Legal Briefs

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What is an employee?

In most fields, "employment" has well-defined effects in terms of requirements of the Internal Revenue Service, vicarious liability, labor relations, workmen's compensation and other areas. Recently, I was making a point that nurse anesthetists are rarely "employed" by surgeons when someone asked me what was an employee. As I tried to explain, I began to realize that not only is "employment" a legal concept that can have different meanings in various contexts, but also nowhere are the variable meanings of employment more evident than in the field of health care.

In health care and in certain other areas in an increasingly complex society, relationships do not always fall into the neat little boxes that legal doctrine creates. Consider, for example, that a single legal volume published in 1929 contained one article concluding that operating room nurses who had improperly conducted a sponge count were the "borrowed servants" or employees of the surgeon,[1] while another article indicated that a nurse was a professional and not an employee of a patient for purposes of the Workmen's Compensation Act.[2]

It is said that common law "employment" depended on four elements:[3]

1. The employer had the power to select and engage the employee.
2. The employer paid wages to the employee.
3. The employer had the power to dismiss the employee.
4. The employer had the power to control the conduct of the employee.

Of these, the power to control conduct was recognized as the most important. Whether or not someone is an employee depends not only on the exact nature of the relationship but also on the context in which the question is asked. Many nurse anesthetists work in varying degrees of collaboration with surgeons. Are these nurse anesthetists employees of the surgeon? Rarely will the relationship between nurse anesthetist and surgeon embody the four elements listed above.

Internal Revenue Service

Under the Internal Revenue Code, a number of taxes become payable if someone is an employee. For example, employers are required to collect withholding taxes on wages but not on amounts paid to independent contractors. The Internal Revenue Service (IRS) has accepted the "common law" definition of employment. Because the question has such ramifications, the IRS has published a number of comprehensive rulings. The IRS also recognizes control as the most important factor determining whether the employment relationship exists. An employee is one who is subject to the will and control of the employer not only as to what shall be done but also as to how it shall be done. "*Conversely . . . individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.*" Accordingly to the IRS' most recent ruling, it has identified 20 factors to indicate whether suffi-

cient control is present to establish an employee-employer relationship.[4]

The following factors are considered an indication of employment:

1. A person is required to comply with another person's instructions about when, where and how he or she is to work.
2. Training is provided.
3. Integration of the worker's services into the business operations of the person for whom services are performed.
4. A requirement that the services must be rendered personally by the worker.
5. The person for whom the services are performed has the right to hire, supervise and pay assistants.
6. A continuing relationship.
7. The person for whom the services are performed has the right to set hours.
8. The worker must devote substantially full time to the business of the person for whom the services are performed.
9. Work is performed on the premises of the person for whom the services are performed.
10. The services are performed in an order or sequence set by the person for whom the services are performed.
11. The worker must submit regular reports.
12. Payment is made by the hour, week or month.
13. The person for whom the services are performed pays business or travel expenses.
14. The person for whom the services are performed furnishes equipment or materials.
15. The person for whom the services are performed has the right to discharge.
16. The worker has the right to terminate his or her relationship with the person for whom the services are performed, at any time and without incurring liability.

The following factors are indications of an independent contractor relationship:

1. The worker invests in facilities that are used in performing services which are not typically maintained by employees (such as a separate office [IRS example] or an anesthesia machine [my example]).
2. The worker can realize gain or loss as a result of the worker's services.
3. The worker performs substantial services for multiple unrelated persons or firms.
4. The worker makes his or her services available to the public at large.

While some of these factors may be present in various relationships, they will almost never describe the relationship between CRNA and surgeon. They may describe the relationship between anesthesiologist and nurse anesthetist, especially an anesthesiologist-employed nurse anesthetist. For hospital-employed nurse anesthetists, some or all of these factors may also exist although there may be different groups within the hospital exercising some of the functions. Since the IRS is concerned that taxes be withheld from wages paid to employees, it is less concerned about who exercises the function and more concerned with whether there is anyone who exercises the function.

Revenue Ruling 87-41 pointed out that these factors were merely guides and each factor would vary in importance from occupation to occupation and from factual context to factual context.

Vicarious liability

A law review article considered the theoretical basis for holding an employer liable for the mistakes of the employee although the employer was free of any wrongdoing ("vicarious liability").[5] The purpose of vicarious liability is to promote careful behavior and to see that competing businesses bear the same degree of risk. If the business regularly produces injuries and the employee is unable to bear the full costs of his or her wrongs, the employee may have too little incentive to avoid wrong. If the business is not also held liable, the economic burden of wrongs which are caused by the business fall on the innocent victims and the business avoids costs which other competing entities must carry. In our economic and political system, we want businesses to compete on the basis of how well they avoid harming other people; we do not want businesses to compete on the basis of how well they avoid paying for the harm they cause other people.

Vicarious liability gives the employer a financial incentive to promote care on the part of employees. Even in institutions which hire insolvent employees (who, except for pride and personality would have no theoretical economic incentive to avoid injury), vicarious liability gives *someone* an incentive to avoid injury. The employer would be expected to promote and reward his or her more careful employees and this should theoretically provide a financial incentive to employees to avoid wrongs, as well, even if the employee is otherwise insolvent.

Once the *Law* has made a decision, it must apply the principle in situations where its application is not so suitable. Consequently, when a wealthy individual works for an insolvent employer, both employer and employee continue to be liable even though in this peculiar and unusual circumstance there may be insufficient justification for holding the employer liable.

Since the major purpose of vicarious liability is to promote careful behavior and make sure risks are borne equally by comparable companies, it is easy to see that it should apply only in those circumstances where the employer had sufficient control over the employee to be able to affect the employee's behavior. Thus, an understanding of the purpose of vicarious liability helps explain the courts' decisions in a number of cases involving nurse anesthetists.

For example, in *Parker v Vanderbilt University*,[6] the Court eliminated consideration of "Captain of the Ship" because the *"use of the term 'Captain of the Ship' with respect to the liability of a surgeon for the negligent acts of others in or around the operating room is unnecessarily confusing and should be avoided. We think the surgeon's liability for the acts of others should rest on the more familiar concepts of master and servant."*

It also explains the Court's view that *"To hold the master/principal liable, it must be established 'that the servant or agent shall have been on the superior's business, acting within the scope of his employment.'"* When does a master-servant relationship exist? The Tennessee cases indicate that *"the right to control the 'result' is not determinative of the existence of the relation of master and servant, but the actual control of means and method is."* If the employee is not "on the superior's business" and if the employer does not control "means and method," it is unlikely that the employer could have affected the wrong in any meaningful fashion.

National Labor Relations Board

The National Labor Relations Board (NLRB) is also somewhat involved in determining who is an employee. To be more precise, the NLRB is concerned with who is an employer. Some hospital-employed nurse anesthetists are so closely supervised by anesthesiologists that they are really employed by both the hospital and the anesthesiologists. When the anesthesiologists are also hospital employed, they are part of the accepted supervisory structure. But when the anesthesiologists are independently incorporated, this column has previously argued that the nurse anesthetists are employees of dual employers. The NLRB has recognized the concept of multiple employers in other industries. In a series of cases, the NLRB has found that an employer is one who significantly participates in (1) day-to-day supervision, (2) scheduling of working hours and vacations, (3) rule-making, and (4) the right to hire, fire and discipline.[7] There is a case now on appeal before the NLRB raising the issue of dual employers in a case involving nurse anesthetists.

Health care

In the health care area, traditional notions of employee and independent contractor are superseded by a reality of practice in which a number of professionals interact in varying degrees of collaboration and cooperation. Moreover, many of the colaborators are professionals, exercising independent judgement and using specialized education that makes "control" unlikely. Hospital administrators had the power to hire, fire and discipline, often thought to be the key to "control." Nonetheless, it was obvious that hospital administrators did not have the ability to control hospital-employed physicians, nurse anesthetists and others.

In the early days of hospitals, hospitals served not only the patient but also the admitting physician. Legal analysis overly concentrated on the point that nurses and others were there to serve physicians. This analysis, along with considerations that nurses could cause damage for which they were incapable of paying, resulted in the rise of the "Captain of the Ship" doctrine. As surgery has become more complex requiring members of surgical teams to carry out their own areas of expertise, and as nurses and hospitals increasingly carry insurance, voluntarily assuming the economic costs of the risks that vicarious liability was intended to accomplish, the Courts become less and less likely to find elements of control and joint enterprise in the relationship between surgeons and nurse anesthetists.

REFERENCES

(1) 60 A.L.R. 147 (1929) "Liability of operating surgeon for negligence or lack of skill of nurse assisting him."
(2) 60 A.L.R. 303 (1929) "Nurse as independent contractor or servant."
(3) 53 Am Jur 2d "Master and Servant" 82.
(4) Rev. Rul. 87-41.
(5) Alan O. Sykes, "The Boundaries of Vicarious Liability," 101 *Harvard Law Review* 563 (January, 1988).
(6) 767 S.W. 2d 412; 1988 Tenn. App. LEXIS 734, Court of Appeals of Tennessee, Middle Section.
(7) *NLRB v Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F. 2d 1117 (3d Cir. 1982) and *Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v Cotter & Company*, 691 F. Supp. 875 (E.D. Pa. 1988).