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ATTORNEYS AT LAW

NEWSLETTER

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DETERMINING WHETHER A WORKER IS AN INDEPENDENT CONTRACTOR OR EMPLOYEE

By Kirsten Barron

I attended a continuing legal education seminar on employment issues and one of the speakers, who I highly regard, reported that there are 17 different tests to determine whether a worker is an employee or an independent contractor. I trust that he is correct in his assessment – and the statement points out the difficulty for employers who make these determinations – whether it be for employee benefits, compliance with wage-and-hour/compensation laws, particularly overtime, discrimination laws, payroll taxes and liability to third parties. I would like to consider two scenarios that illustrate how tricky this designation can be – and the importance of carefully considering the designation. I will address overtime compensation and taxation as those are the issues that seem to affect clients the most. I note that discrimination and liability of employers for the acts of workers, whether independent contractors or employees, are not addressed in this article.

OVERTIME COMPENSATION

Employees who are not exempt under the Washington Minimum Wage Act ("MWA") and the federal Fair Labor Standards Act are entitled to overtime for all hours worked in excess of 40 in 1 week. Independent contractors are not entitled to overtime under either law. The Washington State Supreme Court recently considered whether a worker was an employee or independent contractor, as such determination relates to determination of entitlement to overtime under the MWA.

Randy Anfinson and two other drivers filed a class action lawsuit against FedEx Ground Package System, Inc., on behalf of themselves and other FedEx Ground drivers. Anfinson v. FedEx Ground Package Sys., Inc., No. 85949 -3 (Wash. July 19, 2012). Although Anfinson and the other drivers had signed contracts with FedEx Ground stating that they were inde-

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pendent contractors, their complaint alleged that they were employees for purposes of the MWA and they should have been paid overtime wages.

The trial court certified the case as a class action and split the trial into two phases, the first to determine liability and the second to address damages. After a 4-week trial on just the liability issues, the jury decided that the drivers were independent contractors, not employees, thus ending the case. The drivers appealed, and Division I of the Washington Court of Appeals reversed the trial court's decision. The Washington Supreme Court accepted reviewed and agreed with the court of appeals. The Supreme Court determined that the trial court had given the jurors the wrong test by which to determine whether the workers were independent contractors or employees.

Specifically, the trial court told the jurors:

> You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work.
>
> In deciding "control" or "the right to control," jurors were instructed to consider (1) the degree of FedEx Ground's right to control the manner in which the work was performed; (2) the opportunity for profit or loss depending on one another's managerial skill; (3) the investment in equipment or materials required for their tasks or their employment of others; (4) whether the service rendered required a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered was an integral part of FedEx Ground's business; (7) the method of payment, whether by hours worked or by the job; and (8) whether the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Jurors were told that neither the presence nor the absence of any individual factor was determinative.

The drivers argued that with a focus on "control" or "the right to control," the instruction erroneously stated the legal standard for distinguishing between employees and independent contractors under the MWA. The Washington State Supreme Court agreed, finding that the proper standard is the "economic realities" test used by most federal courts to determine employee status under the Fair Labor Standards Act ("FLSA") - not the "control" or "right to control" standard. The "economic realities" test includes six factors: (1) the permanence of the working relationship between the parties; (2) the degree of skill the work entails; (3) the extent of the worker's investment in equipment or materials; (4) the worker's opportunity for profit or loss; (5) the degree of the alleged employer's control over the worker; and (6) whether the service rendered by the worker is an integral part of the alleged employer's business.

The court noted that the "control" test and the "economic realities" test overlap to some extent; for example, the fifth factor of the "economic realities" test, the "degree of the alleged employer's control," is essentially the same as the first factor of the "control" test. However, in this case, the court found that the primary focus of the two tests is different: Under Washington's "control" test, the most important inquiry is whether the employer has the right to control the details of the worker's performance, while under the FLSA test, the ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on the alleged employer.

Under the "economic realities" test adopted for Washington law, the court expressly stated that more workers will be considered employees than under the "control" test.

TAXATION

Nationwide, the status of independent contractors is a very hot topic for both workers and federal and state payroll and taxing authorities. Because there has been a marked increase in the number of cases claiming that workers classified as independent contractors are really employees subject to payroll taxes and protection of the wage-and-hour laws, employers who use independent contractors should carefully review their circumstances to be sure that the independent contractor status is appropriate. We have seen a marked increase in payroll audits from Washington State taxing authorities – specifically, the Employment Security Department and the Department of Labor and Industries. The test for each of these taxing authorities is slightly different, and notably different from the "economic realities" test.

The test for Employment Security or unemployment compensation taxes is as

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INDEPENDENT CONTRACTOR OR EMPLOYEE — CONTINUED

set forth in RCW 50.04.140 and provides:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:
>
> (1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
>
> (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.
>
> (2)Or as a separate alternative, it shall not constitute employment subject to this title if it is shown that:
>
> (a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and
>
> (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
>
> (d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
>
> (e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
>
> (f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

While this test considers some of the same "control" issues, where the work is performed and whether the worker is in a particular type of trade or licensed profession must also be considered. Categorizing work for tax purposes is more difficult because the taxation statutes are read in favor of taxations, and the employer bears the burden of proving that the worker is not covered by the taxation statute.

EMPLOYERS...

November 30, 2012

The Department of Labor & Industries (L&I) today announced there will be no overall increase in workers' compensation insurance premiums in 2013. This is the second year in a row that L&I has held overall rates flat.

While there will be no overall rate increase in 2013, individual employers may see their rates go up or down, depending on their recent claims history and changes in the frequency and cost of claims in their industry.

I-502—HOW MARIJUANA AFFECTS THE WORKPLACE

By Kirsten Barron

I-502 went into effect this month – meaning that it is no longer against the law in Washington State to possess and use small amounts of marijuana. As a practical matter, the state will be adopting regulations on sales, distribution, and growing marijuana, but those are not yet in effect.

A number of employers have asked me how this affects the workplace. Whatever your position on this initiative, the good news is that the initiative does not affect the workplace. Employers are free to exclude from hiring or to fire employees who use marijuana – whether at work or not. In fact, the Washington State Supreme Court ruled last year that even though medical marijuana use is legal, employers may still terminate employees for such use. Roe v. Teletech, 171 Wn.2d 736 (2011).

Employers may want to consider revising their employment handbooks to include marijuana. Marijuana has typically been treated as an "illegal drug" under employer drug and alcohol policies. Employers are free to treat marijuana the same as alcohol, which would mean that employees must not be under the influence while in the workplace or while performing the work of the employer. Alternatively, employers may prohibit marijuana use all together – both on and off duty.

There may be practical issues with enforcement of a blanket prohibition against marijuana use. How is the employer to know? Can we test? Do we want to test? I try to give practical advice on this issue, which does depend on the particular circumstances. Generally, I encourage employers not to hunt, search for, or test for violations – unless it is required for licensing purposes, i.e., commercial drivers' license permits. If there is an issue with performance or the employer acquires information about a breach of the policy – address the issue then.

We have not seen the regulations yet, and we will provide an update if any of those regulations affect the workplace.

IMPORTANT! DOES YOUR NONPROFIT NEED TO REGISTER AS A CHARITABLE ORGANIZATION?

By Debbie Nelson

If your organization is asking for donations from the public, then it may need to register as a "Charitable organization" with the Washington State Charities Program.

RCW 19.09.020(2) "Charitable organization" means any entity that solicits or collects contributions from the general public where the contribution is or is purported to be used to support a charitable purpose. ("Entity" is defined in this statute as "an individual, organization, group, association, partnership, corporation, agency or unit of state government, or any combination thereof."). Visit the following link to self- assess your organization: http://www.sos.wa.gov/_assets/charities/CharitiesFlowChart609.pdf. If you determine that your entity should be registered as a Charitable Organization, you can file online at http://www.sos.wa.gov/charities/AllForms.aspx.

WHAT IS THE PURPOSE FOR REGISTERING?

The purposes of Washington's Charitable Solicitations Act (the "Act") are to "(1) provide citizens of the state of Washington with information relating to persons and organizations who solicit funds from the public for charitable purposes in order to prevent (a) deceptive and dishonest practices in the conduct of soliciting funds for or in the name of charity; and (b) improper use of contributions intended for charitable purposes; (2) Improve the transparency and accountability of organizations that solicit funds from the public for charitable purposes; and (3) Develop and operate educational programs or partnerships for charitable organizations, board members, and the general public that help build public confidence and trust in organizations that solicit funds from the public for charitable purposes."

EXEMPTIONS/EXCLUSIONS

There are some activities that are exempt from the state registration requirements. In Washington State, any organization that is one of the following is not required to register:

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CHARITABLE ORGANIZATION — CONTINUED

- Any charitable organization raising less than $50,000 from the public in any accounting year when all the activities of the organization, including all fundraising activities, are performed by volunteers.
- Political organizations and organizations whose activities are subject to the reporting requirements of the Washington State Public Disclosure Act or Federal Elections Campaign Act.
- Appeals for funds on behalf of a specific individual named in the solicitation, but only if all of the proceeds of the solicitation are given to or expended for the direct benefit of that individual. This does not include organizations that conduct fundraising for one or more individuals on a repeated or ongoing basis.
- Churches and their Integrated Auxiliaries.
- Commercial Covertures, Fundraising Counsel or Consultants.

OPTIONAL REGISTRATION

An organization that is not required to register and report under the Act may nevertheless submit information about itself to the Charities Program so that the organization will appear in the lists used to respond to inquiries by the public and thus avoid the possibility that a potential donor might assume that the absence of a listing implied some defect in the organization or its work. There is no fee to file the Optional Registration and it is accessible online at http://www.sos.wa.gov/assets/charities/OPTIONAL-REGISTRATION-PAPER-APPL.pdf or http://www.sos.wa.gov/charities/OnlineFilingsareNowAvailable.aspx.

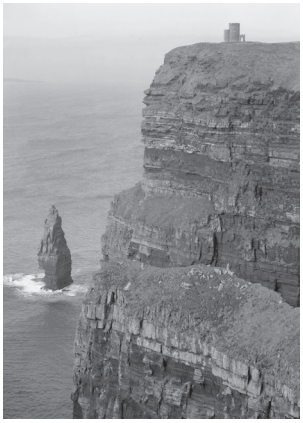
For further information regarding Charitable Organizations visit http://www.sos.wa.gov/charities/default.aspx. If you have questions, you can email the Secretary of State's Charities Division at charities@sos.wa.gov or you can contact our office.

ESTATE AND GIFT TAX IMPLICATIONS AS WE APPROACH THE FISCAL CLIFF

By Erin Crisman Glass

We are rapidly approaching the much discussed "fiscal cliff." Unless Congress reaches agreement in the next three weeks, we will fall over the proverbial 'cliff' on December 31st when a combination of tax cuts and spending cuts expire. As estate planners we are anxiously watching this whole show because some beneficial estate and gift tax exclusions as well as favorable tax rates are set to expire at the end of the year. What follows is a brief summary of current estate and gift tax rules and a few last minute planning strategies that you might consider.

Until December 31, 2012, the amount you can currently transfer, either during life or at death, without incurring any federal gift, estate, or Generation-skipping Transfer (GST) tax, is $5.12 million. Unless Congress changes the law, this amount, which is referred to as the "applicable exclusion amount," is scheduled to drop from $5.12 million to $1 million. This means that more of your assets are likely to be subject to estate taxes. Currently the tax rate applicable to gifts, estates, and generation-skipping transfers is 35%. This rate will jump to approximately 55% on January 1, 2013.



In Washington State, there is a separate Washington estate tax on property transferred on death in excess of $2 million. The applicable tax rate depends on the value of the estate, but the range is from 10 to 19%. There is no state gift tax and there is no federal or Washington estate tax on property passing to a surviving spouse or to a qualified charity. Please note that no changes are anticipated at the state level.

What, you might ask, can you do to prepare for the uncertainty presented by this situation? If you have a potentially taxable estate (which could mean any estate over $1 million, or $2 million between spouses) you might consider gifting assets to children or charity. Gifts up to $5.12 million that occur before the end of the year will not trigger gift tax liability. It is important that you consult your tax advisors to determine whether gifting is an appropriate planning tool considering your total net worth, your lifestyle needs and desires, and your broader family composition. If you are not comfortable making such

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ESTATE AND GIFT TAX IMPLICATIONS — CONTINUED

a large gift, you can make "annual exclusion gifts" of $13,000 without using your "applicable exclusion amount." The $13,000 annual exclusion increases to $14,000 in 2013. The exclusion covers gifts on a per-donee, per-year basis. Thus, if you have three children, you can transfer a total of $39,000 to them every year with no federal gift taxes ($13,000 x 3). If you're married with three children, you and your spouse can each gift this amount, for a total of $78,000. If those are the only gifts you can make during the year, you won't even need to file a federal gift tax return.

It is generally advisable to make gifts during your lifetime to use up your "applicable exclusion amount" as any appreciation in value of the gifted asset that occurs after the gift is made escapes taxation in your estate when you die. Additionally, with the expected reduction in the "applicable exclusion amount" come year end, taking advantage of today's high "applicable exclusion amount" through gifting before year end is advisable.

Capital gain rates are also scheduled to increase at year end. To plan for this, you might consider recognizing your long-term gains in 2012, while holding off on selling your losers until 2013. Contrary to usual practice, you should avoid the active harvesting of tax losses that might otherwise be a part of your investment strategies. One strategy might be to gift appreciated stock to children or charity before the end of the year.

We anticipate that by the next issue, we will know how Congress is going to act and will therefore be able to give you additional guidance and planning tools. Stay tuned…

MINIMUM WAGE INCREASE

Effective January 1, 2013, Washington's minimum wage will increase to $9.19 per hour.

According to the Washington State Department of Labor & Industries, Washington's minimum wage applies to workers in both agricultural and non-agricultural jobs, although 14 and 15-year-olds may be paid 85 percent of the adult minimum wage, or $7.81 in 2013.

SEATTLE ORDINANCE—PAID SICK AND SAFE TIME (PSST)

By Kirsten Barron

The City of Seattle is known for passing its own employment ordinances. Employers with operation and employees in Seattle need to be aware of another layer of regulation affecting their employees. For example, Seattle passed an ordinance making sexual orientation a protected status years before the State followed suit. And Seattle has done it again.

These types of Seattle ordinances affecting employment don't usually regulate those outside of Seattle, but this one does – in potentially significant ways. A Seattle ordinance passed in September 2011, which was effective September 1, 2012, requires all but the very smallest employers to provide employees who work in Seattle a minimum amount of paid sick and safe time, or "PSST." An employee who is entitled to use PSST may use it for absences because of:

an illness, injury or health condition or the need to obtain preventive care (in each case, relating to either the employee or the employee's partner or family members);

certain reasons related to domestic violence, sexual assault or stalking; or

a school or workplace/daycare closure by a public official to limit health hazards.

The public policy behind the ordinance is that workers who have no paid time off are more likely to come to work when they or their family members are sick, spreading disease and prolonging illnesses and injuries. The "safe leave" provisions of the ordinance recognize that employees without paid time off struggle to obtain legal, medical and other services relating to domestic violence, sexual assault and stalking.

The ordinance requires that PSST be provided to employees who perform work in Seattle at least 240 hours per year, unless the employee just works in Seattle and he or she is covered regardless of hours worked. This can cover sales people who make a few trips each month to Seattle to meet with customers.

The ordinance does not distinguish between employees based on where their employer is located. In fact, under the rules, an employer's obligations begin even before any of its employees perform work in Seattle; one of the rules requires employers to provide notice to employees who sometimes work in Seattle "reasonably in advance of their

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SEATTLE ORDINANCE—PAID SICK AND SAFE TIME (PSST) - CONTINUED

first period of work in Seattle."

Telecommuters who perform their work from Seattle are also covered by the ordinance, even if their employer is located outside of the city. Conversely, the ordinance does not cover telecommuters who perform their work outside of Seattle for an employer located in the city unless the employee is working in the city at least 240 hours per year.

The larger the employer the more leave that must be offered. The chart to the right illustrates this:

Note – the ordinance counts the number of employees not just in Seattle but employer by the employer in total – including those outside Seattle.

Seattle is often at the front of trends in employment. While there is no information yet that any other locality or the State are considering following suit, we will continue to monitor this issue.

Employer Size	Accrual Rate	Use Per Calendar Year	Carryover to Next Calendar Year
Tier One more than 4 but fewer than 50 FTEs	1 hour PSST / 40 hours worked	40 hours	40 hours
Tier Two at least 50 but fewer than 250 FTEs	1 hour PSST / 40 hours worked	56 hours	56 hours
Tier Three 250 or more FTEs	1 hour PSST / 30 hours worked	72 hours (if separate sick leave and vacation banks) 108 hours (if combined or universal leave policy)	72 hours (if separate sick leave and vacation banks) 108 hours (if combined or universal leave policy)

NOTICE OF IMPORTANT GARNISHMENT CHANGES...

By Debbie Nelson

Effective June 7, 2012, Washington passed a bill changing garnishment laws - specifically the bill modified service procedures, changed and clarified exemptions, and changed statutory forms.

I have received many calls from clients inquiring about some of the changes they have noticed, so I thought I would address a couple of the changes that affect employers in preparing the answers to writs.

1. The exemption amounts for continuing lien on earnings increased to:

   $253.75 Weekly $507.50 bi-weekly $549.79 semi-monthly $1099.58 Monthly

These amounts have been updated on Washington State forms so if your company receives a writ of garnishment, its respective answer should reflect these amounts.

2. Garnishments served on or after June 7, 2012 no longer include three copies of the answer form and three stamped addressed envelopes. A copy of your answer will still need to be mailed or delivered to the court, defendant, and plaintiff within 20 days of service, but you will need to make copies of the completed answer and mail them to the addresses set forth at the bottom of the Writ.

For a more in depth look at the changes, you can visit

A PERSONAL NOTE FROM THE FIRM:

Happy Holidays and best wishes for the new year.

We believe there is much to be expected in 2013 and we look forward to assisting you with the good (and hopefully not too much bad) that the new year has to offer.

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