

# **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, wage and hour and workers compensation) they qualify as employers.

Even sophisticated business operations can be caught unaware of these hidden liabilities. This is especially true for trustees, who in many states can be liable for a lot more than they initially realize because their specific state laws make 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. If you believe that there is greater liability exposure than first thought, it is recommended to 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, Caregiver Betsy must have a neat and clean appearance and wear either blue or green scrubs and white shoes, which she must purchase herself. Caregiver Betsy must also provide her 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. It 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. However, 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 Illinois, similar to many other states, in order to be responsible for workers compensation payments, an individual or entity must meet the definition of “employer”.<sup>1</sup> The Illinois Workers Compensation Act (the “Act”) differentiates between the specified classes of employers that are automatically included in the Act’s coverage and those employers who are not automatically included. The employers who are not automatically included in the Act’s coverage may elect to be voluntarily included in the Act’s coverage. However, like many other state’s workers compensation laws, with only a few exceptions, most employers are automatically included in the Act’s coverage.

In determining whether an employment relationship exists for workers compensation purposes, one needs 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?
5. Who furnishes the tools, materials, and equipment?

Aides-R-Us interviewed, screened and placed Caregiver Betsy in John’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 Aides-R-Us policies. Based on these considerations, Aides-R-Us would almost certainly be considered an employer under the Act.

On the other hand, USA Bank maintains the *right* to control Caregiver Betsy and pays her

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<sup>1</sup>Although probably very similar, each state’s workers compensation laws will vary. The Illinois Workers Compensation Act, 820 ILCS 305/1 *et seq*, referred to in this article is used for example purposes only, but appears to be representative of many other states’ workers compensation laws.

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. In addition, 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 Act, which like many other state workers compensation laws are 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. However, as previously mentioned, the inquiry does not end there. Even if an entity is considered an employer under the Act, unless it is automatically included in the Act's provisions, it will not be responsible for workers compensation payments without voluntarily opting in.

There is a long list of different types of companies and industries that are specified in the Act that are automatically included under the 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." (820 ILCS §305/3) 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." (820 ILCS §305/3) 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 (USA Bank) is actually the employer? Remember that the Act, similar to most other state workers compensation laws, is intended to protect injured workers. Keeping this in mind and considering the factual scenario presented, USA Bank probably qualifies as an employer under the Act. The likelihood is therefore good that a court would find a way to bring USA Bank back into the equation.

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 from Aides-R-Us, it is unlikely that USA Bank would be able to escape liability.

## Who Is Responsible for Minimum Wage and Overtime?<sup>2</sup>

Similar to liability for workers compensation benefits, in order to be responsible for minimum wage and overtime payments, an entity must meet the definition of “employer” under the applicable state minimum wage and overtime compensation laws. Both USA Bank and Aides-R-Us meet the definition of “employer” under the Illinois Minimum Wage Law.<sup>3</sup>

However, just like the workers compensation coverage issues discussed above, the inquiry does not end there. In order to make a claim for minimum wage and overtime payments an individual must be an “employee” as defined under the applicable minimum wage and overtime law. In Illinois, 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 the Illinois Minimum Wage Law. The Illinois minimum wage and overtime requirements do not apply to USA Bank.

However, because Aides-R-Us places and oversees more than four individuals, including Caregiver Betsy, it is quite likely that Aides-R-Us will be considered her employer, and is therefore responsible for ensuring that minimum wage and overtime laws are not violated.<sup>4</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 may be 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. Therefore minimum wage and overtime standards apply to it, and as a consequence of the agency relationship between Aides-R-Us and USA Bank, may apply to USA Bank as well. If USA Bank fails to meet these standards in paying Caregiver Betsy, Aides-R-Us may be responsible for making up the difference. If responsible, Aides-R-Us is then free to seek compensation and

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<sup>2</sup>This article addresses state law, but similar arguments can be made under the Fair Labor Standards Act which is the federal law concerning minimum wage and overtime pay.

<sup>3</sup>Although probably very similar, each state’s minimum wage and overtime laws will vary. The Illinois Minimum Wage Law, 820 ILCS 105/1 et. seq., referred to in this article is used for example purposes only, but appears to be representative of many other states’ minimum wage and overtime laws.

<sup>4</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 your trusted legal advisor.

damages from USA Bank for its failure to pay appropriate wages on its behalf.<sup>5</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 minimum wage and 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. Illinois courts have found that a joint employer status exists when two or more employers exert significant control over the same employee. Many states employ a similar test, but each state’s law must be consulted to determine the exact test used in the applicable state.

In Illinois, the courts used the following factors in determining joint liability. These factors include each employer’s role in hiring and firing, promotions and demotions, setting wages, work hours, other terms and conditions of employment, discipline, 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 unlikely that USA Bank and Aides-R-Us will be considered joint employers. 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 its duties 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. For the purposes of workers compensation and wage and hour issues, it does not. Under the Illinois Workers Compensation Act, like most state workers compensation laws, joint and several liability is already established. This means that both employers are responsible for payments, and if one cannot make those payments, the other one must. Because joint employer status established through common law (court made law) also provides for joint and several liability, the outcome is the same.

Under the Illinois Minimum Wage Law, 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. Although USA Bank might be considered a joint employer, it does not employ four or more individuals; meaning it does not have an obligation to pay minimum wage and overtime under the Illinois Minimum Wage Law. USA Bank’s liability is established only through its failure to meet a delegated obligation from Aides-R-Us.

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<sup>5</sup>In at least two cases, a trustee bank has been named as a defendant in a suit by a caregiver for overtime pay. *Nellis v. Herberger Revocable Trust*, 360 F.Supp.2d 1033 (DC Az 2005); *Sandt v. Holden and United Penn Bank*, 698 F.Supp. 64 (DC Pa 1988)

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

Caregiver Betsy could, in fact, qualify as a leased employee. Again, for purposes of this discussion, this article will review Illinois law, which is representative of most other states. The greatest impact of this status is under the Illinois Workers Compensation Act. However, as with joint employer status, the ultimate liability of the parties changes little.

Under Illinois common law, 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 Illinois 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. 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, 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 Illinois

Workers Compensation Act, USA Bank will be considered 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, but 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.

Although each topic discussed above has focused on Illinois statutes and case law, it is likely representative of the statutes and case law in most other states. However, each state's law should be consulted to determine the standards used in the applicable state.

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