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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HEARTLAND EMPLOYMENT SERVICES, LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	No. 48893-1-II UNPUBLISHED OPINION

MELNICK, J. — Heartland Employment Services, LLC (Heartland) appeals the trial court's order granting the Washington State Department of Revenue's (DOR) motion for summary judgment and its ruling that no genuine issue of material fact existed as to whether Heartland was a professional employer organization (PEO) qualified for a tax deduction. Because Heartland did not provide the required written notice to its employees regarding a coemployment relationship, we conclude that no genuine issue of material fact existed. We affirm.

FACTS

HCR ManorCare, Inc. owns Heartland, an employment services company for a number of affiliated entities (clients) that operate nursing and assisted living centers nationwide, including Washington. Heartland and its clients operate under the trade name "HCR ManorCare." Clerk's Papers (CP) at 34.

Heartland provides its clients with personnel and administers their payroll and benefits. In consideration for these services, each client pays Heartland an amount "equal to the direct wage

and compensation expenses incurred by [Heartland] to provide the services of the Personnel." CP at 39. Heartland's expenses include all wages, salaries, bonuses, employer payroll taxes, employee benefit costs, administration expenses, and overhead expenses relating to the personnel.

I. HEARTLAND'S WRITTEN AGREEMENT WITH CLIENTS

Heartland provides personnel to its clients pursuant to a written agreement titled "Employee Leasing Agreement." The agreement refers to Heartland's clients as "Lessees" and employees as "Personnel." CP at 396. It states that Heartland is the "provider of select personnel" necessary to operate each clients' facilities, and that all "Personnel will be employees of [Heartland]." CP at 396. The agreement is "the entire understanding of the parties."[1] CP at 399.

Heartland also has "the right and responsibility to direct and control the Personnel consistent with" each client's employee policies. CP at 396. Clients have the "right to provide input" in recruiting, hiring, supervising, etc., of personnel provided by Heartland; however, Heartland "retain[s] ultimate direction and control over such matters." CP at 396-97. The agreement allows clients to amend their employee policies "from time to time at its sole discretion," but directs clients to "cooperate with [Heartland]" in forming and implementing employee policies, and that Heartland maintains "the right of control and direction of the promulgation and administration of the Personnel employment policies." CP at 396-97.

[1] The agreement also obligates Heartland to perform other duties. Heartland must "comply with all federal, state and local employment laws and regulations," and assume responsibility for the payment of all federal and state employment taxes. CP at 397. Heartland must also carry or provide all appropriate workers' compensation insurance and be the rated employer for unemployment compensation purposes.

II. DOCUMENTS RECEIVED BY EMPLOYEES

All Heartland employees receive an "Employee Handbook" at the commencement of their employment. One section of the handbook states, "Most employees are employed by [Heartland], an employment company of HCR ManorCare." CP at 384.

Employees also receive and sign a document titled, "Letter of Understanding—Forty-Hour Work Week." CP at 388. The letter states, "I understand that as an employee of [client's name], I am working under the 40 hour work week . . . as defined in the HCR ManorCare overtime policy." CP at 388. It further states, "HCR ManorCare, through its employment company, [Heartland], is committed to paying its employees correctly and on-time," and states that the employee is "an employee of HCR ManorCare and . . . if an error in [the employee's] pay is made, HCR ManorCare has the right to make deductions from [the employee's] pay to correct the error." CP at 388.

Employees receive paystubs that list three entities' names: HCR ManorCare, Heartland, and the operating facility where the employee works (Heartland's client). The paystubs do not delineate the relationships between each entity and the employee.

Heartland also posts a notice on its intranet which is accessible to all employees. In one section, the notice identifies Heartland as the "Hiring Employer." CP at 393. The notice also responds "Yes" to the question, "Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or [PEO])?" CP at 393. The notice further states that HCR ManorCare is the insurance carrier for workers' compensation.

III. DOR INVESTIGATION AND LAWSUIT

In October 2012, DOR learned that Heartland was reporting millions of dollars in wages to the Washington Employment Security Department (ESD) for unemployment insurance purposes. At the time, however, Heartland was on active non-reporting filing status with DOR.

See RCW 82.32.045(4). Due to this discrepancy, DOR informed Heartland that it would be examining Heartland's records for excise taxes.

Heartland responded to DOR's inquiry and described itself as a PEO that qualified for a PEO tax deduction under RCW 82.04.540. Based on this information and other research, DOR conducted an audit. Heartland provided DOR with documents demonstrating that its written agreement with clients complied with RCW 82.04.540, and that employees received written notice of coemployment. DOR held a conference with Heartland to give Heartland an additional opportunity to present evidence that it qualified as a PEO.

In November 2013, DOR concluded that Heartland did not qualify for the PEO deduction. It issued a tax assessment against Heartland for approximately $2.7 million in B&O (business and occupation) tax, penalties, and interest for the period of January 1, 2009 to March 31, 2013.

Heartland filed a lawsuit seeking a refund of approximately $71,000 that it paid with its May 2013 tax return for B&O tax on costs of wages and benefits for covered employees. Both parties filed motions for summary judgment. Heartland argued that it was a PEO; therefore, it was not subject to B&O taxes on payroll and benefit costs of employees employed at its clients' facilities. DOR argued that Heartland did not meet the statutory definition of a PEO and that the trial court should, therefore, deny Heartland's request for a refund.

The trial court entered an order denying Heartland's motion and it granted summary judgment to DOR. Heartland appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A genuine issue of material facts exists only if reasonable minds could differ on the facts that control the result of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

II. PEO TAX DEDUCTION STATUTE

Washington's B&O tax is applied to the gross income of virtually all businesses for the act or privilege of engaging in business activities. RCW 82.04.220(1); *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896, 357 P.3d 59 (2015). PEOs, however, are allowed a deduction from gross income for certain amounts derived from performing PEO services. RCW 82.04.540(2). RCW 82.04.540 governs whether an entity meets the requirements of a PEO and is, thus, entitled to such a deduction.

A PEO is any person or entity engaged in the business of providing professional employer services. RCW 82.04.540(3)(f). "Professional employer services" is defined as "the service of entering into a coemployment relationship with a client in which all or a majority of the employees providing services to a client . . . are covered employees." RCW 82.04.540(3)(g).

A "[c]oemployment relationship" is "a relationship which is intended to be an ongoing relationship rather than a temporary or project-specific one, wherein the rights, duties, and obligations of an employer which arise out of an employment relationship have been allocated

between coemployers pursuant to a professional employer agreement and applicable state law." RCW 82.04.540(3)(c). A "[c]oemployer" is either a PEO or a client. RCW 82.04.540(3)(b). A "[c]lient" is "any person [or buyer] who enters into a professional employer agreement with a [PEO]." RCW 82.04.540(3)(a). A "[p]rofessional employer agreement" is a written contract between a client and a PEO that provides for the coemployment of covered employees and the allocation of employer rights and obligations between the client and PEO with respect to the covered employees. RCW 82.04.540(3)(e)(i-ii). A "[c]overed employee" is:

> [A]n individual having a coemployment relationship with a [PEO] and a client who meets all of the following criteria: (i) The individual has received written notice of coemployment with the [PEO], *and* (ii) the individual's coemployment relationship is pursuant to a professional employer agreement.

RCW 82.04.540(3)(d) (emphasis added).

Thus, in order for Heartland to qualify as a PEO, its covered employees must receive both written notice, and have its coemployment relationship with Heartland and the client expressed pursuant to a professional employer agreement.

III. NO WRITTEN NOTICE OF COEMPLOYMENT RELATIONSHIP

Heartland argues that employees receive written notice of their coemployment relationship with Heartland and its clients from the employee handbook, paystubs, letter of understanding, and the notice to employees posted on its intranet. We conclude that because the documents do not give employees written notice of a coemployment relationship, Heartland does not qualify as a PEO.

Interpretation of a statute is a question of law we review de novo. *Chicago Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). When reviewing a statute, our review begins with the plain language of the statute. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When a statute is unambiguous or clear on its

face, we determine legislative intent from the statutory language alone. *Waste Mgmt. of Seattle, Inc., v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

The written notice requirement is explained in DOR's Excise Tax Advisory (ETA).[2] Although no specific language is required, the notice must clearly identify the PEO and the client. It must put the employee on notice, either actually or constructively, that he or she is coemployed by both the PEO and the client. ETA 3192.2014 at 3. An employee can only be coemployed by one client and one PEO. ETA 2912.2014 at 4.

Here, RCW 82.04.540(3)(d) unambiguously requires that the employee be given written notice of the employee's coemployment relationship with the PEO and the client. Even if there was ambiguity, DOR's ETA explains the requirement. None of the documents Heartland produced at summary judgment gives employees notice of their coemployment relationship with Heartland and the client facility.[3]

Heartland first refers to the "Employee Handbook" and directs us to the statement in the handbook, "most employees are employed by [Heartland], an employment company of HCR ManorCare." Br. of Appellant at 14(quoting CP at 384). However, the statement means what it

[2] DOR's Excise Tax Advisories are interpretative statements authorized by RCW 34.05.230. "However, an agency's written expression of its interpretation of the law [via its interpretative statements] does not implement or enforce the law and is 'advisory only.'" *Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003) (quoting RCW 34.05.230(1)).

[3] At trial court, DOR submitted a declaration of a DOR Tax Policy Specialist. It included examples of coemployment notices from PEOs the Tax Policy Specialist found through an internet search. The notices were titled, "CO-EMPLOYEE NOTICE AND AGREEMENT." CP at 604, 606. The court denied Heartland's motion to strike the declaration, stating that the declaration was not germane to its decision. On appeal, Heartland argues that the trial court erroneously refused to strike the documents because they were not authenticated and were irrelevant. Heartland does not cite to any legal authority in support of its argument. Because an appellant must provide citations to legal authority to support its argument, we do not address this argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

plainly says. As DOR points out, the statement does not specify if an employee falls in the category of "most employees" or not. Br. of Resp't at 33. It leaves each employee to question whether he or she qualifies as "most employees." Br. of Resp't at 33. Also, the remainder of the handbook references HCR ManorCare instead of Heartland. Thus, it is unclear whether the employee is coemployed by Heartland and the client.

Heartland next references the employees' paystubs, which merely lists the names Heartland, the client (ex. "Manor Care of Lynwood"), and HCR ManorCare. An employee reading the paystub would not know with which entities it has a coemployment relationship. Beyond listing the names of three entities, the paystub does not give actual or constructive notice to the employee of a coemployment relationship specifically with Heartland and the client facility.[4]

Heartland also refers to the letter of understanding, arguing that by receiving and signing the letter, employees acknowledge that they are "employees of" the client facility and that Heartland is the "employment company." Br. of Appellant at 15. However, when read in its entirety, the letter does not give actual or constructive notice to the employee of a coemployment relationship with Heartland and the client. The letter states that the employee is "an employee of [the client]," and mentions that Heartland is an employment company of HCR ManorCare, through which it is "committed to paying its employees correctly and on-time." CP at 388. The letter also

[4] Heartland cites to the ETA to argue that if the PEO is listed in the employee handbook and if the employee's paystub contains the PEO's name, the employee receives sufficient notice of a coemployment relationship with the PEO. This argument is an incorrect reading of the ETA. The ETA states, "[A]n employee can only be coemployed by one client and one PEO." ETA 3192.2014 at 4. It then provides an example of what the DOR considers to be sufficient notice of coemployment: "[A] PEO is listed in the employee handbook as a PEO (or is adequately described as operating like a PEO) and the employee's paystubs contain PEO's name." ETA 3192.2014 at 4. The ETA does not interpret RCW 82.04.540 as merely requiring Heartland to be listed in the employee handbook. It requires an employee handbook to list Heartland *as a PEO* or describe it as operating like a PEO, which is not the case here.

states that the employee is "an employee of HCR ManorCare." CP at 388. It is not clear who the PEO is. The coemployers must be Heartland and the client. Although the letter mentions the client facility, HCR ManorCare, and Heartland, it does not state with which entities the employee has a coemployment relationship with.

Lastly, Heartland refers to the notice to employees on its intranet, arguing that it identifies Heartland as a PEO. However, the notice only identifies Heartland as the "hiring employer" and does not specify which type of staffing agency Heartland falls under. CP at 393 ("Temporary Services Agency; Employee Leasing Company; or [PEO]"). Nor does it name a client facility. The notice also references another entity, HCR ManorCare, as the insurance carrier for workers' compensation. The intranet does not give employees notice of a coemployment relationship specifically with Heartland and the client.

Heartland contends that employees receive ample constructive notice of a coemployment relationship because employees know who their "day-to-day functional employer" is and the documents inform them that Heartland is the "co-employer of record." Br. in Reply at 13. However, when each document is analyzed, there is no adequate written notice to the employee of a coemployment specifically with Heartland and the client facility.

We conclude that Heartland does not meet the statutory requirement for written notice because it is unclear from the documents who the PEO is and who the employee has a coemployment relationship with. We, therefore, conclude that there was no genuine issue of material fact as to whether Heartland qualified for a PEO deduction under RCW 82.04.540.[5]

[5] Because we resolve the matter based on the written notice requirement, we need not decide whether the agreement allocated employer rights and obligations between Heartland and its clients. *See* RCW 82.04.540(3)(d).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.