

Inside This Issue

Independent Contractor
or Employee? The Wrong
Answer Could Cost You...

Success Story

Health Care Reform—
Employer Calendar Time-
lines

Tax Corner

The Latest News at SLG

Employment Corner

Reminders and Other
Items of Note

Dates to Remember

Did You Know?

Independent Contractor or Employee? The Wrong Answer Could Cost You...



Tamara B. Pow, Esq.

Whenever a business hires someone, that worker is either an independent contractor or an employee. Using the correct classification is crucial because federal and state governments are targeting businesses with incorrectly classified employees to collect substantial employment taxes and penalties. In addition, workers may sue for employee benefits they claim they should have been eligible for.

How do you determine the proper classification?

The IRS and the state governments have different tests. The IRS tells you to consider behavioral control (do you have the right to control what will be done and how?), financial control (is the worker offering their services to others and incurring their own costs?), and relationship of the parties (more than just what title your contract puts on it). California boils it down to one question: Does the employer have the right to direct and control the manner and means in which the worker carries out the job? If the answer to that is not clear, there are ten

secondary factors to consider.

What can a business do to protect itself?

The most important thing a business can do to protect itself from a claim of improper classification is to have a written, signed contract with every independent contractor. The process of reviewing appropriate terms for this contract is as important as the writing itself. Consult an attorney for assistance in creating a contract for your company, and before making any changes to that contract. Then, follow its terms. Give independent contractors control over how they perform their duties, maintain good records such as invoices for their services, and send them a Form 1099 if you pay them more than \$600 in a calendar year. Finally, treat them consistently and treat your employees differently, and be very careful when changing a workers classification – especially when you are changing it from employee to independent contractor. If you are not sure of the proper classification, you can get help from the IRS (fill out Form SS-8) or the EDD (use Form DE-38 or file form DE-1870). Be careful – a worker can also complete Form SS-8 to determine their proper classification, and if they think they have been misclassified, they can choose to only pay employee side taxes and file Form 8919, telling the IRS to go after their employer for the other half.



Success Story

A sole proprietorship was looking to hire some help but did not want to pay for worker's compensation insurance for an employee. SLG's attorneys determined that the client's needs could be satisfied through an independent contractor, for which worker's compensation insurance is not required. SLG's attorneys were able to properly advise the client regarding the parameters of the independent contractor relationship, including very important distinctions at the hiring stage. The client was able to get the help needed and stay within budget.

Health Care Reform—Employer Timelines

Although many changes are still expected to the new health care reform, below are some changes that employers should be aware of.

2010

- Tax credits are implemented for small employers (with 25 or fewer employees earning an average of less than \$50,000) that provide health insurance benefits.
- Employers with 50 or more employees must provide reasonable unpaid breastfeeding breaks and a private location for nursing mothers.
- Individual and group policies must provide coverage for adult children up to the age of 26 for plan years that begin on or after October 1st.
- Employers can no longer deny coverage to an employee based on a preexisting condition.

2011

- Beginning January 1st, all employers must report employee health benefits on W-2s.
- Flexible spending account funds can no longer be used

to buy non-prescribed items including over the counter medicines.

- Government grants will be created for small employers to establish employee wellness programs.

2013

- As of January 1st, health care flexible spending account contributions are limited to \$2,500.

2014

- Effective January 1st, all individuals must have health insurance. To ensure that all employees have health insurance, employers with more than 200 workers must automatically enroll employees into a health insurance plan. Employees may opt out. State based exchanges known as Small Business Health Options Programs will open to allow employers with less than 50 employees to pool risk together and, ideally, lower coverage costs. All employers that don't provide coverage will receive penalties.

[Source: The HR Specialist Vol. 8, No. 6 June 2010]

Tax Corner **New Rules for CA Nonprofits**

Starting January 1, 2011 small tax exempt organizations, other than churches, are no longer exempt from filing an annual notice to California. For calendar years they will have to e-file by May 15th. While there is no monetary penalty for failure to file, three consecutive failures will cause an organization to automatically lose its tax exempt status. The Franchise Tax Board can also revoke tax exempt status in California (i) if the IRS suspends or revokes the federal tax exemption, (ii) for failure to file a return, (iii) for non-payment of balance due, or (iv) for failure to file a Statement of Information. [Source: Spidell's California Tax Letter Vol. 32.6, June 1, 2010]

LLC Suspensions

In April 2010 the Secretary of State sent their first delinquency notices to California LLCs that have failed to file or update their Statement of Information. This is in addition to Franchise Tax Board LLC suspensions for failure to file or pay. To revive a suspended LLC, members must file the Statement of Information with the Secretary of State, pay the regular \$20 fee, plus pay a \$250 penalty. [Source: Spidell's California Tax Letter Vol. 32.6, June 1, 2010]

Taxes are Going UP!

Normally we try to push income into next year to avoid paying taxes on it this year. However, you may want to accelerate income and capital gains this year because delaying it to 2011 could cost you a lot more in taxes. As a result of the expiration of the Bush Administration's tax rate cuts, effective January 1, 2011, individual tax rates will increase from 35% to 39.6% in the highest bracket, and the maximum long term capital gains rate will increase from 15% to 20%. [Source: The Kiplinger Tax Letter Vol. 85, No. 13, June 25, 2010]

Real Estate Professionals Beware

Real estate pros may need to elect to treat all of your rental units as one activity for tax purposes in order to be exempt from the passive loss rules. Otherwise, you must satisfy the strict material participation tests for each property you own for rental losses to be treated as nonpassive. The election is made by attaching a statement to the tax return saying all rentals are being treated as a single activity under Section 469(c)(7)(A) of the tax code. Simply aggregating profits and losses on your Schedule E doesn't qualify according to the Tax Court. (Shiekh, TC Memo. 2010-126).



The Latest News at



New Litigator Joins Our Team



We're excited to announce that Steven Scully has joined our firm. Steve assists with litigation matters. He has in-depth courtroom experience, having worked as an extern for Hon. Mary Jo Levinger, Judge of the Superior Court of Santa Clara County, and as a law clerk for the Santa Clara County Office of the District Attorney. He is well-qualified to handle business litigation matters, including contractual, real property, and licensing disputes.

Steve earned a Juris Doctor Degree from the Honors Lawyering Program at Golden Gate University School of Law, and a Bachelor's Degree from the University of California at Davis. During law school, Steve was recognized for his academic excellence. He has been admitted to the State Bar of California and the United States District Court for the Northern District of California.

Congratulations to Rebecca



Structure Law Group, LLP has a new member to welcome to our family. Rebecca gave birth to her second daughter, Brooke Leah McCracken, on June 17, 2010. Rebecca is currently out on maternity leave and will be joining us again in January 2011. Congratulations to Rebecca and her family.



Mark Nominated as a Super Lawyer

Mark Figueiredo was nominated as one of Northern California's Super Lawyers for 2010 for the second year in a row. Mark is featured in the 2010 Super Lawyers Publication. Only 5% of all lawyers in Northern California are chosen as Super Lawyers each year. Congratulations Mark on this prestigious selection!



Employment Corner

Social Networking Policies in Your Business

As social media sites such as Facebook, LinkedIn and Twitter have become a part of everyday life, it is important for companies to develop policies on social networking. Here are some items to include in your policy:

- Use of these sites must not interfere with work time.
- Any use of the company's name, logo or trademark is prohibited.
- Messages should not disclose confidential or proprietary company information.
- Remind employees that they can be terminated for making disparaging remarks about the company, its employees, clients or vendors online, even if those comments are made during non-work hours.



Reminders and Other Items of Note

Structure Law Group has a NEW website!

We have just launched our new and improved website. Be sure to check out our new website at www.structurelaw.com and look for news on all of the latest happenings at SLG.

Conference Room Available For Use

Our conference rooms are available to our clients to hold their annual meetings. The large conference room can comfortably seat 12 people. Please be sure to contact our office if you would like to use our conference room for an annual meeting or other event.





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Dates To Remember

- | | |
|--------------|--|
| July 4 | Independence Day |
| August 8 | Hall of Fame Game (NFL) |
| August 12 | Preseason Begins (NFL) |
| September 6 | Labor Day— courts and government
offices closed |
| September 12 | Grandparents Day |
| September 22 | First Day of Autumn |



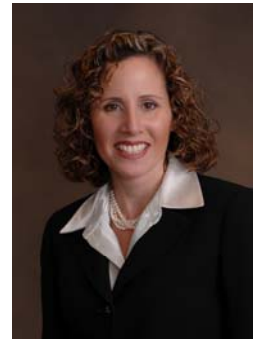
Did You Know?

- Ticket prices for the Hall of Fame 2010 game between the Cincinnati Bengals and the Dallas Cowboys are between \$150-\$500 each.
- Traditionally, it has been unacceptable to wear white after Labor Day, though today's fashion rules seem to be tired of this tradition.
- Both President Thomas Jefferson and President John Adams died within hours of each other on July 4, 1826 which is the 50th anniversary of the Declaration of Independence.
- National Grandparents Day was started by Marian McQuade, a housewife from West Virginia whose primary motivation was to champion the cause of lonely elderly people in nursing homes.

We appreciate your referrals!



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Check out our new website!