

N.D.A.G. Letter to Sinner (May 11, 1989)

May 11, 1989

Honorable George A. Sinner
Governor
Office of the Governor
State Capitol - 1st Floor
600 East Boulevard
Bismarck, ND 58505

Dear Governor Sinner:

Thank you for your inquiry requesting my opinion on whether personal attendant care aides who contract with counties to perform community-based in-home services for the elderly and disabled are independent contractors or employees for unemployment compensation purposes.

To determine whether an individual is an employee or an independent contract for unemployment compensation purposes, the "ABC test" found at N.D.C.C. § 52-01-01(17)(e) must be applied. "Employment" is defined as follows:

52-01-01. Definitions. In the North Dakota Unemployment Compensation Law, unless the contest or subject matter otherwise requires:

17. "Employment" means:

....

- e. Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to the North Dakota Unemployment Compensation Law unless and until it is shown that: (1) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; (2) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of the enterprise for which such service is performed; and (3) such individual is customarily engaged in an independently established trade, occupation, profession or business.

In-home services are available to the aged and disabled under a Medicaid waiver and a state program in which funding is made available to pay for services designed to prevent the aged and disabled from entering nursing homes. County social service boards administer both the state and federal programs.

Counties may contract with an aide to perform activities involving bathing, oral hygiene, toileting, transferring, continence, ambulation, nutrition, money management, housework, respiration, pulse, blood pressure, skin care, catheters, and colostomy, ileostomy or urostomy care. Counties do not either train aides or direct the details, methods, or manner of the work. Rather, the county assesses the needs of the aged or disabled person and then contracts with a qualified aide to perform the needed services. Aides are not prevented from entering into more than one contract involving welfare recipients, nor are they prevented from performing their services for non-welfare recipients.

Courts in Florida, Nebraska, New Hampshire, New York, and South Carolina have addressed the issue of whether individuals providing community-based in-home services are "employees." In each of these cases, courts have concluded that persons providing similar services to welfare recipients through social service departments or private service delivery systems were not "employees" for unemployment compensation purposes. In addition, the Social Security Administration has recently determined that under a common law test, North Dakota's personal attendant care aides are not employees of counties for Social Security purposes.

Based on the foregoing discussion, it is my opinion that individuals performing community-based in-home services under the Medicaid waiver and state-funded program are independent contractors and are not employees for unemployment compensation purposes.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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