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BN&F NEWS UPDATE

Death of the Independent Contractor?

Illinois is about to further limit the definition of "independent contractors." Will this impact your business and, if so, how?

Any company, including those engaged in construction and related transportation activities involving equipment or material transport to and from job sites, that currently hire independent contractors will have to reevaluate their need for and use of independent contractors. The reach and impact of this new law is expected to be broad. It covers all forms of construction and construction related activity, including landscaping and wrecking, as well as roads, bridges, and sewers. Because the bill employs such an expansive definition of "construction" it is quite possible that it will supplant the standard presumption that independent owner-operators hauling either equipment or material to job sites are not employees. Motor carriers will need to also consider federal regulations, which apply to leases of equipment and drivers from owner operators.

Businesses currently hiring independent contractors may have to treat those individuals as employees as a result of the Act's more demanding definition of an "independent contractor." This will most likely translate to higher payroll expenses for such things as workers compensation and unemployment compensation coverage, payroll taxes, overtime, and health and retirement benefits.

If there is a violation, employers will have to provide claimants with the same benefits and compensation that they provide to their other employees. Employers will be subject to both civil and criminal prosecution and penalties for violations are substantial.

Although the Act's definition of "independent contractor" is similar to definitions utilized by the Internal Revenue Service or other Illinois statutes, it will nonetheless confer "employee" status on individuals previously considered independent contractors unless the test set forth in the Act is satisfied. Elements of the test ask if:

(1) the individual has been and will continue to

be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;

(2) the service performed by the individual is outside the usual course of services performed by the contractor; and

(3) the individual is engaged in an independently established trade, occupation, profession or business; or

(4) the individual is deemed a legitimate sole proprietor or partnership.

As a practical matter, conducting your own audit now could limit your exposure to future liability and the significant expense associated with a violation - back pay, penalties and administrative costs. Starting now to set up a system for maintaining and reviewing documentation, working relationships, and contractual provisions gives you the time to ease into a workable system while, at the same time, bringing to light those relationships that may fall under the Acts provisions thereby giving you time to reassess and reevaluate the relationship and how to go forward.

For more information about the Employee Classification Act and how it might impact your business please contact Frank Davenport of our Construction Law Department.

Estate Plan / Charitable Gifts Time is running out!

If you wish to include a gift to your favorite charity in your estate plan there are many ways to achieve your goal.

The simplest way to give to the charity is to

include a gift in your will or trust. To include a charity in your will, the following language can be used:

"I give to [name of charity], of [city, state], (a specific amount or percentage of the residence of the estate) to be used for research."

To include a charity in your trust, the following language can be used:

"The trustee shall distribute (a specific amount or percentage of the balance of the trust) to [name of charity], of [city, state], to be used for research."

A charitable remainder trust (CRT) can achieve your philanthropic goal while providing current tax benefits for you and your family. To take advantage of this technique, transfer assets to an irrevocable trust that pays income to you or your beneficiaries for life or a specified term and then distributes the remaining assets to the charity.

Act quickly! This year, there's a chance for people who are at least 70 ½ years of age to donate funds up to \$100,000.00 from their individual retirement accounts (IRAs) directly to a charity without incurring income tax on the donation. But those who are eligible this year must act before December 31, 2007. After that, the window of opportunity slams shut-until Congress revisits the issue.

In addition, a charity can be named as a beneficiary of life insurance or annuity policies.

For more information about the charitable gifts and how it might impact your estate planning, please contact Alan Garland of our Estate Planning Department.

Methods of Holding Title to Real Estate in Illinois

In Illinois there are many ways to hold title. When individuals hold title to Illinois real property, there are up to three different forms of joint ownership. These forms of joint ownership are 1) tenancy in common, 2) joint tenancy and 3) tenancy by the entirety. These forms of joint ownership can determine whether an individual's interest in real property is part of his/her estate or if such interest can be partitioned or "attacked" by a judgment creditor.

Tenancy in common is a form of joint ownership in which, typically, investors choose to hold real property. Each individual named in the deed as a grantee has an undivided interest in the property. Upon the death of an individual, his/her interest becomes part of his/her probatable estate and thus may require a probate administration estate filing. Further, an interest in property held as a tenant in common can be partitioned by a judgment creditor.

A partition action is a suit brought by a judgment creditor that seeks to divide out that specific individual's interest in the real estate. Ordinarily, a partition action forces the "sale" or "buying out" of that individual's interest in the real estate to a third party or the other tenants in common.

The next form of joint ownership is joint tenancy. Joint tenancy avoids the possibility of probate, but does not avoid the risk of a partition. Upon the death of a joint tenant, his/her interest is divided by operation of law among the remaining surviving joint tenants. Thus, no probate of the real property is necessary until the death of the last joint tenant. Joint tenancy is often incorrectly used by married couples as the manner in which hold title to their principal residence.

The last form of joint ownership is tenancy by the entirety. This form of joint ownership may only be utilized by individuals married to each other to hold property to be used as their principal residence. The real property also must not have more than four dwelling units. This form of joint ownership, in addition to avoiding probate, does not allow a judgment creditor to file a partition against the marital residence.

There are three other methods for the holding of title which will be the subject of a future newsletter article. Property owners would be well advised to determine if they are holding title to their real property in a form that best serves their interests.

For more information about Real Estate Ownership and Development how it might impact your rights, please contact Chuck Jiongco of our Real Estate Development Department.

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