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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO AUTHORIZE NOTICE UNDER 29 U.S.C. § 216(b)

Preliminary Statement

Plaintiff Claudia Gayle worked for defendants' nurses registry. She seeks overtime premium pay under the Fair Labor Standards Act 29 U.S.C. § 201 et seq. ("FLSA"). Defendants allege that Ms. Gayle is an independent contractor not protected by the FLSA.

The defendants' employment practices are substantially identical to those of the defendant-employer in Brock v. Superior Care, 840 F.2d 1054 (2d Cir. 1988), the leading Second Circuit FLSA case on the independent contractor/employee distinction generally and in the nursing industry specifically. In Superior Care, the nurses were held to be employees.

Nevertheless, defendants seek summary judgment that their registry nurses are independent contractors. They do so by: (1) proposing analysis under a standard that has long since been rejected in FLSA cases; (2) ignoring Superior Care and (3) misconstruing the applicable test.

Plaintiff cross-moves for summary judgment and for an order authorizing notice of the pendency of the action to similarly situated persons and directing defendants to produce information sufficient to identify and locate those persons.[1]

[1] One such person, Patricia Robinson, has already filed a consent to join the action. Dkt. No. 15.

Statement of Facts

Introduction

Defendants' only business is to place nurses in patients' homes. Ex. C (transcript of the deposition of defendant Harry Dorvilier) 9:16-10:22.[2] Plaintiff was a field nurse, who, having been placed by defendants in patients' homes, performed nursing services. Id. 40:6-17.[3]

With few exceptions, plaintiff does not dispute the facts alleged in defendants' statement of facts (Defendants' Memorandum of Law ["DMOL"] at 3-11). Plaintiff does dispute the materiality of those facts as well as the inferences and legal conclusions defendants draw from them, e.g., "Harry's maintains a referral list or 'registry' of independent contractor LPNs (like Plaintiff)."

Defendants Control All Economic Relationships with Nurses, Patients and Third Parties

Patients typically come into contact with defendants via defendants' advertising on radio, in newspapers and to social workers and doctors in hospitals and communities, or through social service agencies. Harry Dorvilier personally initiates those contacts. Ex. C 14:9-18:2. Defendants determine what level of care is appropriate for a patient, determine the fee that they are able and willing to pay a nurse, and then tell the nurse what the pay is. Id. 19:6-21:23. Since Medicaid fees are inflexible, Harry's nurses are not able to negotiate their fees with defendants.

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[2] Exhibits are annexed to the accompanying Affirmation of Jonathan A. Bernstein dated August 13, 2008.

[3] Defendants apparently contend that performance of the nursing work is irrelevant to the business of placement of nurses. Plaintiff argues that the contention lacks merit, as is discussed at Point I-E(5).

Id. 90:3-11. The hourly rate Harry's pays the nurses depends on Harry's contract with the individual patient. Id. 19:16-22. That is, Harry's contracted with the patients cared for by plaintiff. Plaintiff had no contractual or economic relationship with her patients. Ex. B at 2.[4]

Field nurses have no investment in defendants' business. Id. 43:13-15. Nurses are paid by the hour, and cannot possibly lose money providing services to Harry's patients. A nurse cannot profit beyond the hourly fee paid. Id. 43:16-45:13. Harry's takes charge of billing and collections from the field nurses' patients' insurance carriers; Harry's pays its nurses promptly regardless of whether the carriers pay promptly. Id. 118:21-120:9. Field nurses are covered by Harry's commercial liability insurance policy. Id. 118:14-20. Such durable medical equipment as oxygen tanks is provided by a third-party vendor selected by the hospital social worker and not by Harry's. Id. 41:24-42:19.

Plaintiff formed no corporation or other business entity. Affidavit of Claudia Gayle, sworn to August 8, 2008 (the "Gayle Aff.") ¶ 5. She has no business cards, has never advertised, and has never solicited a patient directly. She is entirely dependent upon referrals from Harry's and similar placement agencies. Id. ¶ 4.

A nurse may decline a shift or an assignment, but absent special arrangements, must work a prescribed shift rather than a portion thereof. Ex. C 74:3-75:12. Defendants require that field nurses arrange their schedules to avoid conflict with Harry's assignments. Id. 110:13-111:12. If plaintiff was sick or busy and could not cover a shift, she was not permitted to send another nurse

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[4] Plaintiff propounded an interrogatory seeking identification of her patients. Defendants objected on relevance grounds. Plaintiff replied that she was entitled to develop evidence regarding her economic relationship with her patients. Defense counsel admitted that no such relationship existed, as is further discussed in Bernstein Aff. ¶ 8.

in her place. Id. 40:18-41:13.

Defendants may unilaterally end their association with a field nurse. If they do so, they will owe the nurse for hours actually worked, but will not owe contract damages (e.g. expectation damages, liquidated damages). Ex. C109:22-110:12. A discharged nurse is forbidden to seek employment directly from her patient. Ex H. The "Confidentialty of Patient" form generated by defendants says that "[f]ailure to maintain patient confidentiality may lead to discharge ..." Ex. K; Ex. C 108:14-25. Harry's removes a nurse from a patient's home if the patient requests or the nurse does not report to work punctually. Id. 23:19-24:1.

Defendants Exercise Control Over Nursing Work

Plaintiff alleges, by way of the non-party affidavit of defendants' former nursing supervisor, that the nursing supervisor is responsible for monitoring patients and the nurses placed by Harry's in their homes.[5] Affidavit of Cherriline Williams-West, sworn to August 13, 2008 ("Williams-West Aff.") ¶ 1.[6] Specifically, within 90 days of the time that a nurse was placed in service by Harry's, a Harry's nursing supervisor would go into the field, that is, to the home of the patient. While there, she would observe and assess the nurse's skills, for example, hand washing. She would also check the book of doctor's orders relating to the patient, to make

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[5] Defendants allege that they do not supervise their nurses. As is discussed at Point I-E(1), this is not so much a factual dispute as a dispute about the inference to be drawn from the facts. Defendants claim that the purpose of the monitoring is to monitor the patient's care, not to monitor the care provided by the nurse. Plaintiff argues that the claim of distinction lacks merit.

[6] Ms. Williams-West was defendants' nursing supervisor for about a year until the end of 2007. Ex. C13:15-20. Her duties were the same as those of the current nursing supervisor. Id. 14:6-7.

sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive supervision of this kind every 6 months. A Harry's nursing supervisor would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient. Id. ¶ 2. Defendants acknowledge that their nursing supervisor visits the patient's home on occasion to monitor the patient yet deny that the nursing supervisor has direct contact with nurses in the field. Ex. C 55:15-57:14; 23:2-4. Harry's nursing coordinator phones the patient at least once per day to verify that the nurse reported for duty. Id. 68:19-70:11.

Harry's nursing supervisors are also responsible for documentation, that is, review of assessments performed by nurses in the field. For example, Ms. Williams-West would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. She would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, she would be accompanied on these in-service assessments by medical equipment vendors or technicians so that she could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, Ms. Williams-West (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's. Williams-West Aff. ¶ 3.

The parameters of patient care are set by the patients' doctors. Defendants' nursing supervisor's job is to speak to the doctors and occasionally with patients to see if the doctors' orders are being carried out by the field nurse. Ex. C 22:5-25. Field nurses communicate with the nursing supervisor contact in case of emergency. Id. 23:2-18.

Defendants' nursing supervisor reports to the nursing director. Id. 28:18-20. The current nursing director is Harry's sister. Id. 28:6-13. The nursing director created a progress notes form, which must be completed by the nurse and submitted with her time sheet. Ex. A. If the progress notes are not completed, the nurse does not receive a paycheck. Ex. C 29:6-18. If any note is "not in compliance," the nursing supervisor directs the nurse to rewrite the note or attend an in-service, i.e., continuing education. Id. 26:25-30:12. A Harry's employee reviews the progress notes for monitoring purposes. Id. 29:13-22.

Defendants generated a 20-page in-service manual, which nurses must certify having read and understood. Id. 85:1-24; Ex. V. Harry's provides the field nurses in-service documents pertaining to HIV confidentiality, ventilators, oxygen, and the like. Harry's does this because the state requires nurses to complete in-service training to maintain their licenses. Ex. C 31:13-32:17. The in-service document has a blank for "employee's signature;" in-service training is given to field nurses. Id. 32:22-25; 34:15-20.

Defendant is responsible to the state for monitoring the patient's care, e.g., in case of a malpractice lawsuit. Id. 53:11-19. When field nurses care for patients, they are expected, on each tour of duty, to perform 12 categories of assessments, each category being described more particularly in documents issued by defendants ("Neurological Assessment, e.g., Alertness, awareness, consciousness, unconsciousness") and note it in the chart. Id. 125:23-126:19; Ex. O.

Plaintiff worked more than 40 hours per week. Ex. C 75:13-19; 87:8-13. The nurses' weekly time sheets (Ex. Q) are the most accurate reflection of the hours actually worked (Ex. C 128:11-17) but do not reflect hours spent in in-service training, for which the nurses are not paid (id. 85:2-86-4).

Defendants' Documentary Admissions

Defendants' business forms, which Mr. Dorvilier ratified at his deposition, include many admissions of employee status.

- Nurses applying for work at Harry's fill out an "application for employment." Ex. C 58:6-21; Ex. D. Each page bears the legend "Equal Opportunity Employer." Id. By their signatures, applicants acknowledge their understanding that false information may result in discharge. Id. at 4;

- Once the employment application is completed, Harry's sends the applicant's former employers a form stating that "the applicant listed below has applied for Temporary Employment with Harry's Nurses Registry, Inc." Ex. F; Ex. C 92:5-15;

- All field nurses sign an agreement stating "Upon accepting employment with Harry's Nurses Registry, Inc., all agency staff members agree that for a period of one year after his/her employment ends with Harry's Nurses Registry, Inc., he/she will not directly or indirectly seek independent employment with any Harry's Nurses Registry, Inc. patients to whom the staff member has been assigned" Ex. H; Ex. C 99:8-102:18;

- Applicants for placement by Harry's must execute a form (created by defendants' consultant) permitting defendants to conduct a "pre-employment screening." Ex. I; Ex. C 103:22-104:25;

- Defendants generate in-service forms that say "one copy for the employee's file." The "employee" is the field nurse Ex. J; Ex. C 105:2-106:9;

- Harry's issues employee identification cards to field nurses, which they must wear in-service; Ex. L; Ex. C 112:7-113:7;

- Defendants requires their nurses to complete an "Employee Verification of Orientation" (Ex. M), wherein the nurse affirms receiving an "employee orientation" including a "detailed discussion of," among other things,
  - "job duties and responsibilities,"
  - "conditions of employment,"
  - "employment forms,"
  - "attendance and punctuality policies;"

- Defendants require their field nurses to sign a "HIPAA Privacy Training Employee Certification Statement" certifying that they "understand my

obligation as an employee of Harry's Nurses Registry, Inc. to abide by the agency's privacy practices." Ex. P; Ex. C 125:11-22;

- Defendants require compliance with their procedures for filling out notes, time sheets and medication sheets, which they describe as "the rules and regulations of the New York State Department of Health and Harry's Nurses Registry, Inc." Ex. E (emphasis supplied);

- Documents generated by defendants and issued to field nurses as part of their "in-service," i.e., continuing education, have blanks for "employee signature" Ex. C 32:22-25; Ex. N.

Argument

I. Plaintiff is an Employee Under the Economic Realities Test

A. Procedural Standards

The summary judgment standards set forth in defendants' memorandum of law are not inaccurate. However, defendants fail to note that (1) plaintiff, the non-movant, is entitled to have doubts resolved in her favor and (2) this court must disregard all evidence favorable to the defendant-movant that the jury is not required to believe.

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Matsushita Elec. Indus. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986); Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir.1988). A summary judgment court must determine whether "after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." Okon v. Appia, 2008 U.S. Dist. LEXIS 42412 (E.D.N.Y. May 28, 2008) (Sifton, J.). Thus, if the non-movant proposes a reasonable interpretation of a material fact

that conflicts with the interpretation proposed by the movant, summary judgment must be denied. Schering Corp. v. Home Ins. Co., 712 F.2d 4 (2d Cir. 1983); New York State Energy R & D Auth. v. Nuclear Fuel Svcs., 666 F.2d 787 (2d Cir. 1981).

Credibility determinations are the province of the jury, not the summary judgment court. Accordingly, this court must

> disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000) (citations and quotations omitted).[7]

B. Substantive Standard: Economic Realities, and Not Common-law Agency, Is the Test of Employee or Independent Contractor Status

The Second Circuit, in Superior Care, affirmed Judge Wexler's determination of employee status on facts nearly identical to those of this case. In so doing, the court announced the standard applicable to FLSA employee/independent contractor assessments:

> Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the FLSA. These factors, derived from United States v. Silk ... and known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working

[7] Although Reeves arose under Fed. R. Civ. Pro. 50, standards under Rules 50 and 56 "mirror" each other such that the inquiry is the same. 530 U.S. at 151 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 250-51 (1986)).

> relationship, and (5) the extent to which the work is an integral part of the employer's business. The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.

840 F.2d at 1058-59 (citations omitted). Defendants would have this court believe that the IRS or common-law test of employee status is appropriate, but that is not the law, as the Supreme Court made clear generations ago[8] and stated explicitly 16 years ago. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (explaining that Congress' failure to define "employee" in ERISA requires application of common-law agency principles, but the far broader FLSA definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").[9] Accord Frankel v. Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993); Barfield v. New York Health & Hosps. Corp., 2008 U.S. App. LEXIS 16731 * 19-23 (2d Cir. Aug. 8, 2008). That is, defendants' unsupported contention that the common-law agency factors merely flesh out the economic reality test is simply wrong.

Accordingly, defendants do not (and cannot) point to a single modern FLSA case in which the IRS or common-law factors guided the analysis. On the other hand, dozens of courts have employed the economic realities test. E.g., Ling Nan Zheng v. Liberty Apparel Co., 355

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[8] NLRB v. Hearst Publications, 322 U.S. 111 (1944) (rejecting common-law right-to-control test under NLRA); Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947) ("common law employee categories or employer-employee classifications under other statutes are not of controlling significance" under FLSA); United States v. Silk, 331 U.S. 704 (1947) (extending Hearst rule to employee-status determinations under Social Security Act); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (employee-status decisions under NLRA and SSA are persuasive under FLSA).

[9] For example, "custom of the industry" is relevant under the common-law test. DMOL at 14. It is not relevant under economic realities. Reich v. SNET, 121 F.3d 58 (2d Cir. 1997).

F.3d 61, 67 (2d Cir. 2003) (applying economic realities test); Lopez v. Silverman, 14 F. Supp. 2d 405, 419-20 (S.D.N.Y. 1998) (same) (Cote, J.); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 191(S.D.N.Y. 2003)(same) (Hellerstein, J.); Lee v. ABC Carpet & Home, 186 F. Supp. 2d 447, 454-55 (S.D.N.Y. 2002)(same) (Batts, J.); McGuiggan v. CPC Int'l, Inc., 84 F. Supp. 2d 470, 479 (S.D.N.Y. 2000) (same) (McMahon, J.); Donovan v. Unique Racquetball & Health Clubs, 674 F. Supp. 77, 82 (E.D.N.Y. 1987) (same) (Wexler, J.); Schwind v. EW & Assocs., 357 F. Supp. 2d 691, 700 (S.D.N.Y. 2005) ("[t]he Supreme Court has specifically declined to apply the well-established agency law concepts of 'employee' and 'independent contractor' when interpreting congressional labor statutes")(Casey, J.).

Defendants' reliance on Critical Care Register Nursing, Inc. v. United States of Am., 776 F. Supp. 1025 (E.D. Pa. 1991) is misplaced. Critical Care was a tax case, to which the IRS factors applied, not an FLSA case. Texas Co. v. Higgins, 118 F.2d 636 (2d Cir. 1941), on which defendants also rely, has been superseded by the subsequent authority cited above.

C. Defendants Admit that the Facts of This Case are Virtually Identical to the Facts of Superior Care

Defendants' Rule 56.1 Statement is strikingly similar to the "Background" set forth in Superior Care. What follows is a juxtaposition of paraphrases from that Statement, with citations thereto, and the facts of Superior Care as set forth by the Circuit.[10]

Harry's is a New York corporation engaged in the business of referring temporary healthcare personnel, including registered nurses and licensed practical nurses, to individual

[10] The single factual distinction between Harry's and the Superior Care defendant is discussed in Point I-D immediately below.

patients. Def. 56.1 ¶¶ 1-2. "Superior Care is a New York corporation engaged in the business of referring temporary health-care personnel, primarily nurses, to individual patients, hospitals, nursing homes, and other health care institutions." Superior Care, 840 F.2d at 1057.

Harry's maintains a referral list of RNs and LPNs. Def. 56.1 ¶ 3. Harry's interviews nurses prior to placing them on the referral list. Id. ¶ 6. "Nurses who wish to work for Superior Care are interviewed and placed on a roster." Superior Care, 840 F.2d at 1057.

As placement opportunities arise, Harry's generates a pool of available RNs and LPNs from the referral list whose qualifications it deems best suited to the particular patients. Def. 56.1 ¶ 9. "As work opportunities become available, Superior Care assigns nurses from its list." Superior Care, 840 F.2d at 1057.

Harry's nurses are not under any obligation to accept a placement offer, and refusal of an offer does not trigger negative ramifications as to future placement opportunities. Def. 56.1 ¶¶ 11-12. "Superior Care nurses are free to decline a proposed referral for any reason." Superior Care, 840 F.2d at 1057.

Once a Harry's nurse accepts an assignment, the schedule is determined based on patient needs, with the details of the services determined by the patient's physician's instructions and the patient's and patient's family's wishes. Def. 56.1 ¶¶ 15-16. "Once a [Superior Care] assignment is accepted, the nurse reports directly to the patient, where treatment is prescribed by the patient's physician." Superior Care, 840 F.2d at 1057.

Although Harry's, the movant, claims that it does not regularly supervise nurses in the field (Def. 56.1 ¶ 34), this is disputed by Harry's former Nursing Supervisor, who claims that she supervised each field nurse 4-5 hours monthly (Williams-West Aff. ¶ 3). "Superior Care

supervises its nurses through visits to the job sites once or twice a month." Superior Care, 840 F.2d at 1057.

RNs and LPNs who accept placements from Harry's are required to hand in patient progress notes bi-weekly. Def. 56.1 ¶ 41. The nurses are required to do so in compliance with Medicaid standards. Id. ¶ 43. "Nurses are also required to submit to Superior Care patient care notes that the nurses keep pursuant to state and federal law." Superior Care, 840 F.2d at 1057.

For each assignment accepted by a Harry's nurse, the schedule is determined based on the needs of the patient, and each placement usually entails a different amount of time required. Def. 56.1 ¶ 15. "The length of a particular [Superior Care] assignment depends primarily upon the patient's condition and may vary from less than a week to several months." Superior Care, 840 F.2d at 1057.

Harry's requires its nurses to execute agreements not to seek employment with the patients in their care for one year following placement with the patient by Harry's. Ex. C 110:13-111:12; Ex. H. "Patients contract directly with Superior Care, not with the nurses, and the nurses are prohibited from entering into private pay arrangements with the patients." Superior Care, 840 F.2d at 1057.

Defendants set the rate of pay for LPNs based on the Medicaid reimbursement rate less Harry's expenses and profit. Def. 56.1 ¶ 48. "The nurses are paid an hourly wage by Superior Care. Most of the time, the hourly wage is set by Superior Care, depending on the market conditions in the local geographic area. Occasionally, if an assignment involves special patient treatment or an inconvenient location, nurses may be able to negotiate a pay rate just for that job." Superior Care, 840 F.2d at 1057.

Harry's nurses understand that they are free to engage in any other type of work, so long as that work does not conflict with a Harry's patient. Def. 56.1 ¶¶ 18-21. Harry's nurses commonly work at one or several other jobs, including maintaining their names on other nursing referral lists, during the time between Harry's placements. Id. ¶ 25. "Superior Care permits its nurses to hold other jobs, including positions with other nursing-care providers. Many of the nurses take advantage of this opportunity and are listed with several health-care providers simultaneously." Superior Care, 840 F.2d at 1057.

Claudia Gayle was on Harry's registry for approximately nine months. Def. 56.1 ¶¶ 71. "[M]any of the nurses work for Superior Care only several weeks a year, and few rely on Superior Care for their primary source of income." Superior Care, 840 F.2d at 1057.

D. The Single Difference Between This Case and Superior Care Is Not Material

In Superior Care, the district court had deemed it significant that the employer classified some of its nurses independent contractors and other nurses, who did the same work, employees. 840 F.2d at 1059. The Circuit agreed that, although this fact does not appear in the list of "economic realities" factors, Judge Wexler had not abused his discretion by considering it. Id.

In this case, there is no evidence before the court that Harry's classified some of its field nurses as employees. It is respectfully submitted that this single difference is insufficient to entitle the defendants to judgment as a matter of law, especially since a fair reading of the Circuit's opinion in Superior Care indicates that the five economic reality factors standing alone were sufficient support for judgment in favor of the plaintiff. Id.

E. The Economic Reality Factors

Most of the economic reality factors favor a finding of employee status in this case.[11] Defendants' view of several factors contradicts caselaw and common sense.

1. Control [12]

a. Supervision and monitoring

Each month, a nursing supervisor employed by Harry's would spend 4-5 hours in the field with each nurse. Williams-West Aff. ¶ 3. Within 90 days of the time that a nurse was placed in service, a nursing supervisor employed by Harry's would go into the field, that is, to the patient's home. Id. ¶ 2. While there, she would observe and assess the nurse's skills and check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Id. The nursing supervisor also reviews assessments performed by nurses in the field. Id. ¶ 3. Defendant testified that nurses were required to complete patient progress notes and that a nurse who failed to complete progress notes would not be given her paycheck. Ex. C 26:25-30:12.

This degree of supervision and monitoring parallels that exercised by the employer in Superior Care and weighs in favor of employee status.

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[11] The employee/independent contractor determination is a mixed question of fact and law. Superior Care, 840 F.2d at 1059 ("the existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts ... is a question of law").

[12] The cases defendants cite for the proposition that "right to control" is the crucial factor are inapposite. Kreinik v. Showbran is an ERISA case, not an FLSA case (400 F. Supp. 2d at 556) to which the economic realities standard did not apply. RSR Security was a "joint employer" case, not an independent contractor/employee case. 172 F.3d at 140. In employee/ independent contractor cases in this circuit, the ultimate concern is whether, under the totality of the circumstances, the worker is in business for herself. Superior Care, 840 F.2d at 1059.

> As to control, the District Court found that Superior Care ... supervised the nurses by monitoring the patient care notes and by visiting job sites. Superior Care argues that the finding of control is clearly erroneous because the parties stipulated that supervisory visits to job sites were infrequent. Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers' shoulders every day in order to exercise control.

Superior Care, 840 F.2d at 1060. Control does not require continuous monitoring of or absolute control over employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA. Herman v. RSR Security Servs., 172 F.3d 132, 139 (2d Cir. 1999) (joint employer analysis).

Although Defendants deny that they review patient progress notes for the purpose of monitoring, Mr. Dorvilier admitted as much in his deposition.

> Q. Another person [i.e., a Harry's employee other than the person responsible for payroll] reviews the progress notes for the purpose of monitoring the progress, right?
>
> A. Yes.

Ex. C 29:13-22.

Defendants apparently now contend that since their intention is to monitor the patient, they are not monitoring the nurse and/or that they require the nurses to complete progress notes only because Medicaid requires it. This contention fails because (1) the ultimate reason for exercising the right to control is immaterial; (2) the contention turns on defendants' profession of intent and proposed inference, which dooms their application for summary judgment and (3) the contention contradicts defendants' position vis-à-vis their business purpose.

(1) Motive is not relevant. Defendants offer no support for their novel attempt to negate their right to control the field nurses by arguing that "we only control the nurses because, or to the extent that, Medicaid or the Department of Health require us to." This is tantamount to a bank arguing that "we require the tellers to give correct change, but only because banking regulations require us to" or a bus company arguing "we require drivers to adhere to the speed limit, but only because the police require us to." Defendants' proposed "motive" exception to "right to control" would have the perverse effect of subjecting employers to the FLSA in inverse proportion to the level of governmental regulation of the industry.

Although it is conceivable that an employer might control its employees in order to gratify a psychological urge, the more common motive for controlling employees is a business imperative of some kind, whether imposed by government regulation or market discipline. The consideration relevant to this analysis is that from the plaintiff's perspective, defendants require progress notes. Ultimately, the motive behind control is irrelevant, and this court should decline defendants' invitation to impose a motive element on the "right to control" inquiry.

(2) Even where intent is relevant, disputed intent precludes summary judgment. Even if defendants' intent were relevant to the issue of control, summary judgment is ordinarily not available where state of mind is genuinely at issue. Ramseur v. Chase Manhattan Bank, 865 F.2d 460 (2d Cir. 1989).

(3) The asserted reason for monitoring contradicts defendants' contention that their business is nurse placement rather than patient care. Defendants contend that their business is merely to broker the placement of nurses and that they have no interest in what happens thereafter. DMOL at 26 ("the actual services rendered by Plaintiff during placement for any

particular client were not an integral part of Harry's Nurses"). That is, defendants ask this Court to believe that they monitor the patients' progress for no business reason at all. In any event, defendants concede that they are responsible to the state for monitoring the patient's care, e.g., in case of a malpractice lawsuit. Ex. C 53:11-19.

b. Right to discharge, assign, accept or reject shifts

Defendants claim on this motion that they have no power to discharge nurses, but that is contradicted by their deposition testimony and business forms. Defendants may unilaterally end their association with a field nurse. If they do so, they will owe the nurse for hours actually worked, but will not owe contract damages (e.g., expectation damages, liquidated damages). Ex. C 109:22-110:12. The "Confidentialty of Patient" form generated by defendants says that "[f]ailure to maintain patient confidentialty may lead to discharge ..." Id. 108:14-25; Ex. P. Nurses applying for "employment" at Harry's acknowledge their understanding that false information on the application may result in discharge Ex. D. at 4. That is, defendants' ability to discharge a nurse with or without cause, with no contract damages, more resembles an employer's ability to discharge an at-will employee than it does a termination provision in a service contract.

Field nurses are not permitted to assign their shifts to others. Ex. C. 40:18-41:13. The non-assignability of the contract militates in favor of an employment relationship. Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981).[13]

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[13] Superior Care relied heavily on Donovan v. DialAmerica Marketing, 757 F.2d 1376 (3d Cir.), cert. denied, 474 U.S. 919 (1985). 840 F.2d at 1059. DialAmerica, in turn, referred to economic realities as the "Sureway Cleaners test." 757 F.2d at 1382.

Harry's nurses are free to accept or reject shifts, but if they do work, they must work a prescribed shift rather than a portion thereof. Ex. C 74:3-75:12. Defendants issue, and require nurses to acknowledge receipt of, Harry's attendance and punctuality policies. Ex. M. Contrary to defendants' contention, this does not militate in favor of independent contractor status, since a person whose freedom to work is constrained by defendant's choice of shifts is an employee. Doty v. Elias, 733 F.2d 720 (10th Cir. 1984) (waiters free to set their own hours, but could work only during restaurant's business hours; restaurant thus established work schedules; employee status found). As noted, the nurses in Superior Care were also free to accept or reject shifts.

c. Economic Control

Defendants set the rate of pay for LPNs based on the Medicaid reimbursement rate less Harry's expenses and profit. Def. 56.1 ¶ 48. Compare Superior Care, 840 F.2d at 1060 ("As to control, the District Court found that Superior Care unilaterally dictated the nurses' hourly wage").

Defendants acknowledge that Harry's nurses have no economic relationship with their patients. Ex. B at 2. The facts set forth at pp. 2-4 above illustrate that Harry's nurses cannot control their economic outcomes except to the extent that they can accept or refuse shifts.

2. Investment; Opportunity for Profit or Loss

Mr. Dorvilier testified that field nurses have no investment in defendants' business. Ex. C 43:13-15. He also testified that nurses are paid by the hour, cannot possibly lose money providing services to Harry's patients and cannot profit beyond the hourly fee paid. Id. 43:16-

45:13. That is, he admits that the nurses have no opportunity for profit or loss.

Nevertheless, defendants argue on this motion that because the more hours the nurses work, the more money they make, they have an opportunity for "profit." This is simply not what "opportunity for profit or loss" means. If it were, then factory workers and letter carriers with the opportunity to work overtime would be independent contractors.

Similarly, defendants' argument that plaintiff has an investment in the business because she uses her own car to get to work would make an independent contractor of every automobile commuter in the United States, i.e., the great majority of the working population outside the five boroughs of New York City. Defendants also argue that since plaintiff financed her own education, she has an investment. If that were the law, law firm associates would be independent contractors.

The "investment" relevant to this motion is risk capital, not tools or supplies (let alone a commuter's vehicle). Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989) (investment in tools did not qualify as investment in business).[14]

3. Skill and Independent Initiative

Plaintiff concedes that nurses are skilled workers. However,

> the fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do

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[14] Even where there is a genuine opportunity for profit or loss, where determinants of profit and loss are established unilaterally by the employer through advertisements and prices, courts find an employment relationship. Martin v. Selker Bros., Inc., 949 F.2d 1286 (3d Cir. 1991) (gas station operators had no cognizable opportunity for profit or loss where volume of business depended on location). Defendants cite Selker Bros. as an authoritative statement of the economic realities standard. DMOL at 12-13.