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and handled effectively. The ultimate goal is to “create and implement a streamlined model to encourage Section members’ involvement in labor and employment pro bono work within the Atlanta community and ensure easy access to such pro bono opportunities by providing helpful resources for efficient and quality pro bono work and seeking out diverse opportunities to compliment the talent of the Labor and Employment Section of the Atlanta Bar.”

One of the primary short term goals specified in the proposal is to create accessible resources to aid Section members with projects. To effectuate this goal, the Section has sought and continues to seek volunteers to create forms and samples of commonly utilized documents and policies in employment relationships. Section members’ involvement in creating such resources constitutes valuable pro bono time, and it is the Section’s hope that the availability of critical resources will encourage Section members to take on pro bono matters even in the face of time and resource constraints.

A second goal is to provide trainings to guide volunteers on recurring pro bono employment issues, including worker classification, worker compensation and employee handbooks. In light of these goals, in March 2009, the L&E Section and the Pro Bono Partnership of Atlanta joined forces to prepare and present training on these timely employment issues during the Atlanta Bar Association’s March Madness Program. Because the training was so well received, the Section and the Pro Bono Partnership of Atlanta conducted an identical training in September 2009, and are scheduled to participate in March Madness again on March 24, 2010. The Section plans to continue to make this and other important training available for Section members and area practitioners.

The strategic proposal also sets out a long term goal of increasing Section members’ overall participation in pro bono legal work by centralizing pro bono opportunities offered through various community organizations and providing electronic access to those opportunities. To accomplish this goal, the L&E Section has sought and obtained agreements from several local legal organizations to give L&E Section members first priority over labor and employment pro bono matters. The Section currently is working to centralize these opportunities and post them on the Atlanta Bar Association’s website in hopes that easy access to the projects will ensure that they are placed quickly.

The Section, which is made up of practitioners with vast and different experiences, undoubtedly can make a difference in the Atlanta community; however, achieving the short and long term goals discussed above and meeting Atlanta’s pro bono needs cannot be done without the time and support of the Section members. The pro bono opportunities discussed here provide for opportunities for plaintiffs’ attorneys, defense attorneys and neutrals to collaborate across bars for the better good. If you are interested in becoming more involved in the Section’s efforts, assisting in the creation of the resource bank or being placed in contact with one of the many community organizations that await labor and employment attorneys, please contact either Marcia Ganz (mganz@hunton.com) or Michelle Shivers (mshivers@littler.com).

## IS YOUR INDEPENDENT CONTRACTOR REALLY YOUR EMPLOYEE

By Michelle W. Johnson, *Nelson Mullins Riley & Scarborough LLP\**



Properly utilized, independent contractors can provide companies with a flexible and cost-effective method for dealing with the ebb and flow of production requirements. Employers may engage contractors to accomplish discrete goals without the administrative burden and expense of providing employee benefits, withholding payroll taxes, or worrying about whether there is enough work to justify a permanent hire. The risk of misclassification has always existed, but misclassification cases have not always appeared to be a top enforcement priority.

As with many other employment issues, the times may be changing. Proposed federal legislation currently pending in both houses of Congress would dramatically change the federal enforcement landscape. The Obama administration has also proposed a number of initiatives involving the Internal Revenue Service and the U.S. Department of Labor. In light of these developments, employment attorneys and their clients should take another look at their procedures for hiring and using independent contractors.

### Federal Enforcement Initiatives

The Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (H.R. 3408) was introduced in the House of Representatives on July 30, 2009 by Representative McDermott and 28 co-sponsors. The same bill (S. 2882) was introduced in the Senate on December 15, 2009 by Senator Kerry and six co-sponsors. If passed, the Act would repeal the safe harbor provisions of Section 530 of the Internal Revenue Code; increase employers’ reporting obligations; dramatically heighten penalties for failure to file correct tax return information or to comply with other reporting requirements; implement new classification criteria and rules; and require the Secretary of the Treasury to issue an annual report on worker misclassification.

If the Act is passed, the most dramatic change for employers would be the repeal of Section 530. Under current law, Section 530 provides protection from IRS penalties for employers who have

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a “reasonable basis” for classifying a worker as an independent contractor. The “reasonable basis” may arise from a prior audit of workers in similar positions, a longstanding industry practice of treating similarly situated workers as independent contractors, or an IRS ruling or court decision. To take advantage of the safe harbor, an employer must have consistently treated the worker as an independent contractor (and issued 1099 forms to the worker), and must also treat all similarly situated workers in a consistent manner. Section 530 prohibits the IRS from issuing regulations regarding worker classification for employment tax purposes, and also from prospectively reclassifying workers as employees. The repeal of Section 530 would open the door to much more vigorous enforcement actions from the IRS.

While it is unclear whether Congress will pass the Act this year, it seems likely that legislation aimed at tightening classification procedures will be enacted at some point during the Obama administration. In addition, the Obama administration has proposed that the IRS be permitted to issue classification guidelines and reclassify workers (and to notify the DOL when workers are reclassified), and that employers be required to notify contractors of their status and the consequences of independent contractor classification. If these changes occur, the estimated increase in tax revenue would be \$7.3 billion over ten years. The Obama administration has also proposed to strengthen enforcement efforts by the DOL and the states, including by making misclassification a violation of the Fair Labor Standards Act and providing funds to the states to help them identify and pursue employers that misclassify workers.

**A Reality Check for Employers**

In light of this enhanced enforcement environment, employers should review the ranks of their independent contractors and weed out contractors who are really employees in disguise. Employers should ask themselves the following questions about their independent contractors:

Are the contractors’ duties integrated with core business operations, or do they perform non-essential business activities? An independent contractor’s services should be peripheral rather than core business functions.

Do they work full-time for me, or do they also work simultaneously for other companies? Is there a non-compete agreement that would prohibit a contractor from providing services to a competitor? Such an agreement may be the kiss of death for the independent contractor classification. Contractors should not work full-time for one company; the more employers, the better.

Do the contractors perform the same job as employees, work side by side with employees, or supervise employees? If so, this clearly indicates a misclassification problem.

Is the work required to be performed on-site, in person, and according to detailed procedures governing the means, method, time, and manner of performance? If so, this raises a red flag signaling probable misclassification.

Do the contractors receive company benefits such as insurance or paid time off? If so, they are probably employees, and the company ERISA plans need to be

reviewed to ensure treatment consistent with the terms of the plans.

**Keeping the Contractors on the Correct Side of the Classification Fence**

Once an employer has audited its workforce and fixed any classification errors, there are several steps that can help enhance its chances of surviving a classification challenge:

**DO** have every independent contractor sign a written independent contractor agreement that is limited to a specific term or project and cannot automatically roll over. The agreement should provide that the contractor will determine how, when, and where the work will be done. The agreement should specify that the contractor is not covered by the employer’s liability, health, or workers compensation insurance, and that he or she receives no other benefits that are provided to employees. The agreement should include an indemnification provision providing that the worker will indemnify the employer for tax or other liability if the contractor is later held to be an employee by the IRS, other government agency, or a court.

**DO NOT** conduct performance evaluations for contractors, provide extensive or ongoing training, or require them to work specific hours or attend company meetings.

**DO** maintain separate files for independent contractors, and ensure that accounting records are consistent with a contractor relationship. Be sure that all contractors receive 1099 forms, and that copies are maintained in a separate, easily accessible file.

**DO NOT** give contractors an “employee” handbook. Contractors should receive only the policies that relate to their status as contractors (such as harassment, workplace violence, security, etc.). Policies concerning attendance, performance, supervision, and benefits should not be provided.

**DO** require that contractors use their own tools or equipment.

**Conclusion**

Misclassifying an employee as an independent contractor can lead to employer liability for unpaid taxes, FLSA overtime violations, unplanned unemployment benefits, ERISA problems, gaps in workers compensation coverage, and other undesirable outcomes. Companies and their attorneys should be proactive. It is far better to self-audit and address classification problems on the client’s own terms and timetable, than to be forced to defend questionable classification practices in the midst of a lawsuit or government regulatory action.

\*Michelle W. Johnson is a partner in the Atlanta employment group of Nelson Mullins Riley & Scarborough LLP. Her practice includes management-side employment litigation, counseling, training, and the drafting and review of restrictive covenant agreements.