



Companions & Homemakers

Home Care for Older Adults

LAW DEPARTMENT
613 NEW BRITAIN AVENUE
FARMINGTON, CONNECTICUT 06032
www.companionsandhomemakers.com

J. MARTIN ACEVEDO, GENERAL COUNSEL
EMAIL: martin.acevedo@elderly-care.com

DIRECT DIAL: (860) 751-8882
FACSIMILE: (860) 408-2501

February 26, 2013
Committee on Labor and Public Employees
Testimony Regarding Raised Bill No. 6432
"An Act Concerning Homemaker Services And Homemaker Companion Agencies"

DEAR MEMBERS OF THE COMMITTEE:

My name is Martin Acevedo. I am General Counsel for Companions & Homemakers, Inc., a twenty-two year old employment-based homemaker-companion agency registered with the Department of Consumer Protection. Our agency cares for over 2,700 elderly consumers in their homes and employs approximately 2,300 caregivers. Thank you for the opportunity to submit comments regarding Bill 6432—a proposal which seeks to eliminate worker misclassification in the homemaker-companion industry by designating Registries as the employer of individuals providing home care services to consumers.

Our testimony is twofold.

First, we believe that under Connecticut law homemakers, companions, home health aides and personal care assistants do not qualify as independent contractors. Therefore, Registries that "recruit" and "refer" such workers to consumers (who in turn pay such Registries an ongoing fee for as long as the caregiver performs services at the consumer's home) should be designated the employer of those workers. For years, many registries have engaged in misclassification by treating their workers as independent contractors when in fact they should have been treated as employees all along. Not only is this practice in violation of state and federal law but it also contravenes Connecticut public policy as embodied in Public Acts 08-156 and 10-12.

Second, because an individual or family hiring a caregiver privately also can engage in misclassification (unintentionally or otherwise), we believe this Bill (6432) should be amended to clarify that an individual or family who privately hires a caregiver must also comply with the law and, consequently, must treat the caregiver as an employee—not as an independent contractor.

COMPANIONS, HOMEMAKERS, HOME HEALTH AIDES AND PERSONAL CARE ASSISTANTS ARE EMPLOYEES OF REGISTRIES

Registry caregivers are, indeed, employees of the registry. We believe that existing law supports this conclusion. "Home care workers," understood primarily as homemakers, companions, personal care assistants, etc., already have been adjudicated to be "employees":

(1) In the matter of the Paffen v. Griswold Special Care, 9019-BR-97, the Connecticut

Unemployment Board of Review found that a companion employed by Griswold Special Care--a well known registry chain--was not an independent contractor under the "ABC TEST" and therefore was entitled to unemployment compensation benefits. This case was affirmed on appeal by the Superior Court and remains good law.

(2) An advisory memorandum published by the Connecticut Department of Labor going back to 1998 warns registries not to advise customers that registry workers are "independent contractors."

(3) In *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988), a case which is binding in Connecticut, the Second Circuit held that nurses recruited by a New York registry were "employees" of the registry and therefore protected by the provisions of the Fair Labor Standards Act (FLSA).

COMPANIONS & HOMEMAKERS, INC.
OFFICE OF THE GENERAL COUNSEL
TESTIMONY CONCERNING BILL No.6432
COMMITTEE ON LABOR AND PUBLIC EMPLOYEES
FEBRUARY 26, 2013
PAGE 3 OF 4

Homemakers, home-health aides, companions, personal care workers, follow direction, receive (or are subject to) supervision, and are not customarily engaged in an independent occupation, or profession or business. Consequently, they do not meet the definition of "independent contractor" and are employees of the person or entity that employs them. As employees, they are entitled to certain benefits including, among many, unemployment benefits and workers' compensation coverage.

The vast majority of Connecticut home care agencies treat their workers as employees. Furthermore, recognizing that these type of workers are employees—not independent contractors the State of Connecticut itself has contracted with fiscal intermediaries to handle the **employer responsibilities** (tax withholdings, etc) of Medicaid clients who elect to hire their own caregivers under a number of "self-directed" care options and programs. Evidently, if the State of Connecticut had not thought that these workers were employees, it would not have set up a system to ensure the workers were treated as employees, legally and tax-wise.

THE BILL SHOULD BE AMENDED TO CLARIFY THAT INDIVIDUALS OR FAMILIES WHO HIRE CAREGIVERS PRIVATELY ARE THE EMPLOYER OF THE CAREGIVER

Just like an agency, an individual or family that hires a caregiver privately also can engage in worker misclassification if it treats the home care worker as an independent contractor. **Consequently, we believe it is imperative that the Bill be amended to provide that an individual or family that hires a caregiver privately will be designated as the employer of record of that home care worker.**

Connecticut case law is clear that an individual (or family) who hires, controls and directs the work of home care aides can be held liable for unemployment contributions on the basis that the individual (or family) is the employer of the aide. Indeed, in *Latimer v. Administrator*, 216 Conn. 237

COMPANIONS & HOMEMAKERS, INC.
OFFICE OF THE GENERAL COUNSEL
TESTIMONY CONCERNING BILL NO.6432
COMMITTEE ON LABOR AND PUBLIC EMPLOYEES
FEBRUARY 26, 2013
PAGE 4 OF 4

(1990), the Connecticut Supreme Court held that personal care workers retained by a private individual's representatives were employees of the household and thus entitled to unemployment compensation benefits. In that case, the aides were paid directly by the private individual's representatives at an agreed-upon hourly rate, and were subject to the client's control and direction in the performance of their services. The *Latimer* case remains good law.

PUBLIC POLICY COMPELS THE PASSAGE OF THIS BILL

As a matter of public policy, employee misclassification hurts workers, reduces tax revenues and creates unfair competition for law-abiding employers. We strongly urge this Committee to move this Bill forward.

Thank you for the opportunity to testify today.

ENCLOSURES:

(1) *Latimer v. Administrator*, 216 Conn. 237 (1990); (2) *Paffen v. Griswold Special Care*, 9019-BR-97, affirmed by the Superior Court in CV-98-0351244-S; (3) DOL Advisory Memorandum dated December 1998; (4) *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988).

▷
Latimer v. Administrator, Unemployment Compensation Act
Conn., 1990.

Supreme Court of Connecticut.

Walter N. LATIMER

v.

ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT.

No. 13863.

Argued May 3, 1990.
Decided Aug. 14, 1990.

Connecticut Unemployment Compensation Act administrator assessed stroke victim for unpaid unemployment tax contributions on behalf of personal care assistants who rendered at-home services to stroke victim, and stroke victim appealed. The Superior Court, Judicial District of Litchfield, Pickett, J., upheld a hearing officer's decision that stroke victim was liable for assessment. On appeal, the Supreme Court, Callahan, J., held that: (1) de novo review by trial court was not warranted, and (2) evidence permitted conclusion that stroke victim had failed to sustain burden of showing that assistants who cared for him were free from his control and direction in rendering services, so as to preclude holding stroke victim liable for unemployment tax contributions.

Affirmed.

West Headnotes

[1] Taxation 371 ☞3291(9)

371 Taxation

371V Employment Taxes and Withholding in General

371k3291 Assessment

371k3291(9) k. Proceedings. Most Cited Cases

(Formerly 371k493.6)

De novo review by trial court of matter in which unpaid unemployment compensation contributions were sought from alleged employer, without regard to record developed before hearing officer, was not war-

ranted, where parties agreed to elaborate procedural arrangement that contemplated and resulted in full scale hearing before hearing officer with resultant findings of facts and decision; trial court properly restricted its review to record developed at administrative hearing.

[2] Taxation 371 ☞3271

371 Taxation

371V Employment Taxes and Withholding in General

371k3270 Tests of Employment

371k3271 k. In General. Most Cited Cases

(Formerly 371k111.9(1), 371k111.9)

For a recipient of services to demonstrate that he is not employer and therefore has no liability for unemployment taxes, he must show that he has satisfied criteria necessary to establish nonliability under all three prongs of statutory test. C.G.S.A. § 31-222(a)(1)(B)(ii)(I-III).

[3] Taxation 371 ☞3271

371 Taxation

371V Employment Taxes and Withholding in General

371k3270 Tests of Employment

371k3271 k. In General. Most Cited Cases

(Formerly 371k111.9(1), 371k111.9)

For purposes of unemployment tax liability, employer-employee relationship does not depend upon actual exercise of right to control; right to control is by itself sufficient.

[4] Taxation 371 ☞3271

371 Taxation

371V Employment Taxes and Withholding in General

371k3270 Tests of Employment

371k3271 k. In General. Most Cited Cases

(Formerly 371k111.9(1), 371k111.9)

Stroke victim who required care to live at home failed to sustain his burden of showing that personal care assistants were free from his control and direction in rendering of their services, so stroke victim

had not demonstrated that personal care assistants were not employees and was liable to pay unemployment tax contributions for such assistants; stroke victim had right to discharge assistants, assistants were paid at hourly rate, assistants reported their day-to-day activities to attorney-in-fact for stroke victim, attorney-in-fact monitored level of care afforded stroke victim, and reporting and monitoring permitted inference that if care were unsatisfactory, attorney-in-fact would intervene and take corrective measures. C.G.S.A. § 31-222(a)(1)(B)(ii).

[5] Taxation 371 ↪ 3271

371 Taxation

371V Employment Taxes and Withholding in General

371k3270 Tests of Employment

371k3271 k. In General. Most Cited Cases

(Formerly 371k111.9(1), 371k111.9)

Retention of right to discharge was strong indication that relationship of stroke victim with personal care assistants who provided at-home care was one of employment, for purposes of determining stroke victim's liability for unemployment tax contributions. C.G.S.A. § 31-222(a)(1)(B)(ii).

[6] Taxation 371 ↪ 3285

371 Taxation

371V Employment Taxes and Withholding in General

371k3285 k. Independent Contractors. Most Cited Cases

(Formerly 371k111.20)

Payment of worker at hourly rate is persuasive evidence that status of worker is that of employee, rather than that of independent contractor, in determining liability for unemployment tax contributions on the part of one who receives services. C.G.S.A. § 31-222(a)(1)(B)(ii).

**498 *238 Brian McCormick, Torrington, for appellant (plaintiff).

Thadd A. Gnocchi, Asst. Atty. Gen., with whom, on the brief, were Clarine Nardi Riddle, Atty. Gen., and Charles A. Overend, Asst. Atty. Gen., for appellee (defendant).

Before PETERS, C.J., and SHEA, CALLAHAN, COVELLO and HULL, JJ.

CALLAHAN, Justice.

This is an appeal from an assessment by the defendant administrator ^{FN1} of the Connecticut Unemployment Compensation Act pursuant to General Statutes § 31-270 ^{FN2} for unpaid contributions allegedly *239 due under the act from the plaintiff, Walter N. Latimer. The assessment was based on a determination by the administrator that the plaintiff was the employer, within the **499 meaning of General Statutes § 31-222(a)(1)(B)(ii), of certain individuals who rendered services to him in his home during the first two calendar quarters of 1987. ^{FN3} The plaintiff claimed, to the contrary, that the subject individuals were independent contractors, not his employees, and that he is not liable for any contributions under the act.

^{FN1}. The administrator of the Connecticut Unemployment Compensation Act is presently Betty L. Tianti.

^{FN2}. "[General Statutes] Sec. 31-270. failure to employer to file report of contributions due. appeal from action of administrator. . If an employer fails to file a report for the purpose of determining the amount of contributions due under this chapter, or if such report when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient report within twenty days after the administrator has required the same by written notice, the administrator shall determine the amount of contribution due, with interest thereon pursuant to section 31-265, from such employer on the basis of such information as he may be able to obtain and he shall give written notice of such determination to the employer. Such determination shall be made not later than three years subsequent to the date such contributions became payable and shall finally fix the amount of contribution unless the employer, within thirty days after the giving of such notice, appeals to the superior court for the judicial district of Hartford-New Britain or for the judicial district in which the employ-

June of 1987. Each of the PCA's is either a Certified Nurse's Aide, a Certified Home Health Aide or has prior experience working as a nurses' aide. Each Certified Nurse's Aide has undergone a certain number of hours of training in a nursing home under the supervision of a registered nurse. Each Certified Home Health Aide has undergone a certain number of hours of training in a licensed home health care agency under the supervision of a registered nurse.

"(13) Each PCA who has performed services for the appellant, Mr. Latimer, has been trained to assist patients in activity guidance, including taking medicine on a regular schedule, assisting patients toward ambulation, bathing, dressing, feeding, assistance with therapy and meal planning. The particular services Mr. Latimer required of each PCA included bathing, dressing, breakfast preparation, regular dispensing of medications, assistance toward ambulation including safe use of a walker and wheelchair, errands including occasionally driving Mr. Latimer's car and any other assistance in daily living activities which Mr. Latimer is incapable of managing on his own. With respect to meal preparation, each PCA is required to be cognizant of a medically-imposed salt restriction on Mr. Latimer's diet. In addition, there was an initial concern regarding the risk of choking, since Mr. Latimer's stroke had resulted in a numbed gag reflex. Most of the PCA's assigned to perform services for Mr. Latimer had some level of training in resuscitation techniques. PCA's are not required to perform cleaning, laundry or grocery shopping.

"(14) The requisite level of skill and training required of PCA's performing services for Mr. Latimer was determined by the Nurses Registry, based upon recommendations made by Mr. Latimer's personal physician, Dr. Frank Vanoni.

"(15) Pursuant to the procedure established by the Nurses Registry, the PCA is paid by the appellant, Mr. Latimer through his attor-

ney-in-fact, a Mr. Christian upon presentation of an invoice. The PCA[s] may utilize billing forms provided to them by the Nurses Registry which identify them as ... member[s] of the Litchfield Hills Nurses Registry. Prior to May 9, 1988, the PCA paid a portion of his or her fee to the Registry. As of May 9, 1988, the procedure was changed by the Registry so that the PCA now bills the client directly and the Registry also bills the client directly. While there are hourly rates set by the Registry for the services provided by the PCA's, the rates are actually negotiable, although generally the rates set by the Registry are the minimum rates charged to clients by the Registry and its members. The Registry now bills the client directly for its scheduling services at a rate of \$1.75 per hour. The 'Schedule of Rates and Fees' as well as the 'Client Agreement' utilized by the Nurses Registry are items which are submitted to, reviewed by and approved by the State of Connecticut Department of Labor, Working Conditions Division of Occupational Safety and Health.

"(16) The PCA's report their day-to-day activities to Mr. Christian who does not actively direct the performance of their duties, but monitors the care given to Mr. Latimer.

"(17) The appellant, through his attorney-in-fact, issued a Form 1096 to each of the PCA's who performed services for Mr. Latimer during 1987, which listed all remuneration paid to the PCA as 'non-employee compensation.' The appellant treated each of the PCA's as an independent contractor for federal income tax purposes.

"(18) Neither the appellant nor the Nurses Registry accepted responsibility for Social Security taxes, personal or professional liability insurance, malpractice liability insurance, workers compensation insurance or individual life, health or disability insurance.

"(19) The appellant, through his attorney-in-fact retained the right to discharge any PCA.

Prior to the plaintiff's discharge from Gaylord Hospital his personal physician, Frank Vanoni, informed Christian that the plaintiff should either be placed in a nursing facility or receive twenty-four hour care at home because he was incapable of independent living. *243 In response, Christian contacted Carol Johnson, the president of the Litchfield Hills Nurses Registry (registry), and requested that she provide home health aides to the plaintiff in order to furnish him with the level of care and assistance he needed on a daily basis.

Pursuant to Christian's request, personal care assistants (PCAs) were supplied by the registry and placed in the plaintiff's home. The PCAs placed with the plaintiff were either certified nurse's aides, certified home health aides, or had had prior experience working as nurse's aides. They offered their services to the general public through the Registry and in some instances were enrolled with more than one registry and also *244 advertised their services independently. The plaintiff was initially provided with twenty-four hour care for seven days per week, but his care was gradually reduced to eight hours per day for six days per week.

In accordance with the procedures established by the registry, the PCAs were paid at an agreed hourly rate directly by the plaintiff, Christian, acting through his attorney-in-fact.^{FN8} Christian, thereafter, issued an Internal Revenue Service form 1096 to each of the PCAs who performed services for, and were paid by, the plaintiff during 1987. That form listed all remunerations to the PCAs as "non employee compensation." The plaintiff also treated the PCAs as independent contractors for federal income tax purposes and neither the plaintiff nor the registry assumed any responsibility for social security taxes, personal or professional liability insurance or individual life, health or disability insurance. Furthermore, each PCA placed with the plaintiff by the registry signed an agreement with the registry that he or she "is an independent contractor unless otherwise employed directly by the Registry Client."

^{FN8}. Hourly rates were set by the Registry for the PCA's services. Those rates, however, were actually negotiable.

[1] The hearing officer also found that the plaintiff, through his attorney-in-fact, retained the right to discharge any PCA and that the registry acknowledged that the plaintiff, or any client of the registry, could communicate to any PCA at any time that the PCA's services were no longer needed. Moreover, the hearing officer found that although Christian did not directly supervise the performance of the PCAs' duties, the PCAs did report their day-to-day activities to him and he monitored the care given the plaintiff. The trial court rendered its decision on the appeal after *245 reviewing the findings of fact and the record submitted by the hearing officer.^{FN9} The Nurses Registry recognizes that the appellant or any client may directly communicate to a PCA that his services are no longer needed, although it would encourage the appellant or any client to inform the Nurses Registry when it takes such an action, in order to preclude further billing by the Registry with respect to that individual PCA."

^{FN9}. The plaintiff, although he does not dispute the facts found, argues that the trial court erred in not conducting a de novo review of the administrator's action without regard to the record developed before the hearing officer. The scope of review in an appeal from an assessment of unemployment tax contributions under General Statutes § 31-270 is less than clear. See Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175, 181-83, 15 A.2d 17 (1940); Ogozalek v. Administrator, 22 Conn.Sup. 100, 101, 163 A.2d 114 (1960). In this instance, however, the trial court was warranted in reviewing the record to determine whether the administrator's conclusion, assessing contributions against the plaintiff, was unreasonable, arbitrary or illegal. See All Brand Importers, Inc. v. Department of Liquor Control, 213 Conn. 184, 192, 567 A.2d 1156 (1989). Although not provided by statute, the parties agreed to an elaborate procedural arrangement that contemplated and resulted in a full scale hearing before a hearing officer with a resultant finding of facts and a decision. To ignore the finding of

facts and the conclusion of the hearing officer and to treat this appeal as a de novo proceeding would defy common sense and go against the grain of what the parties obviously intended. See General Statutes § 4-183. The trial court did not err by restricting its review to the record developed at the administrative hearing.

**502 [2] The Unemployment Compensation Act (act) defines employment in General Statutes § 31-222(a)(1)(A) and (B).^{FN10} Besides codifying the common law rules used *246 to determine the existence of an employer-employee relationship, the act was amended in 1971 to include the use of what is popularly known in Connecticut and throughout the country in similar legislation as the "ABC test." The ABC test is utilized to ascertain whether an employer-employee relationship exists under the act. The ABC test is embodied in subdivisions (I), (II) and (III) of § 31-222(a)(1)(B)(ii). F.A.S. International, Inc. v. Reilly, 179 Conn. 507, 511, 427 A.2d 392 (1980). In order to demonstrate that he is not an employer and therefore has no liability for unemployment taxes under the act, a recipient of services must show that he has satisfied the criteria necessary to establish nonliability under all three prongs of the *247 ABC test. Id.; State Department of Labor v. Medical Placement Services, Inc., 457 A.2d 382, 385-86 (Del.Super.1982), aff'd, 467 A.2d 454 (Del.1983); Unemployment Ins. Tax Contribution v. Friedrichs, 233 Mont. 384, 760 P.2d 93 (1988); Nielsen v. Department of Employment Security, 692 P.2d 774, 776 (Utah 1984) "The test is conjunctive; all parts must be satisfied to exclude an employer from the Act." **503 Gay Hill Field Service v. Board of Review, 750 P.2d 606, 608 (Utah App.1988); Appeal of Work-A-Day of Nashua, Inc., 132 N.H. 289, 564 A.2d 445 (1989).

FN10. General Statutes § 31-222(a)(1)(A) and (B) provide: DEFINITIONS. As used in this chapter, unless the context clearly indicates otherwise:

"(a)(1) 'Employment', subject to the other provisions of this subsection, means:

"(A) Any service, including service in interstate commerce, and service outside the

United States, performed under any express or implied contract of hire creating the relationship of employer and employee;

"(B) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, including service in interstate commerce, by any of the following: (i) Any officer of a corporation; (ii) any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exist, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed; (iii) any individual other than an individual who is an employee under clause (i) or (ii) who performs services for remuneration for any person (I) as an agent-driver or commission driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages, other than milk, or laundry or dry-cleaning services, for his principal; (II) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmis-

sion to, his principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants or other similar establishments for merchandise for resale or supplies for use in their business operations; provided, for purposes of subparagraph (B)(iii), the term 'employment' shall include services described in clause (I) and (II) above performed after December 31, 1971, if 1. the contract of service contemplates that substantially all of the services are to be performed personally by such individual; 2. the individual does not have a substantial investment in facilities used in connection with the performance of the services, other than in facilities for transportation; and 3. the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed."

Under the ABC test any service provided by an individual is considered employment, unless and until the recipient of the services provided has sustained the burden of showing "to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed..." General Statutes § 31-222(a)(1)(B)(ii); F.A.S. International, Inc. v. Reilly, supra, 179 Conn. at 511-12, 427 A.2d 392. Under Part A of the ABC test, therefore, in order to denominate them as independent contractors, the plaintiff bore the burden of showing that the PCAs who cared for him have "been and will continue to be free from control and direction in connection with the performance of such service, both under [their] con-

tract for the performance of service and in fact." General Statutes § 31-222(a)(1)(B)(ii)(I); *248 State Department of Labor v. Medical Placement Services, Inc., supra, 384; Appeal of Work-A-Day of Nashua, Inc., supra, 564 A.2d 447.

[3] "The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work." Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175, 179, 15 A.2d 17 (1940); Northwestern Mutual Life Ins. Co. v. Tone, 125 Conn. 183, 190, 4 A.2d 640 (1939); Norwalk Gaslight Co. v. Norwalk, 63 Conn. 495, 524, 28 A. 32 (1893); see Yurs v. Director of Labor, 94 Ill.App.2d 96, 103, 104, 235 N.E.2d 871 (1968). "The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." Hartley v. Red Ball Transit Co., 344 Ill. 534, 539, 176 N.E. 751 (1931). "Caraher v. Sears, Roebuck & Co.", 124 Conn. 409, 413-14, 200 A. 324 (1938). An employer-employee relationship does not depend upon the actual exercise of the right to control. The right to control is sufficient. Id.; Zimmer-Jackson Associates, Inc. v. Department of Labor, 231 Mont. 357, 752 P.2d 1095 (1988); Prime Kosher Foods, Inc. v. Bureau of Employment Services, 35 Ohio App.3d 121, 123, 519 N.E.2d 868 (1987). "The decisive test is who has the right to direct what shall be done and when and how it shall be done? Who has the right of general control?" Thompson v. Twiss, 90 Conn. 444, 447, 97 Atl. 328 [1916]." (Emphasis added.) Caraher v. Sears, Roebuck & Co., supra, 124 Conn. at 413, 200 A. 324; Northwestern Mutual Life Ins. Co. v. Tone, supra, 125 Conn. at 191, 4 A.2d 640; Bennett v. Department of Employment Security, 175 Ill.App.3d 793, 797, 125 Ill.Dec. 383, 530 N.E.2d 541 (1988).

[4] The hearing officer could reasonably have concluded, on the basis of his unchallenged factual findings, that the right to general control of the activities of the PCAs *249 rested in the plaintiff and that consequently an employer-employee relationship existed between him and the PCAs. At the least, he could reasonably have determined that the plaintiff had

failed to sustain his burden of showing that the PCAs who cared for him were free from his control and direction in the rendering of their services. Consequently, the plaintiff has not satisfied the A test of § 31-222(a)(1)(B)(ii) and was therefore liable to pay the administrator's assessment of unemployment tax contributions against him.

[5][6] "The determination of the status of an individual as an independent contractor or employee is often difficult (note, 124 A.L.R. 682) and, in the absence of controlling considerations, is a question of fact. **504 *Francis v. Franklin Cafeteria, Inc.*, 123 Conn. 320, 326, 195 Atl. 198 [1937]." *Robert C. Buell & Co. v. Danaher*, 127 Conn. 606, 610, 18 A.2d 697 (1941); *F.A.S. International, Inc. v. Reilly*, supra, 179 Conn. at 513, 427 A.2d 392. The retention of the right to discharge, which was admittedly reserved by the plaintiff in this case, is a strong indication that his relationship with the PCAs who attended him was one of employment. *Beaverdale Memorial Park, Inc. v. Danaher*, supra, 127 Conn. at 179, 15 A.2d 17; *Jack & Jill, Inc. v. Tone*, 126 Conn. 114, 119, 9 A.2d 497 (1939). "The right to terminate [an employment] relationship without liability is not consistent with the concept of an independent contract." *Johnson v. Department of Labor & Industry*, 240 Mont. 288, 783 P.2d 1355, 1359 (Mont.1989), quoting 1C A. Larson, *Workmen's Compensation Law* § 44.35, pp. 8-149-8-158. Moreover, payment of a worker at an hourly rate, the basis on which the plaintiff paid the PCAs in this instance, is persuasive evidence that the status of the worker is that of an employee rather than that of an independent contractor. *Johnson v. Department of Labor & Industry*, supra, 783 P.2d at 1358-59; *250 *Solheim v. Ranch*, 208 Mont. 265, 273, 677 P.2d 1034 (1984); see *Department of Employment v. Brown Bros. Construction, Inc.*, 100 Idaho 479, 482, 600 P.2d 783 (1979).

In addition to the right to discharge and the manner of payment, the hearing officer took note of other factors that weigh in favor of a determination that the relationship between the plaintiff and the PCAs was that of employer-employee and that the PCAs were not independent contractors. The hearing officer determined that the PCAs were required to comply with certain general directives as to when their services

were required. While the PCAs made known their hours of availability, it was the plaintiff who established the hours when they were to work. Further, the PCAs could be directed to perform personal errands for the plaintiff and were required to be cognizant of instructions concerning his care. Moreover, services to the plaintiff were expected to be rendered personally by the particular PCAs selected by the registry, based on needs and instructions communicated to the registry by the plaintiff's attorney-in-fact. The plaintiff was interested not only in a final result but in who rendered the service. The hearing officer also found that the PCAs did not have any significant investment in the materials or tools necessary to perform their job. Any needed equipment or materials were furnished by the plaintiff. In addition, the hearing officer concluded that the PCAs, unlike independent contractors, were not in a position to realize a profit or suffer a loss based on the service that they provided. Rather, they were paid an agreed hourly wage directly by the plaintiff.

More important than the above enumerated factors is the hearing officer's finding that the PCAs reported their day-to-day activities to Christian, the plaintiff's attorney-in-fact, and that Christian monitored the level of care afforded the plaintiff. That finding embodies *251 the logical inference that the reporting and monitoring had a purpose and that, if the care given the plaintiff were unsatisfactory, Christian could, and would, intervene and take corrective measures. That right of intervention, which we believe clearly exists under the facts, evinces a right to control and direct the PCAs by the recipient of their services. The reporting of their day-to-day activities to Christian by the PCAs and the monitoring of those activities by Christian, who possessed the right to discharge the PCAs, is hardly indicative of the degree of independence that distinguishes an independent contractor from an employee. That the PCAs were permitted to perform their day-to-day duties without interference so long as those duties were performed in a satisfactory manner does not militate against a conclusion of control. See *Caraher v. Sears, Roebuck & Co.*, supra, 124 Conn. at 413, 200 A. 324. As previously noted, it is not the actual exercise of the right to control that distinguishes an employer from an inde-

pendent contractor, but rather the employer's possession of the right to control. *Id.* at 413-14. 200 A.324; **505 *Zimmer-Jackson Associates, Inc. v. Department of Labor*, supra, 752 P.2d at 1098-99; *Prime Kosher Foods, Inc. v. Bureau of Employment Services*, supra, 35 Ohio App.3d at 123, 519 N.E.2d 868.

The fact that the PCAs placed with the plaintiff by the registry signed an agreement that they were "independent contractors" is of no moment. "Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says. *Insul-Lite Window & Door Mfg., Inc. v. Industrial Commission*, 723 P.2d 151 (Colo.App.1986)." *Locke v. Longacre*, 772 P.2d 685, 686 (Colo.App.1989); *State Department of Labor v. Medical Placement Services, Inc.*, supra, 384. Such provisions in a contract are not effective to keep an employer outside the purview of the act when the established*252 facts bring him within it. "We look beyond the plain language of the contract to the actual status in which the parties are placed." *Ellison, Inc. v. Board of Review*, 749 P.2d 1280, 1284 (Utah App.), cert. denied, 765 P.2d 1278 (Utah 1988).

Because the prongs of the ABC test contained in § 31-222(a)(1)(B)(ii)(I), (II) and (III) are conjunctive, the inability of the recipient of services to satisfy any single one of those prongs necessarily results in a conclusion that an employer-employee relationship exists for the purposes of the Unemployment Compensation Act. Having determined that the plaintiff has failed to satisfy prong A of the ABC test we deem it unnecessary to consider prongs B or C. *State Department of Labor v. Medical Placement Services, Inc.*, supra, 385-86; *Ellison, Inc. v. Board of Review*, supra, 1283; *Gay Hill Field Service v. Board of Review*, supra, 609.

The judgment of the trial court is affirmed although on a different ground from that relied upon in its memorandum of decision. "[T]his court is authorized to rely upon alternative grounds supported by the record to sustain a judgment." *Pepe v. New Britain*, 203 Conn. 281, 292, 524 A.2d 629 (1987); *Henderson v. Department of Motor Vehicles*, 202 Conn. 453, 461,

521 A.2d 1040 (1987); *W.J. Megin, Inc. v. State*, 181 Conn. 47, 54, 434 A.2d 306 (1980).

The judgment of the trial court is affirmed.

In this opinion the other Justices concurred.

Conn., 1990.

Latimer v. Administrator, Unemployment Compensation Act

216 Conn. 237, 579 A.2d 497

END OF DOCUMENT

Connecticut Employment Security Appeals Division

[New Query](#) [HELP: About This Page](#)

Documents 1 to 1 of 1 matching the query "*(@apdClaimant 'paffen')*".

- ①①①①① 1. **ANNETTE C. PAFFEN v. GRISWOLD SPECIAL CARE FMCH, INC., 9019-BR-97**, decided 12/30/1997; Digest No. CE 3-00
Abstract: Covered Employment. ABC Test applied even though FUTA specifically exempted the employer's companion-sitter placement agency. The Superior Court for the judicial district of Hartford, docket no. CV-98-0351244-S, affirmed the Board's decision on June 18, 1999.
http://ctboard.org/adlib_docs/1997/9019br97.html

The index is up to date.

Page 1 of 1 Saved

BR-1 #

STATE OF CONNECTICUT

Department of Labor

Employment Security Appeals Division

Board of Review

38 Wolcott Hill Road

Wethersfield, CT 06109

Telephone: (860) 566-3045 Fax: (860) 566-6932

Claimant's Name: ANNETTE C. PAFFEN

S.S. #: *****

Employer's Name, Address & Reg. No.

GRISWOLD SPECIAL CARE FMCH, INC.

2499 Main Street

Stratford, Connecticut. 06497

E.R. #: 93-078-16

Board Case No.: 9019-BR-97

1. Appeal from Referee's

determination

dated: September 25, 1997

Case No.: 9019-DD-94

2. Date appeal

filed: October 16, 1997

3. Appeal filed by: Employer

4. Date mailed to interested

parties: December 30, 1997 DECISION OF THE BOARD OF REVIEW

Provisions of the Connecticut General Statutes involved:

Section 31-222(a)(1)(B)

CASE HISTORY - SOURCE OF APPEAL:

The Administrator ruled the claimant eligible for unemployment benefits, and notified the

employer of its chargeability on November 8, 1994.

The employer appealed the Administrator's decision on October 17, 1994.

Associate Appeals Referee Ralph V. Dorsey affirmed the Administrator's ruling by a decision issued on September 25, 1997.

The employer appealed the Referee's decision to the Board of Review on October 16, 1997.

DECISION

Acting under authority contained in Section 31-249 of the Connecticut General Statutes, the Board of Review has reviewed the record in this appeal, including the tape recording of the Referee's hearing.

The Referee ruled that the appellant failed to establish, pursuant to Conn. Gen. Stat. §31-222 (a) (1)(B)(ii), that it did not employ the claimant. The Referee found that the claimant was engaged in employment as defined by the Connecticut Unemployment Compensation Act.

In support of its appeal, the employer/appellant concedes that for the purposes of the "ABC" test, the claimant is in an employment relationship with the subject employer. However, it is the employer's position that the employer, as a companion-sitter placement agency, is specifically exempted from FUTA withholding under federal law by I.R.C. § 3506,⁽¹⁾ in which Congress specifically intended to exempt such services from tax liability. Although we agree with the employer that it is specifically exempted from FUTA under I.R.C. § 3506 by virtue of its status as a companion-sitter agency, we find no merit to the employer's contention that it is entitled to the same exemption under Connecticut law. We thus conclude that there is no preemption issue before us and that the employer is liable for state unemployment compensation taxes under Connecticut law for its employment relationship with the claimant.

At the outset, we note that there is no parallel provision under Connecticut law which exempts the subject employer from state unemployment tax liability in the manner in which the subject employer is exempted under federal law pursuant to I.R.C. § 3506. The Connecticut Unemployment Compensation Act conforms to the federal requirements enunciated in I.R.C. § 3304, and thus is a federally-approved plan for the payment of unemployment compensation. As an approved law, the state law is independent of the federal law, and contains its own exemptions from employment. See Conn. Gen. Stat. § 31-222(a)(5)(A)-(M). Unlike the federal law, however, the Connecticut Unemployment Compensation Act does not exempt companion-sitter agencies such as the subject employer from covered employment. In the absence of an exemption under state law, we must determine whether the employer is subject to liability under the Connecticut Unemployment Compensation Act. See Conn. Gen. Stat. § 31-223(a). Based on our review, we find that the subject employer is subject to nonvoluntary liability pursuant to Conn. Gen. Stat. § 31-223(a), and that it has tax liability because the claimant was engaged in "employment" as that term is defined in Conn. Gen. Stat. § 31-222(a)(1).

Employment subject to the provisions of the Unemployment Compensation Act means any service by:

any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Conn. Gen. Stat. §31-222(a)(1)(B)(ii). This provision, the so-called ABC test, is in the conjunctive. Unless the party claiming the exception to the rule that service is covered employment satisfies all three prongs of the test, an employment relationship will be found. A worker is considered an employee until the party claiming the independent contractor exemption proves otherwise.

Based on our review of the record, we find that the employer has not established that the claimant was free from the employer's direction and control, both under contract and in fact, in connection with the performance of her services. We find that because the employer has failed to establish that the claimant was free from the employer's control and direction in connection with the performance of his services, it cannot satisfy Part A of the test.

Part B of the ABC test requires that the service of an independent contractor be performed outside the usual course of business for which the service is performed or outside of all places of business of the enterprise for which the service is performed. This subtest is in the alternative, and the employer need only establish that the service is either outside the course or place of its business. The place of business is not only the office, but the individual job sites at which the employer contracts to provide service. See Greator v. Stone Hill Remodeling, Board Case No. 1169-BR-88 (1/9/88), aff'd sub nom. Stone Hill Remodeling v. Administrator, Superior Court, Judicial District of Waterbury, 2/21/91; Feschler v. Hartford Dialysis, Board Case No. 995-BR-88, (12/27/88).

It is clear from the record that the claimant, as a companion-sitter, performed services within the usual course of the employer's business and at all business locations for which the employer had contracted for performances. We thus conclude that the employer has failed to establish part B of the ABC test.

The final prong of the ABC test requires a showing that the individual is "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Conn. Gen. Stat. §31-222(a)(1)(B)(ii)(III). The C test requires a showing that the individuals have "one or more enterprises created by them which exist separate or apart from their relationship with [the contractor] and which will survive the termination of that relationship." F.A.S. International v. Reilly, *supra*, at 515. The Board has held that the statute does not require that an individual merely be able to engage in activity independent of that of the employer, but that the individual customarily be engaged in the independent activity at the time of rendering the service. Feschler v. Hartford Dialysis, *supra*. Although this does not necessarily require that the individual perform the independent activity simultaneously with the service or that an individual is precluded from entering into an exclusive service contract, it does place a heavy burden on the appellant to establish that the individual holds himself out to the public as one who regularly performs this service.

Described as potentially the most far-reaching provision of the ABC test, the C clause requires that the services be rendered by an individual in the capacity of an entrepreneur. "The double requirement, that the worker's occupation be 'independently established' and that he be 'customarily' engaged in it, clearly calls for an enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of that relationship." Wilcox, The Coverage of Unemployment Compensation Laws, 8 Vand. L. Rev. 245, 264 (1955).

The claimant did not appear at the Referee's hearing to present evidence as to whether she was "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services performed" within the meaning of Conn. Gen. Stat. §31-222(a)(1)(B)(III). However, even if the claimant did hold herself out to the public as

engaged in an independent business, the employer, at most, would satisfy only this last prong of the ABC test. As we stated above, the test is in the conjunctive, and an employment relationship will be found unless the employer can satisfy all three prongs of the test. Since the employer has failed to satisfy the A and B prongs of the test, we conclude that the claimant is an employee and that the claimant's services constituted covered employment.

Therefore, in so far as the "ABC" test is concerned, we find that the claimant and the employer were engaged in an employment relationship which subjected the employer to unemployment compensation tax liability pursuant to Conn. Gen. Stat. §31-222(a)(1)(B)(ii).

Accordingly, the decision of the Referee is affirmed, and the employer's appeal is dismissed. In so ruling, we adopt the Referee's findings of fact as modified above.

BOARD OF REVIEW

Bennett Pudlin, Chairman

In this decision, Board member William F. Jones and alternate Board member George Meehan concur.

BP:SCL:sm

**IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY JANUARY 30, 1998.
SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL
RIGHTS.**

COPIES PROVIDED TO:

Attorney Patricia O'Malley

Special Care, Inc.

717 Bethlehem Pike, Suite 3-B

Erdenheim, PA. 19038

Department. of Labor

Wayne Medoff, Field Audit Unit

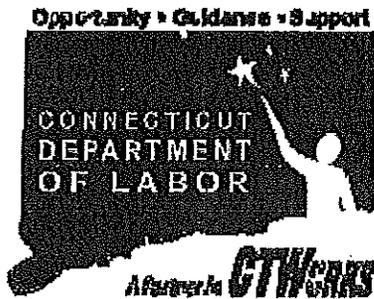
35 Courtland St., Rm. 217, 2nd fl.

Bridgeport, Connecticut. 06604

1. Section 3506 of the Internal Revenue Code provides in relevant part:

(a) ...a person engaged in the trade or business of putting sitters in touch with individuals who wish to employ them shall not be treated as the employer of such sitters (and such sitters shall not be treated as employees of such person) if such person does not pay or receive the salary or wages of the sitters and is compensated by the sitters or the persons who employ them on a fee basis.





December 1998

**RESPONSIBILITIES OF REGISTRIES, EMPLOYMENT AGENCIES
TEMPORARY HELP AGENCIES, EMPLOYEE LEASING COMPANIES, AND
PROFESSIONAL EMPLOYER ORGANIZATIONS UNDER THE
CONNECTICUT UNEMPLOYMENT COMPENSATION LAW**

Any individual who is referred to a client and is subsequently paid by the Registry/Agency may be considered an employee of the Registry/Agency. The Registry/Agency is acting as a temporary help agency when they pay the individual directly; the wages paid are subject to the Connecticut Unemployment Compensation Law. Individuals employed in this manner over one (1) year are considered leased employees. Such agencies should refer to the Department's leasing policy.

If an individual is referred to a client (commercial, domestic, or agricultural), the Registry/Agency receives only a placement fee and does not pay the individual's wages, then the individual is not considered an employee of the Registry/Agency. However, this does not automatically make the individual an Independent Contractor regarding his or her employment status with the client under the Connecticut Unemployment Compensation Law.

The individual will be considered a full or part-time employee of the client who pays the individual's wages, unless the individual is a valid Independent Contractor excluded from employment as defined in Section 31-222(a) (1) (B) (ii) of the Connecticut Unemployment Compensation Law. In a Connecticut Supreme Court decision dated August 14, 1990, (*Walter N. Latimer v. Administrator, U. C. Act (13863)*), it was stated that personal care assistants (PCA's) placed by a registry/Agency with a client who paid the PCA's were employees of the client. The Court ruled that "*The fact that the PCA's placed with the client by the registry signed an agreement that they were "independent contractors" is of no moment. Such provisions in a contract are not effective to keep an employer outside the purview of the Act when the established facts bring him within it.*"

Registries/Agencies should not advise their clients that the referred individual is an Independent Contractor. The Registry/Agency should inform their clients that the referred individual may well be considered the client's employee. Questions regarding employee vs. Independent Contractor status should be referred to the Connecticut Labor Department, Field Audit Unit. The telephone number at the Central Office location, 200 Folly Brook Boulevard, Wethersfield, CT 06109-1114, is (860) 236-6360. Local Field Audit Locations and telephone numbers are listed on the reverse side.



<i>DATE</i>	<i>ADJOURNED UNTIL</i>
October 24, 1978	November 13, 1978, at the request of defendant
November 13, 1978	December 6, 1978, at the request of defendant
December 6, 1978	January 12, 1979, with consent
January 12, 1979	February 18, 1979, with consent
February 18, 1979	February 20, 1979, ready and passed
February 21, 1979	March 12, 1979, at request of the People
March 12, 1979	April 4, 1979, with consent
April 4, 1979	April 17, 1979, with consent
April 17, 1979	May 9, 1979, at the request of the People
May 9, 1979	May 24, 1979, with consent
May 24, 1979	June 1, 1979, ready and passed
June 1, 1979	June 6, 1979, ready and passed
June 6, 1979	June 12, 1979, to conduct a hearing

At the conclusion of the *Wade* hearing on June 13, the defendant requested that the case be adjourned until July 25, 1979.²

The court file endorsements reflect that on July 25, the defendant was not present, and prior to trial the defense requested four additional adjournments until the case was once again marked ready and passed on September 9.³ The indictment continued in that status until it was moved to trial on October 2, 1979.



2. It appears that this request was made so that appellant could submit further motions (See *Wade* hearing p. 146-148).

William E. BROCK, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee,

v.

SUPERIOR CARE, INC.; National Nursing Services, Inc.; Ann T. Mittasch, Individually and as President; and Robert M. Rubln, Individually and as Secretary and Treasurer, Defendants-Appellants.

No. 407, Docket 87-6195.

United States Court of Appeals,
Second Circuit.

Argued Dec. 1, 1987.

Decided Feb. 16, 1988.

Opinion on Motion to Clarify
April 5, 1988.

Secretary of Labor brought action against health-care service engaged in providing nurses to individuals, hospitals and nursing homes and against service's officers and wholly owned subsidiary, alleging they willfully violated record-keeping and overtime pay provisions of Fair Labor Standards Act. The United States District Court for the Eastern District of New York, Leonard D. Wexler, J., entered judgment enjoining defendants from violating Act's provisions and awarding unpaid overtime plus liquidated damages, and defendants appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) nurses were "employees" of service protected by overtime pay provisions of Act, and (2) failure to bring action under provision authorizing liquidated damages precluded Secretary from collecting liquidated damages.

Affirmed as modified to delete liquidated damages.

1. Federal Courts 8-776, 865

Upon review of district court's determination as to whether individuals are "em-

3. In the interim, appellant submitted a motion to dismiss the indictment in the interest of justice on August 8. That motion was denied on September 4 and again the case was adjourned at appellant's request.

