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## **CLIENT ADVISORY**

### **Second Circuit Rules that Physician Can be Classified as an Employee**

On January 16, 2008, the United States Court of Appeals for the Second Circuit, in *Salamon v. Our Lady of Victory Hospital*, 2d Cir., No. 06-1797-cv, found that a voluntary attending physician could be classified as an “employee,” under Title VII of the 1964 Civil Rights Act and New York state law, of the hospital where she enjoyed staff privileges

### **Factual Summary**

The Plaintiff, a board-certified gastroenterologist and internist who had staff privileges at Our Lady of Victory Hospital as well as at several other area hospitals. The Plaintiff usually set her own hours and maintained her own patient load, but was required to use the hospital’s nursing and support staff and was subject to an on-call requirement where she treated patients who were not her own and provided follow-up for those patients. Further, the Plaintiff was subject to other hospital policies and management, including required participation in the quality assurance program, mandatory attendance at quarter-annual staff meetings, and compliance with the hospital’s “staff rules and regulations” and bylaws. The quality assurance program involved quarterly peer reviews of the medical procedures performed at the hospital and discussion of potential problem cases at mandatory division meetings.

Plaintiff alleged that she was the victim of sexual harassment and sex discrimination. The lower court granted the Hospital’s motion to dismiss, finding that as a voluntary attending physician she was an independent contractor and not an employee.

## **The Second Circuit's Decision**

The Second Circuit reversed the lower court's decision and held that there were issues of fact in applying the so-called "Reid factors"<sup>1</sup> to determine whether the Plaintiff was an employee or an independent contractor. The Second Circuit noted that in some ways the Plaintiff was not under the control of the hospital in that she was free to set her own hours and maintain her own patient load. However, the Court found that the Plaintiff was required to use the hospital's nursing and support staff and was subject to an "on-call" obligation. Further, the hospital required the Plaintiff to participate in the quality assurance program.

The Second Circuit noted that "other courts . . . have found that hospital peer review programs do not constitute exercises of control over the manner and means of physician practice," but that the determination must be made on a case-by-case basis. On the facts before it, the Second Circuit found that the hospital's review of the Plaintiff's practices and procedures led to a detailed "reeducation" where the hospital sought to change the methods by which the Plaintiff diagnosed and treated patients. The Court also found that the Plaintiff was subject to continual surveillance by her supervisors at the hospital, and the standards implemented by the hospital went beyond those detailed in government regulations and professional standards. Based on this control over her performance, the Second Circuit therefore ruled that there was a genuine issue of fact as to whether the Plaintiff was an "employee" under Title VII and state law, and remanded the case to the District Court.

While this case does not represent a final determination that the Plaintiff was, in fact, an employee rather than an independent contractor, it does recognize that possible outcome. Moreover, it emphasizes that hospitals, nursing homes and other health care providers who grant privileges to non-employees are not free from potential liability based upon what those individuals do (and what happens to them) when they are on duty.

We invite your questions regarding the *Salamon* decision or any other issue present in your work place.

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<sup>1</sup> *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). The 13 Reid factors are: 1. the hiring party's right to control the manner and means by which the product is accomplished; 2. the skill required; 3. the source of the instrumentalities and tools; 4. the location of the work; 5. the duration of the relationship between the parties; 6. whether the hiring party has the right to assign additional projects to the hired party; 7. the extent of the hired party's discretion over when and how long to work; 8. the method of payment; 9. the hired party's role in hiring and paying assistants; 10. whether the work is part of the regular business of the hiring party; 11. whether the hiring party is in business; 12. the provision of employee benefits; and 13. the tax treatment of the hired party.