

DO COMPANIES OWE INDEPENDENT CONTRACTORS MORE THAN THEY THINK THEY DO?

By: *Laurel A. Van Buskirk, Esquire*
lvanbuskirk@devinemillimet.com
603.695.8565

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Many businesses supplement their regular work force with individuals classified as “independent contractors.” Hospitals, nursing homes and other health care facilities may use independent contractors to perform a wide variety of services. Physicians, nurses, physical therapists and other specialty care providers are often treated as independent contractors. As federal and state laws have narrowed the definition of “independent contractors” and limited the application of this status in the work place, employers are increasingly accused of having misclassified employees for tax and payroll purposes. However, independent contractor relationships remain viable in certain settings. This article assumes that your independent contractors are properly classified and focuses on a business’ obligations to those individuals under federal disability discrimination laws.

When a business engages an independent contractor, it establishes a contractual relationship. Should a dispute arise over that relationship, the business could reasonably anticipate being subject to a breach of contract claim. However, by establishing an independent contractor relationship, businesses assume that they have insulated themselves from liability under discrimination laws designed to protect employees. Recent federal court decisions establish that independent contractors may enjoy some of the same protections against discrimination enjoyed by individuals classified as employees.

On November 19, 2009, the Ninth Circuit Court of Appeals extended the protections of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 to an anesthesiologist who entered into a contract to provide services at an Arizona hospital. After Dr. Lester Fleming informed the hospital that he had sickle cell anemia, it told him that they would not be able to accommodate his operating room and call schedules. Ultimately, this caused the cancelation of Dr. Lester’s contract. Dr. Fleming brought suit against the hospital for breach of contract, as well as for disability discrimination under §504 of the Rehabilitation Act.

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

DEVINEMILLIMET.COM

HEALTHCARE@DEVINEMILLIMET.COM

Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. §794, gives individuals to the right to sue when they are discriminated against on the basis of disability in any program or activity that receives federal financial assistance. This includes discrimination against qualified applicants and employees with disabilities. The Rehabilitation Act, as amended, incorporates standards and remedies from other civil rights law, including the provisions of Title I of the Americans with Disabilities Act (“ADA”) that deal with employment discrimination. As many Circuit Courts (and the District of New Hampshire) have held that the ADA does not apply to independent contractors, the issue in *Fleming v. Yuma Regional Medical Center*, 9th Cir., No. 07-16427 (November 19, 2009), was whether Section 504 would be interpreted as being limited to employer-employee relationships, like the ADA, or whether its protections would extend to independent contractors.

In *Fleming*, the Circuit Court overturned the trial court (who had found that Dr. Fleming was an independent contractor not entitled to protections under the Rehabilitation Act) and held that “§504 of the Rehabilitation Act is not limited to employers and employees as defined in Title I of the ADA, but rather applies to independent contractors and the entities that hire them.” This ruling means that - in the Ninth Circuit - companies or organizations subject to the Rehabilitation Act of 1973, including organizations providing health care that receive federal funding, have responsibilities both toward their employees and independent contractors. These duties include an obligation not to discriminate on the basis of disability, as well as the duty to reasonably accommodate an otherwise qualified contractor’s disability in order to allow him/her to perform the functions of his/her job.

In addition to the Ninth Circuit, three other circuits have weighed in on this issue; the Sixth, Eighth and Tenth Circuit Courts of Appeal. The Sixth and the Eighth Circuits have held that the Rehabilitation Act incorporates Title I of the ADA literally, meaning that the Rehabilitation Act *would not* apply to independent contractors if the ADA did not. See *Wojewski v. Rapid City Reg’l Hospital Inc.* 450 F.3d 338 (8th Cir. 2006); *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999). The Tenth Circuit (and now the Ninth Circuit) have held that the Rehabilitation Act *does* apply to independent contractors. See *Schrader v. Fred A. Ray M.D. PC.*, 296 F.3d 968 (10th Cir. 2002).

For health care facilities and organizations in New England, it is important to note that *Fleming* is not binding law on Courts in the First Circuit (Massachusetts, Maine, New Hampshire, Rhode Island, and Puerto Rico) or the Second Circuit (Vermont, New York and Connecticut). However, because the First and Second Circuits have not ruled on this issue (one way or the other), health care facilities that frequently use independent contractors in either the administrative or clinical settings should proceed with caution when faced with disability-related issues from contractors.

As a practical matter, this means that to the extent an independent contractor discloses that s/he has a disability, the safest course of action for the health care facility would be to engage in an interactive process with the contractor to determine what, if any, accommodations may be needed to allow him/her to perform under the contract. As with any contractors

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F 603.226.1001



(whether or not the contractor has a disability), facilities should document all performance problems, discussions with the contractor about those problems, proposed solutions and any continuing problems. For contractors with disabilities, proposed reasonable accommodations also should be documented. This may help a facility guard against a claim of discrimination or breach of contract in the event the contract-relationship does not work out as planned.

Additionally, decisions as to whether or not to engage a contractor's services (or to terminate the contract) should be made for legitimate business needs based on the individual's merit and abilities, and not on the basis of disability. Administrators should be trained to spot reasonable accommodation issues and how to handle them. Often, awareness of the issues, combined with a measured, common-sense approach to addressing them can help avoid discrimination claims.

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