

## **THE ACCIDENTAL EMPLOYER: OBLIGATIONS OF TRUSTS/TRUSTEES WHEN USING PLACEMENT AGENCIES TO MEET TRUST OBLIGATIONS**

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It is probably safe to say that few consumers are aware of the obligations and potential liabilities that come with hiring a health care provider through a registry or placement agency. Persons can be surprised with a greater legal liability than they expect, because for many purposes (such as tax liability and workers compensation) they qualify as employers.

Even sophisticated business operations can be caught unaware of these hidden liabilities, and this is especially true for trustees, who can be liable for a lot more than they initially realize due to the fact that Illinois makes trustees personally liable on a contract that does not specifically limit liability to the trust itself.

This article uses a factual scenario common to many trust situations in order to help provide some clarification on a number of employment issues that go along with the use of placement or other registry-type agencies when fulfilling health care obligations. It refers to Illinois law but should be instructive for other states as well. Of course, every situation is different, and if you believe that you may have greater liability exposure than you first thought, you should contact your legal advisor for specific advice.

### **Facts**

Mr. and Mrs. Smith established a trust for the care and benefit of their mildly retarded son, John. John is able to maintain his own apartment provided he receives assistance with cooking and cleaning. He also needs medication reminders and transportation to and from appointments. The Smiths select the USA Bank as the trustee, which is where the trust account is maintained. According to the trust document, USA Bank has the responsibility for hiring, overseeing and paying an in-home care provider for John.

In fulfilling its obligations as the trustee, USA Bank uses the Aides-R-Us placement agency to find a caregiver for John. Aides-R-Us interviews, screens, and places Caregiver Betsy. It coordinates her schedule and provides a "supervisor" who is available to answer any questions she might have. When being placed in a client's home by Aides-R-Us, caregivers must have a neat and clean appearance and wear either blue or green scrubs and white shoes, which they must purchase themselves. Caregivers must also provide their own transportation and maintain a minimum amount of auto insurance. Any items needed to cook or clean are purchased by Caregiver Betsy, who is reimbursed by Aides-R-Us. Aides-R-Us is in turn reimbursed by USA Bank.

Caregiver Betsy may seek additional assignments from Aides-R-Us or other agencies if she wishes, however she may not work additional hours or help other Aides-R-Us clients without going through and receiving approval from Aides-R-Us. Aides-R-Us prides itself on finding the

right aide for each client, and advertises that many clients find the perfect, long-term fit through its placement services.

USA Bank maintains an agreement with Aides-R-Us that provides for the continued general oversight and direction of Caregiver Betsy. This mainly entails answering questions, troubleshooting, and ensuring that when Caregiver Betsy is absent a suitable replacement is provided. USA Bank is not involved in any aspect of the provision of care, although it does have the ability to request a different caregiver or fire Aides-R-Us and find a new agency to help it find, hire and supervise a different caregiver. In addition to paying Aides-R-Us for its continuing oversight services, USA Bank pays Caregiver Betsy directly from the trust account for her services.

### **Who is responsible for workers compensation payments?**

In order to be responsible for workers compensation payments, an individual or entity must meet the definition of “employer” and must either be automatically included in the Workers Compensation Act’s coverage or elect to be voluntarily included (opt-in).

In determining whether an employment relationship exists for workers compensation purposes, you need to ask:

1. Who has the right to control an individual;
2. Who controls the manner in which work is performed;
3. The method of payment;
4. Who has the right to discharge; and,
5. Who furnishes the tools, materials, and equipment.

Aides-R-Us interviewed, screened and placed Caregiver Betsy in a specific client’s home. It is responsible for ensuring that a substitute caregiver is found if she needs to be absent from work. If she has problems or issues regarding John or his care, it is responsible for resolving those issues. Finally, although she is responsible for providing her own work clothes, these clothes must be in keeping with the Aides-R-Us policies. Based on these considerations, Aides-R-Us would almost certainly be considered an employer under the Workers Compensation Act.

On the other hand, USA Bank maintains the *right* to control Caregiver Betsy and pays her for her services. Although USA Bank does not actually exercise its right of control, it is the right, and not the exercise of the right, that is important. Further, USA Bank has the right to discharge Caregiver Betsy, either by requesting another caregiver or going to another placement agency. Given the broad nature of the Illinois Workers Compensation Act, 820 ILCS 305, which is designed to be inclusive and not exclusive, it is quite possible that USA Bank will be considered an employer for workers compensation purposes as well.

This being the case, both USA Bank and Aides-R-Us would seem to be responsible for workers compensation claims. But, as previously mentioned, the inquiry does not end there. Even if an entity is considered an employer under the Workers Compensation Act, unless it is automatically

included in the Act's provisions, it will not be responsible for workers compensation payments without opting in.

There is a long list of different types of companies and industries that are automatically included under the Workers Compensation Act. Although the list does not include trusts, placement agencies or registries, it does include "any business or enterprise... in which services are rendered to the public at large, provided that...the annual payroll during the year preceding the date of injury [is] in excess of \$1,000." It also includes "any household or residence wherein domestic workers are employed for a total of 40 or more hours per week for a period of 13 or more weeks during a calendar year." The statute does not specify or limit who the employer of the domestic worker must be.

Both provisions clearly include Aides-R-Us, assuming the domestic worker is employed for a total of 40 or more hours per week for a period of 13 or more weeks, but do they include USA Bank? The domestic worker provision clearly could include USA Bank, again assuming the employee worked more than 40 hours per week in a 13 week period. If included, Caregiver Betsy could make her workers compensation claim against either USA Bank or Aides-R-Us.

However, whether USA Bank is included in the other provision (services rendered to the public at large) is not so clear. USA Bank does not provide services to the public, but rather only to John, the beneficiary. This being the case, unless USA Bank opts in for coverage, Caregiver Betsy would need to make her workers compensation claim against Aides-R-Us.

But what if Aides-R-Us is bankrupt or refuses to pay, claiming that the trust and/or trustee is actually the employer? Remember that the Workers Compensation Act is intended to protect injured workers, and that USA Bank can probably qualify as an employer under this law. The likelihood is therefore good that a court would find a way in which to bring USA Bank back into the equation. For example, hospitals are automatically included under the Workers Compensation Act. A creative court might determine that the nature of certain hospital services (which are covered) are identical to the nature of certain services provided by Caregiver Betsy (which are not covered), and by analogy, Caregiver Betsy's services should be automatically brought under the Act.

Although this kind of reasoning seems to be something of a stretch, the law itself was meant to provide coverage for as many workers as possible, which means having as many entities fall under the Workers Compensation Act as possible. The law was intentionally designed to ensure recovery, regardless of its source.

The bottom line in this particular situation is that although Aides-R-Us clearly falls within the Act's coverage, if for some reason payment was unavailable to Caregiver Betsy, even if USA Bank did not opt in for coverage, it is unlikely that it would be able to escape liability.

### **Who is responsible for minimum wage and overtime?**

Both USA Bank and Aides-R-Us meet the definition of "employer" under the Illinois Minimum

Wage Law, 820 ILCS 105. However, just like the workers compensation coverage issues, the inquiry doesn't end at finding an employer. In order to be able to make a claim for minimum wage or overtime, an individual must be an "employee". An individual will not be considered an "employee" unless the employer has four or more individuals (not counting immediate family members) working for it. Because USA Bank only employs Caregiver Betsy, she is not an "employee" under this law, and so minimum wage and overtime requirements do not apply. Having said this, it is always possible that the Illinois Department of Labor and/or a court would count any substitute caregivers toward the minimum four employees, but this is not overly likely, unless Aides-R-Us is unavailable to Caregiver Betsy for recovery of wages.

On that point, because Aides-R-Us places and oversees more than four individuals, including Caregiver Betsy, it is quite likely that it will be considered her employer, and is therefore responsible for ensuring that minimum wage and overtime laws are not violated<sup>1</sup>. The fact that USA Bank pays Caregiver Betsy directly, will not get Aides-R-Us off the hook, although it does present a certain amount of additional liability to USA Bank.

Aides-R-Us is ultimately responsible for how its employees are paid, and just as Aides-R-Us is considered an agent for USA Bank, USA Bank maybe considered an agent of Aides-R-Us in this situation. Simply put, Aides-R-Us has delegated its responsibility for payment of wages of one of its employees to USA Bank. Aides-R-Us has more than four employees, and therefore minimum wage and overtime standards apply. USA Bank has failed to meet these standards in paying Caregiver Betsy, and Aides-R-Us is responsible for making up the difference. Aides-R-Us is then free to seek compensation and damages from USA Bank for its failure to pay appropriate wages on its behalf.<sup>2</sup>

**Are USA Bank and Aides-R-Us "joint employers"? If they are, does it make a difference as to who is responsible for workers compensation or overtime payments?**

USA Bank and Aides-R-Us may, in fact, qualify as joint employers. However this status will probably do little to change the parties' ultimate liability.

The test for joint employer status changes depending on the law that is being looked at. For purposes of this discussion, Illinois courts have found that a joint employer status exists when two or more employers exert significant control over the same employee. Relevant factors include their roles in hiring and firing, promotions and demotions, setting wages, work hours,

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<sup>1</sup> Many placement agencies and registries take the position that they do not have employees, but rather have independent contractors. Determining whether an individual is an independent contractor or an employee can be a rather involved process, but generally speaking, the issue of control, along with a number of other factors is determinative. For more information on how to determine if an individual is an independent contractor or an employee, contact the Illinois Department of Labor or a trusted legal advisor.

<sup>2</sup> Although the caregiver was held to not be entitled to overtime pay, at least one trustee bank has been named as a defendant in a suit by a caregiver for overtime pay. *Sandt v. Holden and United Penn Bank*, 698 F.Supp. 64 (DC Pa 1988)

and other terms and conditions of employment; discipline and actual day-to-day supervision and direction of employees on the job. Additionally, the fact that only one of the two employers pays the employee's salary does not, by itself, make a difference.

Given the factors that establish a joint-employer relationship, it is likely that USA Bank and Aides-R-Us may be considered joint employers for a number of purposes. Although Aides-R-Us has more day-to-day control over Caregiver Betsy, ultimately, it is USA Bank that has the right and responsibility for this control. The fact that it is delegated to Aides-R-Us makes no difference.

With this in mind, the question then remains as to whether such a joint-employer relationship makes a practical difference in each entity's liability. In fact, for the purposes of workers compensation and wage and hour issues, it does not. This is because under the Workers Compensation Act, joint and several liability is already established. This means that both employers are responsible for payments, and if one can't make those payments, the other one must. Because joint employer status also provides for joint and several liability, the outcome is the same.

Under the Minimum Wage Act, Aides-R-Us remains responsible for payment of overtime and minimum wage to its employees. A failure on the part of USA Bank, as an agent of Aides-R-Us, to meet these obligations does not relieve Aides-R-Us from liability, nor would a joint employer relationship. This is true because although USA Bank might be considered a joint employer, it does not employ four or more individuals, which means that it does not have an obligation to pay minimum wage and overtime. USA Bank's liability is established only through its failure to meet a delegated obligation from Aides-R-Us.

### **Is Caregiver Betsy a “leased employee”? If so, does that change the parties' liabilities?**

Caregiver Betsy could, in fact, qualify as a leased employee. The greatest impact of this status is under the Workers Compensation Act, however, as with joint employer status, the ultimate liability of the parties changes little.

A leased employee relationship exists where the employee is assigned by her employer (the loaning employer) to perform special services for another employer (the borrowing employer) and while she works for the borrowing employer, it exercises exclusive direction and control over her.

Two factors determine whether a leased-employee relationship exists: (1) whether the borrowing employer had the right to direct and control the manner in which the employee performed the work; and (2) whether a contract of hire, either express or implied, existed between the employee and the borrowing employer. Of these two factors, the right to control is the most important.

The Workers Compensation Act automatically defines a placement or similar agency as a loaning employer. However, Illinois courts have held that this is merely to provide additional

coverage for an employee, and it does not necessarily mean that an organization or individual using a placement agency qualifies as the borrowing employer. In this particular case, USA Bank does, in fact, have the right to direct and control the manner in which Caregiver Betsy performs her work. The fact that it chooses to delegate this power does not mean that it does not exist.

The next factor that must be considered is whether there is a contractual relationship between Caregiver Betsy and USA Bank.

USA Bank's only association with Caregiver Betsy is through the issuance of a paycheck to her. Based on the paperwork she likely had to sign to be placed by Aides-R-Us, as well as the fact that the agency, and not USA Bank, has day-to-day interactions with her, it would not be surprising if she viewed Aides-R-Us as an employer, and never considered herself as working for USA Bank. If this was the case, then she cannot be said to have a contract for employment with USA Bank.

Of course, as with other employment law considerations, the analysis is not so straight forward. Illinois courts have considered the rather unusual employment situation that arises when placement agencies are involved, and have determined that consent to work for a borrowing employer (USA Bank in this case) can be implied due to the very nature of working for a placement agency. Because temporary agencies exist for the purpose of providing employees to other entities or individuals, an employee of such an agency impliedly consents to working for others. With implied consent comes an implied contract, and thus the second requirement for a loaned employee has been met.

Assuming that Caregiver Betsy is determined to be a leased employee, under the Workers Compensation Act, USA Bank is an employer. As before, however, there are problems with the application of the Act to a trust and/or trustee. This being the case, the loaning employer – Aides-R-Us - will likely be required to pay any workers compensation claims, and may seek reimbursement from USA Bank, unless such reimbursement is waived by agreement between the employers.

The Minimum Wage Act does not speak directly to loaned employees, however the analysis remains the same as previously discussed. Liability shifts between the borrowing employer (USA Bank) and the loaning employer (Aides-R-Us), depending on how the law applies to each entity and what a court wants the outcome to be. In this case, the borrowing employer (USA Bank) does not have to pay minimum wage and overtime, however the loaning employer (Aides-R-Us) does. A court that wishes to make certain that Caregiver Betsy receives overtime will not find her to be a leased employee. Aides-R-Us will then be responsible for overtime, but could seek damages and compensation from USA Bank for failing to meet that responsibility on its behalf.

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