Knoxville Bar Association

THE CONSIGLIERE

Spring 2016 Vol. 11, No. 1

Let us know your ideas and suggestions for *THE CONSIGLIERE:*

- **Call or email Paul E. Wehmeier at 546-7000 or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.**
- **Submit an article for consideration.**
- **Give us your feedback on this newsletter.**
- **Tell us about CLE topics or networking events you would like the Section to sponsor.**

From the Co-Chairs

FROM THE CO-CHAIRS

By: Marcia A. Kilby
Director of Legal Services
DeRoyal

It has long been my opinion that I am very lucky to practice law in Knoxville. Not only is Knoxville located in a beautiful part of the country, but Knoxville attorneys are both passionate about their work and extremely friendly and professional while conducting it. So, when I attended the KBA's Bar Leaders Meeting back in January, I was not surprised to learn that the KBA leadership shared the following values:

- Professionalism (collegiality, diversity, respect)
- Fellowship (social events, service opportunities)
- Supportive Network (encouraging trust and collegiality, reaching out to new attorneys)
- Education (CLE, Mentor for the Moment)
- Resource for the Public (lawyer referral, access to legal services)

These five bullet points encompass a huge undertaking that extends well beyond the few examples I included; but, even so, I truly believe that the Corporate Counsel Section does a good job with the first four values. Admittedly, I was not sure how corporate counsel could serve as a resource for the public.

Fast forward to Friday, March 11. I attended a CLE at the Duncan School of Law on corporate counsel pro bono initiatives. Truth be told, I wasn't prepared to be swayed by this presentation, especially by lawyers with huge law departments compared to my two lawyer department. I thought of several barriers right away: I don't have insurance for this type of work. I am too busy to take on any more work. Who in the public could possibly need my knowledge on free trade agreements?

In the end, it wasn't the lawyers with huge law departments that caught my attention. It was the Tennessee Alliance for Legal Services ("TALS"). The organization's main goal is to connect vulnerable, low-income Tennesseans with civil legal help. In 2014, issues with medical bills or health insurance were the most frequently reported problem. But, guess what? They will provide training on the most common subject areas. They will provide insurance for your work on their cases. They will provide an easy mechanism of participation through their Tennessee Online Justice program, which is all through email. And, most exciting, they provide the opportunity to host group "power hours" so that groups of attorneys can work together to help fellow Tennesseans. I see this as a great way for the Corporate Counsel Section to participate in that fifth bullet.

As such, I have a proposal. Let's plan "power hours" for Pro Bono Week, October 23 – 29, 2016! However, in order to pull this off, we will need your help and commitment. If you would like to help in planning this event and/or are willing to commit time during Pro Bono Week, please contact me or David. We look forward to hearing from you soon! In the meantime, you can check out TALS at **www.tals.org**.

Section Events

UPCOMING EVENTS

What gives your Human Resources Director a headache? Pitfall Reminders & Emerging Issues in Employee Relations

Thursday, March 31, 2016
5:30 p.m. – 6:30 p.m.
The Alley, 7355 Kingston Pike
Paul Wehmeier, Arnett Draper & Hagood, LLP
Linda Glasgow, Lewis Thomason, Human Resources Director
Approved for 1 Hour of General CLE Credit
Cost: $20 KBA Members; $30 Non-KBA Members

We will discuss hot button employment topics and strategies to avoid employment related litigation from the implementation and legal perspectives.

Register Online at www.knoxbar.org

Reservation Information:
A reservation is required in advance of the program - $5 dollar additional fee the day of the program. KBA Members not wishing to receive CLE credit may attend one hour section CLE programs at no charge. Handout materials are not included, and a reservation by phone or online is required in advance.

KBA CLE Program Cancellation/Refund Policy:
Reservations cancelled less than 48 hours before the program are subject to the penalty of the entire amount. However, you may transfer your registration to another individual.

CORPORATE COUNSEL SPOTLIGHT

By: Erin Gomez
Legal Extern at The Coca-Cola Company
3L at Emory University School of Law

Corporate Counsel Spotlight:

Legal Compliance in One of the World's Biggest Companies

Legal Compliance in One of the World's Biggest Companies

How do you make a company with over 700,000 employees follow the law? What if those employees are spread over more than 200 countries and speak countless languages? This is what I am learning as a legal extern at The Coca-Cola Company. My name is Erin Gomez, and I am a 3L at Emory University School of Law in Atlanta, GA. As an extern, I support Coca-Cola's anti-bribery attorneys, who work at the Company's Atlanta headquarters.

The anti-bribery team's goal is to ensure that every Coca-Cola employee, subsidiary, and agent around the world does not violate the U.S. Foreign Corrupt Practices Act ("FCPA") or the U.K. Bribery Act ("UKBA"). To do this, our team created and periodically updates a company-wide Anti-Bribery Policy that complements the Company's Code of Business Conduct. This global policy applies to employees in all company functions worldwide. Employees are trained regularly on the policy, both in person and online.

The policy addresses both the anti-bribery provision and the accounting and internal controls provision of the FCPA, and the prohibitions against commercial and government bribery in the UKBA. It breaks down the statutory meanings of "anything of value," "government official," and "improper advantage" and provides relevant examples of all three. It also lays out authorization and reporting requirements for the provision of "anything of value" to any "government official." The FCPA and the UKBA depend on facts and agency interpretations that are too complicated and circumstantial to provide much detail on what exactly makes an action illegal. Therefore, the Anti-Bribery policy is intentionally over-inclusive to make it easier to understand and apply. The policy relies on documentation, cross-department reporting, and due diligence to ensure that there are procedures in place to prevent bribery. The policy also aims to serve as evidence that the company has "adequate procedures" in place to prevent bribery, as such procedures can be a defense in UKBA enforcement actions.

Although the anti-bribery attorneys travel to train employees or address situations, they also rely upon a network of local regional counsel to implement the Anti-Bribery policy. Local counsel approve the provision of anything of value to government officials, coordinate training of local employees, and conduct due diligence investigations on third party vendors. Local counsel regularly consult with the anti-bribery attorneys at headquarters.

Further, the anti-bribery lawyers work closely with company auditors. Because The Coca-Cola Company regularly audits its global facilities for compliance with Company policy and the law, the anti-bribery team relies on the Company's auditors to monitor compliance with the Anti-Bribery Policy. The anti-bribery team regularly trains and consults with auditors to explain the law behind the policy and what auditors should be looking for. The anti-bribery team keeps auditors up to date on recent FCPA and UKBA enforcement and circumstances that may lead to a violation of either of these statutes. The auditors are encouraged to work consistently with the anti-bribery team lawyers.

Compliance work at a company as big as Coca-Cola is a complicated and difficult business. Though there is a team whose sole responsibility is the Company's compliance with the FCPA and UKBA, the anti-bribery team relies on many other departments and attorneys throughout the Company to ensure compliance. This only works because the anti-bribery team strives to maintain open communication and information sharing with these other departments and attorneys. Such openness requires the ability to both know the law and communicate it, often to non-attorneys, non-Americans, and non-English speakers. It also helps to have stellar externs to help out from time to time.

EMPLOYEE BENEFIT COMPLIANCE

By: Ashley N. Trotto
Kennerly, Montgomery & Finley, P.C.

The ACA: What's new?

EMPLOYEE BENEFITS COMPLIANCE:

The ACA: What's New?

The Affordable Care Act ("ACA") and its implementing regulations have created an ever-evolving, shifting, expanding piece of legislation that is nearly impossible for employers, and their lawyers, to keep up with. This article is meant to serve as your cliffs notes guide to what the Departments of Labor, Treasury and Health and Human Services (the "Departments") were up to in 2015.

Repeal of Automatic Enrollment

In late October 2015, the powers that be agreed to repeal a provision of the ACA that would have required employers with 200 or more full-time employees to automatically enroll new full-time employees in their health plans.

Penalties

As background: applicable large employers may be subject to an Employer Mandate penalty if they do not offer health coverage to at least 95% of all full-time employees (the "a" penalty) or if they do offer coverage but it is not affordable or does not provide minimum value to at least one full-time employee (the "b" penalty). Penalties do not apply unless at least one full-time employee receives a premium credit through the Exchange.

The original penalty amounts were $2,000 per full-time employee under the "a" penalty and $3,000 per full-time employee actually receiving a premium credit under the "b" penalty. These amounts are indexed annually.

In mid-December 2015, the IRS issued Notice 2015-87, clarifying that the 2015 adjusted penalty amounts are $2,080 and $3,120, respectfully, and announcing that the 2016 adjusted penalty amounts are $2,160 and $3,240.

The "Cadillac Tax"

In late December 2015, President Obama signed a comprehensive spending package that included a two-year delay of the "Cadillac Tax," giving employers a little more time to consider their options. The tax was originally set to take effect January 1, 2018.

Information Reporting

In late December 2015, the IRS issued Notice 2016-4, which extended the due dates for the 2015 information reporting (the most recent and sharpest thorn in the side of large employers). Employers now have until March 31, 2016, to provide required employee statements and until May 31, 2016 (June 30, 2016, if filing electronically), to file the applicable IRS Forms, generally Forms 1094-C and 1095-C, with the IRS.

If that news wasn't good enough, the IRS also announced that employers showing a good faith effort to comply with the ACA's reporting requirements will not be assessed any penalties for submitting incomplete or incorrect returns relating to offers of coverage during 2015. This means that employers pulling their hair out trying to figure out the dreaded "indicator codes" of Form 1095-C can breathe a sigh of relief. For this year only, if you try, you can't fail.

Nondiscrimination for Fully Insured Plans

Self-insured health plans are prohibited from discriminating in favor of highly compensated individuals. The ACA extended that prohibition to fully-insured plans, effective upon the issuance of IRS regulations. To date, no such regulations have been issued. Fully-insured plans are still legally permitted, but not encouraged, to be discriminatory.

Employment Law:

Misclassification of Workers

EMPLOYMENT LAW

By: Sarah R. Johnson
Holifield, Janich & Associates, PLLC

Misclassification of Workers

The U.S. Department of Labor ("U.S. DOL") and the Internal Revenue Service (the "IRS"), along with Tennessee agencies, are cracking down on the misclassification of

employees as independent contractors. The U.S. DOL set out the reasoning for the increased enforcement in Administrator's Interpretation No. 2015-1, released on July 15, 2015:

> When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.

Why should this crackdown on enforcement be important to you and your clients? There are many reasons. First, the IRS imposes a $50 penalty for each Form W-2 that the employer unintentionally failed to file because of misclassification. Also, since the employer failed to withhold taxes on misclassified employees, the IRS charges 1.5% of the wages, plus 40% of FICA and 100% of the matching FICA the employer should have paid, along with interest on these penalties accruing daily from the date they should have been deposited, as well as a failure to pay taxes penalty equal to 0.5% of the unpaid tax liability for each month up to 25% of the total tax liability. In cases of fraud or intentional misconduct, the IRS imposes a penalty of 20% of all the wages paid, plus 100% of the FICA taxes, both the employee's and the employer's share, along with criminal penalties of up to $1000 per misclassified worker and 1 year in prison.

Additionally, violations of the Fair Labor Standards Act ("FLSA") will arise if employees are misclassified as independent contractors. These violations may result in the following: back wages due under the supervision of the Wage and Hour Division; potential lawsuits brought by the Secretary of Labor for back pay and an equal amount as liquidated damages; private lawsuits brought by employee for back wages plus an equal amount as liquidated damages plus attorney's fees and court costs; the imposition of an injunction by the Secretary of Labor to restrain any person from violating the FLSA; actions brought under the FLSA are subject to a two-year statute of limitations for recovery of back pay and three-year statute for willful violations; and criminal prosecution for willful violations.

Next, liability may arise under ERISA regarding employee benefit issues, including potential failures of a plan to meet applicable ERISA requirements, back contributions for workers misclassified as independent contractors and susceptibility to liability for lawsuits from workers for not providing certain employee benefits.

Furthermore, compliance issues will likely arise under the Affordable Care Act ("ACA") due to misclassification issues. Employers that are close to the 50 full-time employee threshold may find themselves subject to the ACA if independent contractors are re-classified as employees.

Finally, class action lawsuits regarding independent contractors/employee classification are on the rise, with the Uber lawsuit at the forefront. *O'Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2015 U.S. Dist. LEXIS 30684 (N.D. Cal. 2015) is set to begin trial on June 20, 2016, and Class Counsel is actively seeking additional class members.

Also, in June 2015, FedEx agreed to create a $228 million fund to settle the decade long California independent contractor case involving more than 2,300 FedEx Ground and FedEx Home Delivery pickup and delivery drivers after the Ninth Circuit Court of Appeals ruled in 2014 that FedEx misclassified these drivers as independent contractors. This settlement only covers California drivers, but could impact the resolution of dozens of other FedEx misclassification lawsuits nationwide. On July 8, 2015, the Kansas Supreme Court ruled that FedEx drivers in Kansas are employees as a matter of law under the Kansas Wage Payment Act.

With penalties and class action lawsuits on the rise, it is imperative to understand how federal and state agencies analyze the misclassification of workers. The U.S. DOL and the IRS use multiple tests to analyze the classification of employees versus independent contractors. First, the Right to Control Test is a subjective 20 factor test focusing on the hiring party's right to control and the manner and means by which the work is performed, as set out in *Nationwide Mutual Insurance Company vs. Darden*, 503 U.S. 318, 112 S.Ct. 1344 (1992):

1. Actual instruction or direction of worker
2. Training
3. Integration of services
4. Personal nature of services
5. Similar workers
6. Continuing relationship
7. Full-time worker
8. Work on premises
9. Order of performance
10. Hours of work
11. Submitting reports
12. Method of payment
13. Payment of expenses
14. Tools and materials
15. Investment
16. Profit or loss
17. Exclusivity of work
18. Available to general work
19. Right of discharge
20. Right to quit

Next, the U.S. DOL utilizes the Economic Realities Test as applied under the Fair Labor Standards Act ("FLSA"), including the following factors, which are not to be

"applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis:"

- Is the work performed an integral part of the employer's business?
- Does the worker have opportunity for profit and loss? Does the worker have overhead?
- Is there a significant personal investment that the worker brings to the job?
- Does the work require special skills or initiative?
- What is the length of engagement?
- How much control does the employer have over the job?

The goal of the Economic Realities Test is to determine whether a worker ***is economically dependent*** on the employer (and is therefore an employee) or is really in business for him or herself (and is therefore an independent contractor).

Tennessee utilizes the Common Law Test and the ABC Test when analyzing the classification of workers. The Common Law Test to determine the employer/employee relationship is referred to in Tenn. Code Ann. § 50-7-207(b)(2)(B), as follows:

> There are a number of indicia to be considered by a trier of fact in determining the existence or nonexistence of an independent contractor relationship, such as (1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment, (6) self-scheduling of work hours, and (7) being free to render services to other entities.

Masters v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982).

The "ABC test" of employment is set out in Tenn. Code Ann. § 50-7-207(e)(1). Under this test, a worker is presumed to be an employee unless it is shown that:

A. Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under any contract for the performance of service and in fact; and

B. Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for 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 service performed.

The Tennessee Supreme Court has stated that a taxpayer must satisfy each of the three parts in the "ABC test" above to establish that a worker is not an employee. *The Beare Co. v. State*, 814 S.W.2d 715, 719 (Tenn. 1991).

In the event employers incorrectly classify workers as independent contractors, the IRS offers an opportunity to voluntarily correct such errors. The Voluntary Classification Settlement Program ("VCSP") is a voluntary program that provides an opportunity for taxpayers to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes. To participate in this voluntary program, the taxpayer must meet certain eligibility requirements, apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS. To participate in the VCSP, certain eligibility requirements must be met. First, a taxpayer must have consistently treated the workers to be reclassified as independent contractors or other nonemployees, including having filed all required Forms 1099 for the workers to be reclassified under the VCSP for the previous three years. Next, the taxpayer cannot currently be under employment tax audit by the IRS and the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency. If the IRS or the Department of Labor has previously audited a taxpayer concerning the classification of the workers, the taxpayer will be eligible to participate in the VCSP only if the taxpayer has complied with the results of that audit and is not currently contesting the classification in court

Additionally, a taxpayer participating in the VCSP must agree to prospectively treat the class or classes of workers as employees for future tax periods. However, once a taxpayer chooses to reclassify some of its workers as employees, all workers in the same class as those workers must be treated as employees for employment tax purposes.

In exchange, the taxpayer will:

- Pay 10 percent of the employment tax liability that would have been due on compensation paid to the workers for the most recent tax year, determined under the reduced rates of section 3509(a) of the Internal Revenue Code. (See VCSP FAQ 15, for information on how payment under the VCSP is calculated. Also see Instructions to Form 8952);

- Not be liable for any interest and penalties on the amount of employment tax liability due; and

- Not be subject to an employment tax audit with respect to the classification of the workers being reclassified under the VCSP for prior years.

If an employer utilizes staffing agencies, special considerations must be made with regard to ACA compliance. The IRS presumes temporary staffing agencies are the true common law employers of their leased workers and as such ultimately responsible for pay-or-play compliance under the ACA. There is a risk that the user of a staffing agency will be deemed the "true" common law employer, making the user obligated to offer health coverage to employees of the staffing agency. This risk can be minimized by including indemnification for "pay-or-play" penalties in the contract with the staffing agency. When the staffing agency is not the common law employer, and the agency makes an offer of health coverage to the employee on behalf of the client under the agency plan, the offer is treated as made by the client for "pay-or-play" purposes only if the fee the client would pay to the agency for an employee enrolled in health coverage is higher than the fee the client would otherwise pay the agency for the same employee if that employee did not enroll in health coverage.

As a take-away, employers can minimize misclassification risks in a number of ways. Potential actions to take include:

- Exercise prudence when classifying workers or reclassifying regular full-time employees as independent contractors.
- Engage independent outside counsel to perform audits of the workforce to ensure compliance.
- Correct any possible misclassifications before IRS, U.S. DOL or Tennessee DOL audits uncover such misclassifications.
- Re-examine independent contractor relationships to ascertain whether they may be vulnerable to the U.S. DOL's and the Tennessee DOL's broad construction of who is an employee.
- Review independent contractor contracts and ascertain whether the contingent worker has his or her own business.
- Use employee leasing agencies to hire workers, but beware of the risk of having the business and the staffing agency deemed as "joint employers."
- Ensure that contingent workers perform duties distinguishable from those performed by regular common law employees.
- Review the language of all employee benefits plans to confirm that they provide a clear exclusion of independent contractors and all leased employees from plan eligibility. The exclusion should make it clear that any reclassifications of such workers by any government agency as common law employees shall not result in retroactive eligibility for benefits.
- Review leased employee arrangements to ensure that they comply with IRS rules governing such arrangements.

Knoxville Bar Association
505 Main Street
Suite 50
Knoxville, TN 37902

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@lasurveying.com
mkilby@deroyal.com
pwehmeier@adhknox.com
mwilson@knoxbar.org

http://www.knoxbar.org