN. For example, the Agreement provides,

1. "As a Registered Nurse Contractor, the undersigned RN hereby contracts to work for a minimum of _____ 40-hour weeks-equivalent . . . with Contract Management Services, . . .";

2. "We [CMSI] guarantee payment for services rendered under this contract and supervise all payroll functions. . . . [. . .AND IN THE EVENT OF AN ERROR IN PAY, RN IS TO CALL IN. [sic] & WE'LL [CMSI] MAKE SURE IT'S CORRECTED.]"

3. "CMSI in its mediation role represents the final authority in all contract performance related disputes."

4. "We [CMSI] guarantee 80 hours work per each two-week pay period, . . ."

5. "YOUR PAYRATE FOR THE CONTRACT CONSISTS OF A BASE AND A BONUS PAID TOGETHER EVER [sic] 2 EWEKS [sic] ON THE HOSP'S REGUALR [sic] PAY SCHED. YOUR CHECK WILL BE DELIVERED TO YOUR HOUSING, USUALLY ON THURSDAY BEFORE THE FRI PAYDAY. PLEASE LET US KNOW IF IT DOESN'T GET THREE, SO WE CAN TRACK IT DOWN FOR YOU."

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[1] Labor Code § 18 defines "person" to include any person, association, organization, partnership, business trust, limited liability company or corporation."

6. "COMPENSATION: While working at _____, you will receive for services rendered the following compensation, _____/hr total, consisting of Base Pay plus P/A Bond/Bonus. . . . RN - $11.00 per hour for all regular hours worked. Regular Hours consist of 80 or under during a pay period, without reference to weekends, holidays, or other special days."

7. "BONUSES: P/A BOND/BONUS: A Performance/Attendance bond/bonus will be accrued and paid each pay period for each Regular hour worked provided that all attendance policies and procedures are followed, including the presentation of a VALID ACCORDING TO HOSPITAL doctor's release for each absence, following call-in procedure, etc.. . . Unauthorized absence results in the loss of the entire performance bond for that period. Unauthorized absence may result in termination. . ."

8. "AUTHORIZED OVERTIME: RN - $_____per hour for all overtime (in excess of 80 hours per pay period exclusive of makeup hours) authorized according to Hospital's policies and procedures, without reference to weekends, holidays, or other special days, which shall not be considered or paid as OT unless such hours shall be in excess of 80 plus any makeup hours within a pay period and authorized by Hospital prior to being worked. No OT will be paid for unauthorized hours worked in excess of 80 hours worked in excess of 80 per pay period or for makeup hours for base hours requirement. OT hours may not be used to meet these requirements."

9. TRAVEL: SHORTTERM: For travel for a SHORTTERM contract (13 FT wks - 1 year), as prepayment in consideration of RN working all hours under this contract, and earned only by completion of assignment hours, RN shall receive reimbursement at the rate of $.20/mi to a maximum of $_____. INTERMEDIATE: For travel for INTERMEDIATE contract (1 year or more), for certain designated hospitals, RN may receive Reimbursement up to $1,200.00 with documentation. . . "

10. ". . . RN is not an employee of the assigned hospital. . . ."

11. FOR CAUSE: If you have not received payment for the contract pay period within 5 days of due date, you may terminate the contract by presenting a written notice to CMSI.

The language of the Agreement provides CMSI with direct and pervasive control over the regular and overtime hours worked by the RN, the rate of pay, conditions under which the RN qualifies for an attendance bonus and reimbursement for travel expenses. The RN does not contract with a hospital for his or her wages and hours; but rather contracts with your client. Moreover, pursuant to the Agreement, if the RN does not receive his or her wages, the RN must provide your client, not the hospital, with written notice of termination. These contractual terms alone are sufficient to conclude that under California law your client is the employer of the RN.[2]

As noted above, control over the means and manner in which the work is performed remains the most significant factor in determining whether an employment relationship exists. "'One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed.' (Press Pub.Co. v. Industrial Acc. Com. [(1922) 190 Cal. 114, 121 (210 P. 820)].) The real test has been said to be 'whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.' (May v. Farrell (1928) 94 Cal.App. 703, 710 . . .); Toyota Motor Sales U.S.A. v. Superior Court (1990) 220 Cal.App.3d 864, 875. Here the provisions of the RN Agreement leave no doubt that instructions

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[2] The fact that DLSE has concluded that your client is the the employer of the nurses would not preclude a finding that the hospital where the assigned nurses perform their duties is a joint employer in conjunction with your client. Bonnette v. California Health and Welfare Agency (9th Cir. 1983) 704 F.2d 1465.

were given by both the hospital and CMSI and that those instructions had to be obeyed by the RN, and that the RN's failure to follow those instructions subjects the RN to discharge by CMSI.

Pursuant to the Agreement, the RN can be terminated for cause by either your client or the hospital. Termination can occur for the following reasons: Nonperformance of duties as assigned under the contract, including absenteeism, with or without excuse; failure to follow Hospital policies and procedures and State Board of Nursing regulations; illegal acts; failure to maintain professional standards; falsification of application or related documents; failure to comply with safety or operating regulations; failure to comply with health and safety regulations that impact patients or staff; failure to maintain applicable RN license; and failure to complete the agreed terms of the contract. Although there must be a cause for a termination, the grounds that establish cause are broad enough to allow CMSI significant latitude. And the mere fact that an employee can only be discharged for cause, as opposed to a "pure" at-will employment, is not in the least bit inconsistent with an employer-employee relationship. For example, virtually all unionized employers are protected by collective bargaining agreements which prohibit discharge without just cause. Civil service rules provide the same protections to public employees. These workers do not become independent contractors because their employers have agreed to limitations on the right to discharge at will. As noted above, control over work details remains the most significant factor in determining whether an employment relationship exists, and CMSI enforces control over work details through its right to discharge for cause.

The fact that the Agreement states that the RN understands and agrees that RN is an independent contractor will not insulate your client from the legal obligations of an employer. The label placed on the relationship by the parties is not dispositive and such subterfuge will not be countenanced by the courts. Borello, Id. at 349. An agreement that acknowledges an independent contractor relationship, and which is signed by the purported independent contractor, is a factor to be considered by the court. However, the court will not assume a waiver of employee protections where compelling indicia of an employment relationship are present. Borello, Id. at 358.

Nor do the requirements placed on the RN to provide insurance and to pay taxes alter DLSE's conclusion that CMSI is, in fact, the employer of the RN. Such requirements "are merely the legal consequences of an independent contractor status not a means of proving it. An employer cannot change the status of an employee to an independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer." Toyota Motor Sales, Id. at 877.

The fact that the hospital to which the RN is assigned provides the tools and instrumentalities for the RN to perform his or her duties merely suggests that the hospital may be a joint employer together with your client. It should be noted, as well, that the RN is paid by the hour for a number of set hours per week pursuant to your client's Agreement. This payment arrangement is indicative of an employer-employee relationship as opposed to an independent contractor who typically is paid according to the job and not by the hour.

Your assertion that your client cannot exercise control over the operations of RNs due to the prohibition under state law which forbids any non-licensed person or entity from exerting control over the duties of a RN misses the point. As Borello recognized, an employment relationship does not require supervision of every detail of an employee's work. An employment relationship will be found where the employer exercises pervasive control over the operation as a whole. Borello, Id. at 356. Your client retains all necessary control over the nursing service operation by hiring the RN, negotiating and guaranteeing his or her salary, placing the RN at a hospital, determining the number of hours the RN will work, and termination of the RN. Moreover, the RNs are an integral part of your client's business, without which, your client could not operate.

You rely upon Avchen v. Kiddoo (1988) 200 Cal.App.3d 532, to support your position that an RN who works pursuant to your client's Agreement is an independent contractor. Avchen is distinguishable on several grounds. First, Avchen was not a wage and hour case and did not concern the definition of an employer under the IWC orders. Rather, the issue decided was whether a nurses' registry was obligated to pay employment taxes to the Employment Development Department; that is, whether the nurses' registry was an employer under the provisions of the Unemployment Insurance Code. In contrast to the narrow common law

definition of "employer" under the Unemployment Insurance Code, the IWC orders set out distinctly broader definitions.

Second, Avchen was prior to Borello, *supra*, and thus, its analysis was not based on current law.[3]

Third, the facts in Avchen, supra, are different than those of your client. In Avchen the nurses negotiated their own assignments, salaries and working conditions directly with the patient or hospital. The nursing registry in Avchen did not have the right to terminate the nurses or supervise their work in any manner. Avchen, Id. at 534, 537. Moreover, the agreement in Avchen was not an exclusive agreement in that the nurses were free to work for other nursing registries. Avchen, Id. at 534. Thus, the nursing registry in Avchen did not exercise direct and pervasive control over the nurses.[4]

Another distinguishing fact is that the nurses in Avchen were considered private duty nurses under former Business and Professions Code § 9958.3 (now Civil Code § 1812.524(c)). Civil Code § 1812.524(c) defines a "private duty nurse" as ". . .a self-employed nurse rendering service in the care of either a physically or mentally ill patient under the direction of a physician or surgeon, but who is paid by either the patient or the designated agent of the patient and who accepts the

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[3] The other cases you cite equally are unpersuasive in that they are all pre-Borello.

[4] The Avchen court concluded that the nursing agency was a mere commercial matchmaker acting as an agent between the nurses and the patients or hospitals, and therefore, there was no employment relationship. Avchen, Id. at 537. The court's analysis is, of course, based on the common law definition of "employer" under the Unemployment Insurance Code. Nonetheless, we would agree that under the facts in Avchen, the nursing registry was not the employer of the nurses, for wage and hour purposes, based on the noninvolvement of the nursing registry in the hiring, negotiating of salaries, job assignments, and firing of the nurses.

responsibilities of a self-employed private contractor." It would appear from your client's Agreement that the nurses that contract with CMSI are licensed registered nurses and do not work as private duty nurses. Therefore, Civil Code § 1812.524(c) is inapplicable.

We hope this advisory opinion provides the guidance sought by your client. Thank you for your interest in California labor law.

Sincerely,

Miles E. Locker
Chief Counsel

MEL:bjf
cc: Art Lujan, State Labor Commissioner
Rich Clark, Deputy Chief Labor Commissioner
Tom Grogan, Assistant Chief
Roger Miller, Assistant Chief
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