



QUARTERLY EMPLOYMENT LAW NEWSLETTER

Mischaracterizing an Employee as an Independent Contractor May Result in Significant Liability

By: Tom Jovanovich, Attorney

Independent contractors comprise a large and growing segment of the workforce. Many employers favor using independent contractors to supplement their workforce since this classification provides a significant benefit to employers for the following reasons: employers do not have to pay Social Security and Medicare taxes; do not have to pay into workers' compensation and unemployment compensation funds; do not have to withhold income taxes; and do not have to provide statutorily required leave or pay minimum wage or overtime for independent contractors. However, failing to comply with the federal law on misclassification of employees can result in significant penalties.

The federal government has initiated an aggressive program to audit and enforce the law with respect to classification of employees. The government accountability office estimates that more than \$2.7 billion per year in taxes is lost because of independent contractor misclassification. Additionally, a Department of Labor (DOL) study indicates that up to 30% of companies misclassify workers as independent contractors. Based on this data, the IRS has added 200 new employment tax auditors who will conduct 6,000 audits on this issue over the next three years. The audits will not be limited to large companies. Accordingly, if you are employing independent contractors, you must insure that they are in fact independent contractors and not employees.

Determining whether an independent contractor classification is correct is extremely difficult. Adding to this complexity is that different agencies apply different tests.

The initial analysis on worker classification begins with these two questions:

1. Does the hiring company pay its regular

employees to perform essentially the same duties as the independent contractor?

2. Has the worker or the type of work previously been paid by the company as an employee to perform essentially the same tasks?

If the answer to either of these questions is yes, the worker in question is likely an employee and not an independent contractor.

Beyond these initial two questions, the IRS considers the following 20 factors to determine whether a person is an independent contractor or employee:

1. **Instructions.** A worker who is required to comply with another person's instructions regarding when, where and how to perform the work is ordinarily an employee.
2. **Training.** Training a worker indicates that the company wants the services performed in a particular method or manner, which also indicates control.
3. **Integration.** Integration of the worker's services into the company's core business operations generally shows that the worker is subject to direction and control.
4. **Services Rendered Personally.** If the workers must personally perform services for the company, this will indicate control by the company. Alternatively, if the worker is free to engage others to perform the service for the company (i.e., subcontractors), a lack of control by the company is indicated.
5. **Hiring, Supervising and Paying Assistants.** If the worker is unable to hire, supervise and pay assistants to perform services for the company, control by the company is indicated. However, a lack of control is indicated when the worker is able to hire his or her own assistants and pay them from the worker's own funds.

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New Tax Benefits for Employers Who Hire and Retain Unemployed Workers

By: Paul Rajkowski, Attorney

In March of this year, President Obama signed into law the Hiring Incentives to Restore Employment (HIRE) Act. The new law allows employers to claim a special payroll tax exemption that applies to some newly hired workers in 2010.

The tax benefit applies to employers who hire workers who were previously unemployed or only working part time. Employers who hire unemployed workers this year (after February 3, 2010 and before January 1, 2011) may qualify for a 6.2 percent payroll incentive, in effect exempting them from their share of Social Security taxes on wages paid to these workers after March 18, 2010. This reduced withholding will have no effect on the employee's future Social Security benefits and employers will still need to withhold the employee's 6.2 percent share of Social Security taxes as well as income taxes. The employer and employee's shares of Medicare taxes will also still apply to these wages.

Employers who hire previously unemployed workers who remain employed for at least a year may also claim a new hire retention credit of up to \$1,000 per worker when they file their 2011 income tax returns.

These two tax benefits will be of value to employers who are adding positions to their payrolls. New hires filling existing positions also qualify but only if the workers they are replacing left voluntarily or for cause.

Businesses, agricultural employers, tax-exempt organizations, tribal governments and public colleges and universities all qualify to claim the payroll tax exemption for eligible newly-hired employees. Household employers and federal, state and local government employers, other than public colleges and universities, are not eligible.

For more information, please contact one of the employment law attorneys at Rajkowski Hansmeier.

The Intent of the Marital Status Discrimination Law

By: Lori Athmann, Attorney

On April 27, 2010, the Minnesota Court of Appeals ruled in Taylor v. LSI Corp. of America that acts of marital status discrimination need not be direct attacks on the institution of marriage. The Minnesota Human Rights Act defines "marital status" discrimination to include conduct based on the "identity, situation, actions, or beliefs of a spouse or former spouse". In a matter of first impression, the Court of Appeals held that an employee's claim that her termination was based on the identity and situation of her spouse, a co-employee who was forced to resign, fell squarely within the statutory definition of marital status. This holding clarifies the legislature's intent in defining marital status discrimination.

LSI hired appellant, LeAnn Taylor in 1988 as the receptionist/secretary. In September, 1999, Gary Taylor joined LSI as its president. Gary and LeAnn subsequently began dating and married in 2001. In 2006, upon a formal review of LSI's management structure, LSI terminated or accepted resignations from six of the 25 management employees. Gary Taylor was one of the employees who was forced to

resign. LeAnn alleged that, prior to her termination, her husband had a conversation with the CEO wherein they discussed her continued employment with LSI. She claims the CEO asked her husband if he wanted to announce LeAnn's departure at the same time as he announced his own. When her husband responded that LeAnn had her own rights, and he would not get involved, the CEO responded that, since he was leaving, "it would probably be uncomfortable or awkward for LeAnn to stay". In a separate meeting, the CEO allegedly told LeAnn that because her husband was leaving LSI "he probably will be [relocating], which means you'll be relocating as well. So we just decided to eliminate your position".

LeAnn commenced an action alleging marital status discrimination in violation of the Human Rights Act. She claimed that she was terminated solely because her husband's employment was ending. The district court dismissed the claim on the basis that LeAnn's termination was not "directed at her marital status itself".

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Mischaracterizing an Employee...

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6. **Continuing Relationship.** A lengthy and continuing relationship between the workers and the company indicates that an employment relationship exists.
7. **Set Hours of Work.** If the worker works certain hours set by the company, employment status is indicated. If the company does not control the hours of the worker, independent contractor status is indicated.
8. **Full Time Required.** If the worker must devote substantially full time to the company's business, control is indicated.
9. **Work Performed on Employer's Premises.** If the work is performed on the company's premises, the company is considered to have control over the worker, especially if the work could be done elsewhere.
10. **Order or Sequence Set.** If a worker must perform services in the order or sequence as determined by the company, the worker is generally subject to an employer's control. However, if the worker chooses his or her own method for completing a job, a lack of control exists.
11. **Oral or Written Reports.** A requirement that a worker submit regular or written reports is an indicator of control.
12. **Payment by Hour, Week, Month.** Hourly, weekly or monthly payments generally point to an employment relationship. On the other hand, payments based on a contract or for completing a particular job or task will generally indicate an independent contractor relationship.
13. **Payment of Business and/or Traveling Expenses.** If the company ordinarily pays the worker's business and traveling expenses, the worker is ordinarily an employee.
14. **Furnishing of Tools and Materials.** If the company furnishes significant tools, materials and other equipment, an employment relationship is indicated.
15. **Significant Investment.** If the worker does not invest in his or her own facilities, control is indicated because the worker depends on the company for such facilities.
16. **Realization of Profit or Loss.** A worker who cannot realize a profit beyond an ordinary salary or suffer a loss is generally considered to be an employee.
17. **Working for More Than One Firm at a Time.** If the worker cannot perform services for more than one company at a time, the company generally controls the worker. However, a lack of control is indicated when the worker is able to perform services for multiple companies at the same time.
18. **Making Service Available to General Public.** If a worker is not free to advertise his or her services to the general public on a regular basis, control is indicated. Workers who advertise their services are generally considered independent contractors.
19. **Right to Discharge.** The right of the company to discharge a worker without breaching a contract indicates an employment relationship as control is exercised through the threat of dismissal.
20. **Right to Terminate.** If, at any time without incurring liability, the worker has the right to end his or her relationship with the company, an employment relationship is indicated.

No one factor is determinative. All factors must be considered to make an accurate determination. If you have any questions as to whether an independent contractor may be an employee, it is important that you consult with an attorney to assist in the determination. Failure to do so could result in significant penalties and back taxes.

The Intent of the Marital Status Discrimination Law

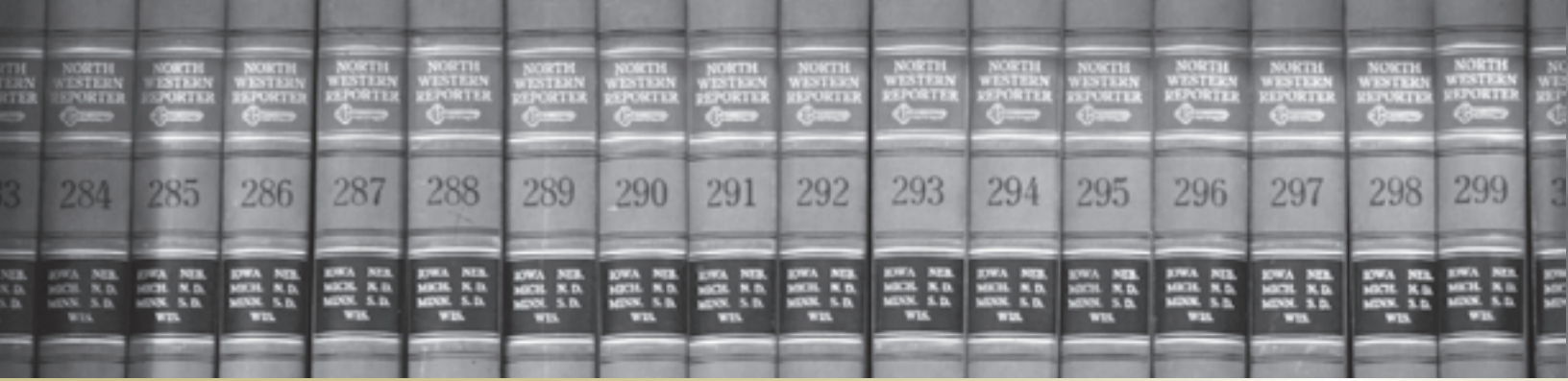
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In 1984, the Supreme Court had held that, absent legislative intent to "proscribe a particular political posture, whether of an employee or of the employee's spouse" and absent evidence that the alleged discrimination was "directed at the institution of marriage itself", no cause of action existed under the Minnesota Human Rights Act. An example of a direct attack on the marriage institution would be the refusal to hire a married couple. In response, the legislature amended the Minnesota Human Rights Act to define marital status in employment cases to include "protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse".

In Taylor, the Court of Appeals interpreted the legislative amendment to include claims of marital status discrimination based upon the

situation of a spouse. LSI argued that the relevant inquiry is if one is married, rather than to whom one is married. The Court of Appeals rejected this argument. In doing so, it held that the Act prohibits an employer from discriminating against an employee based on "the identity or situation" of the employee's spouse. In Taylor, the Court of Appeals found that LeAnn had shown discrimination because of her husband's forced resignation and, thus, was entitled to pursue a claim under the Minnesota Human Rights Act.

The above holding expands the Supreme Court's earlier decision in direct response to the legislative amendment to the Act.



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New Definition of “Son and Daughter” under the Family Medical Leave Act

By: Jessie Becker, Attorney

The United States Department of Labor recently clarified the definition of “son and daughter” for purposes of employee qualification for leave under the Family Medical Leave Act. The new definition now states that all employees who have assumed the responsibility for parenting a child, whether they have a biological or legal relationship with the child or not, may be entitled to FMLA leave.

The Act, as originally enacted, sets expectations for employers of 50 or more employees to grant leaves to employees for their own serious health condition, the birth or adoption of a child, for the care of a child, spouse, or parent with a serious health condition, for

the care of a covered servicemember with a serious injury or illness, and for qualifying exigencies arising out of a the employees’ spouse, son, daughter, or parent who is on active duty or is called to active duty status in support of a contingency operation.

The new definition of the parenting relationship clarifies the extension of these leaves to a greater variety of parenting relationships than exist today. The action is considered a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community who have previously been denied such leave.

Rajkowski Hansmeier Ltd.’s QUARTERLY EMPLOYMENT LAW NEWSLETTER is intended to be informational and not to solve individual legal problems. Some of this information involves significant changes which could impact your organization. If you have further questions about this information, please contact us for an attorney’s opinion. If you would prefer to receive this newsletter via e-mail, just let us know at jphillips@rajhan.com.



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