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MEMORANDUM

TO: LeadingAge New York
FROM: Hinman Straub P.C.
RE: FI's as Employers
DATE: February 25, 2019

On January 30, 2019, a U.S. District Court in New York found, for the first time, a fiscal intermediary (FI) operating in New York's Consumer Directed Personal Assistant Program (CDPAP) to be a joint employer of personal assistants.

Background:

CDPAP is a Medicaid program that provides services to chronically ill or physically disabled individuals who need help with activities of daily living. Under the program consumers control many aspects of employment, including hiring, training, and supervising caregivers. The FI is responsible for managing the administrative aspects of employment.

The respective roles played by consumers and FI's in the CDPAP program blurs the lines of the traditional employer/employee relationship. Similarly, the Department of Labor's guidance regarding employment status of personal assistants in the CDPAP program does not offer FI's a great deal of certainty regarding their employer status.

Hardgers-Powell v. Angels in Your Home LLC:

At issue in this case, was whether the FI, pursuant to the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) was responsible to pay personal assistants at a rate not less than 1.5 the regular rate at which the employee is employed (i.e. overtime). The court held that the defendant was a "joint employer" with the consumer and thereby violated FLSA and NYLL by failing to pay overtime wages at the correct rate.

The court reinforced general factors relevant to making an employment determination such as the ability to hire and fire, control of work schedules and conditions of employment, rate and method of payment, and maintenance of employment record. In finding the FI was acting beyond that of a mere administrator, the court gave significant consideration to the following activity of the employer: 1.) The FI was responsible for establishing the amount of each CDPAP's wages; 2.) The FI maintained the personnel records for CDPAPs; and 3.) The FI identified itself as the employer of record for the CDPAPs. The Court suggested that if these activities varied the conclusion might also vary.

In reaching their decision, the court left many questions unanswered with respect to the factors that compelled their ruling. It is unclear whether the court would have ruled differently if any of the factors relied on were absent or distinct from the facts of this case.

It is clear, however, that the decision in *Hardgers-Powell* increases the exposure of FI's to potentially significant and costly liabilities under state and federal law. FI's should review operational practices in light of the court's ruling in an effort to mitigate and protect against similar litigation.