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ILLINOIS STATE BAR ASSOCIATION

The Corporate Lawyer

The newsletter of the Illinois State Bar Association's Section on Corporate Law

Internal Revenue Service creates incentive program to resolve worker classification issues while also strengthening its compliance mechanisms

By James F. Fitzsimmons, Esq., Budd Larner, PC

Last year, the Internal Revenue Service released Announcement 2011-64. This announcement outlines a new program—the Voluntary Classification Settlement Program or "VCSP")—whereby taxpayers can voluntarily reclassify workers as employees for future tax periods in exchange for reducing their federal employment tax liability for the past nonemployee treatment.

Under the VCSP, eligible employers can obtain substantial relief from federal payroll taxes owed for misclassification of workers in the past if they agree to reclassify their workers for federal employment tax purposes. The VCSP applies to taxpayers who are currently treating their workers (or a class or group of workers) as independent contractors or other non-employees and want to prospectively treat such workers as employees. To be eligible a taxpayer must have previously consistently treated their workers as non-employees and must have filed all required Forms 1099s for the workers for the past three years. The taxpayer also cannot be currently under audit by the Internal Revenue Service or under audit regarding the classification of workers by the De-

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Employee benefit plans—The importance of classifying individuals

Bernard G. Peter of Kubasiak, Flystra, Thorpe & Rotunno, P.C.

Whether an individual is properly classified as an employee or independent contractor can have a very significant impact on the employee benefits plans that an employer sponsors. Employers often believe that they do not have to provide employee benefits to casual, part-time, seasonal or temporary employees or employees who are rehired after retiring. Sometimes employers categorize these special or contingent workers as independent contractors when they may not meet the criteria to be an independent contractor.

The case which makes very clear how significant this issue can be is the case of *Vizcaino v. Microsoft* in which Microsoft argued in the courts for ten years that it was not responsible for providing benefits under the Microsoft 401(k), medical, stock purchase and other employee benefits plans to a certain group of employees that Microsoft had misclassified as independent contractors. The individuals had signed agreements that they were independent contractors and were responsible for their own insurance and other benefits. Also the individuals were paid by the accounts payable department and not carried on the Microsoft payroll. The individuals made

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partment of Labor or by a state government agency.

A taxpayer who participates in the VCSP will agree to prospectively treat the class of workers as employees for future tax periods. In exchange, the taxpayer will pay only ten percent (10%) of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year, determined under the reduced rates of Section 3509 of the Internal Revenue Code of 1986; will not be liable for any interest and penalties on the liability; and will not be subject to an employment tax audit with regard to the classification of the workers for prior years. This is a significant incentive for employers to prospectively address the issue of classification of their workers for federal employment tax purposes.

Two days prior to releasing the announcement regarding the VCSP, the Commissioner of the Internal Revenue Service and the Secretary of the Department of Labor signed a memorandum of understanding that will allow the Internal Revenue Service and the Department of Labor to share information and increase their collaboration regarding worker classification issues. The collaborative efforts between these Federal Agencies are intended to leverage their respective resources to reduce the incidence of worker misclassification and improve compliance with federal tax and labor laws. The Secretary of Labor issued a press release on September 19, 2011 stating that the agreement between the Internal Revenue Service and the Department of Labor is part of a "series of agreements that together send a coordinated message: We're standing united to end the practice of misclassifying employees. We are taking important steps toward making sure that the American dream is still available for all employees and responsible employers alike."

In the course of the two days, the Internal Revenue Service along with the Department of Labor has provided both a carrot and a stick in regard to worker classification issues. All employers that have workers which are currently classified as independent contractors and/or non-employees should consult with their tax attorney to review if they should take advantage of the VCSP, especially in light of the increased compliance mechanisms now at the disposal of the Internal Revenue Service and the Department of Labor. ■

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Employee benefit plans—The importance of classifying individuals

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their claim after an IRS audit had determined that the free-lance personnel were actually employees for federal withholding and payroll tax purposes. Ultimately after the third adverse decision in the Ninth Circuit, *Vizcaino v. Microsoft Corp*, 173 F. 3d 713 (9th Circuit, 1999) and the refusal of the Supreme Court to hear the case, Microsoft settled with the misclassified employees for approximately ninety seven million dollars ($97 million).

As Microsoft found out, hiring an individual through a leasing agency or designating the person as an independent contractor will not necessarily protect the employer from a claim that the individual actually is a common law employee of the employer, and this has a right to employee benefits. Instead the employer should review the criteria for determining whether an individual would be considered a common law employee as set forth by the U.S. Supreme Court in the case of *Nationwide Mutual Insurance Co., et al. v. Darden*, 503 U.S. 318 (March 24, 1992). According to the Supreme Court, the following criteria should be considered (some examples of the criteria are provided):

1. The right of the hiring party to control the manner and means by which the work is completed.

In the 1992 case of *Renda v. Adam Meldrum & Anderson Co.*, 806 F. Supp. 1071 (W.D. New York, 1992), the individual claiming benefits worked in the jewelry department of a department store. The jewelry department was operated under a lease with the store which set forth the right of its department store to contract the manner and method under which the jewelry department was to operate. The court found that the individual was a common-law employee of the department store despite her designation as a "leased employee" because the department store exercised a substantial amount of control over the individual including the right to discharge the employee. Consequently, the individual had the right to participate in the pension plan of the department store.

2. The skill required to carry out the work.

The IRS would more likely consider the person to be an independent contractor if he or she has a skill that normally is offered to many different clients or customers or that is provided through a third party. Some examples of this type of individual would be an actuary or immigration attorney, an insurance agent, a plumber and a security guard.

3. The source of the instrumentalities and tools that the hired party uses in undertaking the assignment.

An individual who provides his or her own equipment is much more likely to be considered an independent contractor than an individual for whom the company provides the apparatus needed to carry out the assignment. An example of an individual who could be an employee or could be an independent contractor is an auditor. If the company gives the auditor a calculator, a computer, a telephone and writing materials, like pens and paper, it is likely that the individual would be considered to be an employee. On the other hand, if the auditor provides his own calculator, computer, telephone and writing materials, he or she likely will be considered to be an independent contractor.

4. The location of the work.

5. The duration of the relationship between the hiring party and the hired party.

The fact that an individual is designated as a "casual employee," a "seasonal employee" or a "temporary employee," will not exclude the employee from being eligible for the retirement and benefits plans of the employer. If an individual who is so designated meets the eligibility requirements of a retirement or benefit plan of the employer, he or she would be eligible to participate in the Plan and receive benefits. Therefore, if an employer has non-regular employees the employer wants to exclude, the employer either must exclude these employees by classification (i.e., all employees in the IT department) or by providing that they will not become eligible for the benefit plan until they complete 1,000 hours of employment or some other standard. Under the Internal Revenue Code of 1986, as amended ("Code"), and Internal Revenue Service regulations generally, if an employee completes one thousand (1,000) hours of service in a retirement plan in a year he or she will be eligible to participate in the plan

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.

In the case *Capital Cities/ABC, Inc. v. Radcliff*, 141 F.3d 1405 (16th Cir. 1998), involving the Kansas City Star newspaper, the facts were similar to *Microsoft*, but with an opposite result. The newspaper carriers for the Star had entered into an agreement with the Star that they were independent contractors for federal, state and local tax purposes and that they had no right to benefits. The newspaper carriers filed a class action suit seeking benefits under two retirement and two welfare benefit plans. As the language of the benefit plans clearly excluded individuals like the newspaper carriers and as the newspaper carriers were not carried on the payroll of the Star, the court found that they were not eligible for the benefits plans.

9. The role of the hired party 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. Does the hired party receive employee benefits from the hiring party?

To the extent that employer is the controlling party in the application of the above twelve (12) criteria, it will be difficult for the employer to support a position that the individual is an independent contractor or leased employee even if he or she is so designated.

One other standard that should be considered is whether the hired party is treated for tax purposes as an employee or independent contractor? To determine whether an individual is a common law employee or an independent contractor, the employer should also review the questions in IRS Form SS-8 which the IRS uses for determination of worker status for purposes of federal employment taxes and income tax withholding.

To summarize, if an individual will be performing work for the employer as an independent contractor:

1. The work should be performed on an irregular basis without supervision or requiring compliance with detailed orders or instructions.

2. The employee should not be given an established work schedule for performing services and should not be required to ask for permission of the employer to be absent from work.

However, there is nothing in the Code or under the Employer Retirement Income Security Act of 1994, as amended, which prevents the employer from including language in documents of the employer which excludes certain employees from plan participation as long as the exclusion is neither entirely arbitrary nor based on impermissible criteria. Properly drafting plan documents to make it clear that only those individuals the employer considers to be employees are covered by the employee benefit plans of the employer is probably the most important action the employer can take to exclude from its plans individuals the employer does not want to cover. ■

Writing briefs judges want to read

By Christine M. Kieta

Recently, I wrote a response to a motion for an in-house attorney. Using my carefully crafted IRAC formula the bolded point headings sat poised in the middle of the pages like sultry steaks. One whiff and you are bound for the first sentence then rushed down by the white spaces into a block quote of the rule. The unsuspecting reader now moves as if unconsciously to the beginning of the next paragraph.

Lying in wait at the indentation is a quote from the poetic annoyance of appellate writing seeping reality into the rule. The application of the facts now beats with a command of authority concluding with a pointed, decisive answer to the issue.

These are the pearls of legal research. This is the art of legal writing.

I. When Writing A Brief, Know The Judge's Docket

Writing well for litigation is two-fold. First, you want to get the judge actually to read what you write. Second, you want the judge to agree with what you write.

Primarily, writers must understand the nature of a judge's docket and the actual time a judge has to read anything submitted. This is important especially for in-house counsel unfamiliar with the day-to-day nuances of courtroom work. In state court, for example, a judge can have a hundred cases on the morning docket alone *daily*. Judges, therefore, often do not have time to read lengthy or poorly written documents. Writing well for this atmosphere requires calculated strategies.

II. IRAC Is Expert Legal Analysis

Surprisingly, many lawyers are unfamiliar with or have forgotten IRAC – the method of legal analysis employed in the attention-getter of this article. Indeed, the in-house lawyer for whom I wrote the referenced response asked me once he received it, "What is IRAC?" Younger lawyers learn this method in droves. But even learning it is a far cry from understanding its practical application.

IRAC stands for "Issue; Rule; Application; Conclusion." The Issue ("I") explains in one sentence the question the IRAC analysis will resolve. The Rule ("R") establishes the controlling authority. But since the Rule sits on the coattails of the Issue it is wedged in with blunt force to choke out any objection that another Rule may apply. This permits the Application ("A") to cherry-pick the necessary facts for a fine-point conclusion. The Conclusion ("C") you need the judge to understand now spins with the force of a tornado poised for anything in its path – the contrary arguments set forth by your opponent.

Strategically, your document needs to be front-loaded with the favorable IRAC analysis at the beginning for two reasons. First, it drives the judge immediately to the correct conclusion which, naturally, is yours. Second, it makes your opponent's arguments easier to attack. Incidentally, each of your opponent's arguments should receive its own IRAC analysis in your brief so that you have the ability to construct your opponent's tornados to be as strong or as weak as you need them.

Now your tornado is ready to drive against your opponent warping the very facts their analysis breathes into the power that drives yours. In other words, IRAC is focused, powerful, and cuts like a knife.

III. Each IRAC Analysis Needs A Calculated Point Heading

Using IRAC effectively in a brief *requires* well-crafted point headings. Therefore, each IRAC analysis should get its own point heading. Point headings catch a judge's eyes and burn into his mind the one thought you need him to remember. Most importantly, they set clear parameters for each analysis which also works to road-map a document. This is a great control mechanism for the babbler unfamiliar that the rush in courtrooms needs focused people.

Expertly crafted point headings are about two full lines. Anything more is too much for someone's eyes on a quick read. Compelling point headings are declarative statements – always favorable to your conclusion – of the IRAC analysis that it introduces. It is the one thought that you need the judge to remember. For example, when I draft my briefs if my one thought is "I am right, and you are wrong," I literally use that as my point heading to drive the focus of that IRAC analysis. Once the analysis is complete I rewrite the point heading so that it is expertly crafted.

Strategically, if the judge does not have the time to read your brief then he can scan the point headings for an expert summation of your position (always first) and then your opponent's (limping along in second). If he did read your brief but is caught among the hundred cases that morning then when you are before him he has the ability to scan your brief catching only your expertly-crafted point headings. If the section it represents is short enough you give the judge the ability read it while on the bench.

IRAC analysis coupled with point headings is one of the best calculated strategies to write well for litigation.

IV. Visual Beauty Of Each IRAC Analysis Is A Two-Step Process

Once the parameters of each IRAC analysis are set off by point headings the visual

beauty of the section is easier to manipulate since the hard work is largely conquered. Therefore, the face of the paper, the position of paragraphs, bolded sentences, and even a hyphen can give a document anything from antique appeal to guerrilla warfare.

The first step to visual beauty is to use the white spaces effectively. The white spaces are like the walls of a canyon holding deep within it the refreshing waters of expert legal writing. For example, if the rule in your IRAC analysis is unfavorable to you use a block-quote of it so that the reader naturally does not want to read it. Instead, the white spaces gently guide the reader to the next paragraph beginning with a quote explaining the rule in the way you want it interpreted.

The second step to visual beauty is well-used punctuation marks. Like the cook that spoils dinner with too many hot peppers is the writer who saturates his work with too many commas and semi-colons. This just leaves the reader choking through the document. The inexpert hand is obvious when the comma signals the breath the writer took when writing and not the grammar rule pursuant to which the comma is employed. Simple sentences create simple beauty. Punctuation marks, much like hot peppers, heat up important points that the judge's eyes must see and remember.

Visual beauty that uses the white spaces of a document and properly employed punctuation marks are the finishing touches on a brief.

V. The Result Is Iron-Clad Legal Analysis

Legal writing is the backbone of courtroom work. Writing in a fashion that gets a judge to read your brief incorporates more than creating iron-clad legal analysis. Legal analysis is the fabric of the document. The author's use of the English language and his ability to use the contours of the page give beauty to the brief. ■

Christine is a solo practitioner in Aurora, IL. She focuses her practice on person and small business legal needs and legal writing for other lawyers.

Upcoming CLE programs

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November

Thursday, 11/1/12- Teleseminar—Business Succession and Estate Planning for Closely Held Business Owners, Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/1/12- Bloomington, Holiday Inn and Suites—Real Estate Law Update- 2012. Presented by the Illinois State Bar Association. 9-4:30.

Thursday, 11/1/12- Friday, 11/2/12- Champaign, U of I College of Law—Attorney Education in Child Custody and Visitation Matters in 2012 and Beyond. Presented by the ISBA Bench and Bar Section; co-sponsored by the ISBA Family Law Section and the ISBA Child Law Section. 12:30-5; 9-5.

Friday, 11/2/12- Teleseminar—Business Succession and Estate Planning for Closely Held Business Owners, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 11/2/12- Chicago, ISBA Chicago Regional Office—Third Annual Great Lakes Antitrust Institute (viewing of Live Webcast). Presented by the ISBA Antitrust Section; co-sponsored by the Ohio State Bar Association, Indiana Continuing Legal Education Forum, and Pennsylvania Bar Institute. 8:25-5:00.

Monday, 11/5/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1.

Tuesday, 11/6/12- Teleseminar—Attorney Ethics in Digital Communications- Remote Networks, Smart Phones, the Cloud and More. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/7/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1.

Wednesday, 11/7/12- Chicago, ISBA Regional Office—Do You Buy or Merge? Presented by the ISBA Business and Securities Law. 9-12:30.

Wednesday, 11/7/12- Chicago, ISBA Regional Office—Fiduciary Risk and Ethical Challenges for Fiduciaries and Their Advisors. Presented by the ISBA Trust and Estates Section.

Wednesday, 11/7/12- LIVE Webcast—Fiduciary Risk and Ethical Challenges for Fiduciaries and Their Advisors. Presented by the ISBA Trust and Estates Section. 2-4.

Thursday, 11/8/12- Teleseminar—Real Estate Partnership/LLC Divorces. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/8/12- Chicago, ISBA Regional Office—National Healthcare Reform and Its Effect on Illinois Employers and Health Insurance. Presented by the ISBA Health Care Section. 1-4:30.

Thursday, 11/8/12- LIVE Webcast—National Healthcare Reform and Its Effect on Illinois Employers and Health Insurance. Presented by the ISBA Health Care Section. 1-4:30.

Friday, 11/9/12- Chicago, ISBA Regional Office—2012 Federal Tax Conference. Presented by the ISBA Federal Taxation Section. All day program.

Tuesday, 11/13/12-Teleseminar—UCC Article 9 Practice Toolkit: From Attachment to Remedies, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/14/12-Teleseminar—UCC Article 9 Practice Toolkit: From Attachment to Remedies, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/15/12- Chicago, ISBA Chicago Regional Office—The Student and Parent Side of School Law. Presented by the ISBA Education Law Section. All Day.

Thursday, 11/15/12- Webcast (originally presented May 31, 2012)—Neutralizing Obnoxious Conduct as Professionals and as a Profession. Presented by the ISBA. 12-1.

Tuesday, 11/20/12- Teleseminar—2012 FMLA Update. Presented by the Illinois State Bar Association. 12-1.

Monday, 11/26/12- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1

Tuesday, 11/27/12- Teleseminar—Discretionary Distributions. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/28/12- Teleseminar—Offers in Compromise. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/28/12- Chicago, ISBA Chicago Regional Office—American Invents Act- Part 1: Protecting Innovation in a First to File System. Presented by the Illinois State Bar Association. AM Program.

Wednesday, 11/28/12- Live Webcast—American Invents Act- Part 1: Protecting Innovation in a First to File System. Presented by the Illinois State Bar Association. AM Program.

Friday, 11/30/12- Chicago, ISBA Chicago Regional Office—Trial Practice Series: How to Prove (or Defend) Your Case. Presented by the ISBA Labor and Employment Section; Co-sponsored by the ISBA Civil Practice and Procedure Section. 8:55-4:15.

Friday, 11/30/12- Lombard, Lindner Conference Center—Real Estate Law Update- 2012. Presented by the Illinois State Bar Association. All day.

Friday, 11/30/12- Teleseminar—Practical UCC- Understanding and Drafting Letters of Credit in Business Transactions. Presented by the Illinois State Bar Association. 12-1

December

Tuesday, 12/4/12- Teleseminar—Drafting Buy/Sell Agreements in Business, Part 1. Presented by the Illinois State Bar Association. 12-1. ■

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