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Summer 2015

Beers Mallers Backs & Salin, LLP

Business Law Summary

News and Important Information For Your Business

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Department Of Labor Having A Busy And Business-Impacting Summer

by Laura L. Maser

The U.S. Department of Labor has been busy. This summer it has issued an Administrator's Interpretation on the age-old issue of employee versus independent contractor. It also issued new proposed regulations amending the "white collar" overtime exemptions under the Fair Labor Standards Act ("FLSA").

First, the employee versus independent contractor conundrum. The issue of whether an individual is an employee or an independent contractor is a hot one and affects many areas of your business. That classification will determine whether you may need to pay minimum wage and overtime, whether you have to pay into the unemployment system, whether you have to pay the employer portion of income taxes, to name a few. Employees and their plaintiff-side lawyers are particularly savvy to the first – is the person entitled to minimum wage and overtime and there have been myriad class-action lawsuits in recent years over this classification issue.

The courts have usually decided the issue based on what it calls the "economic realities" test. This test usually asks the following six questions and the more that are answered "yes," the more likely it is that the person is an employee. The inquiries are these:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's relative investment?
4. Does the work performed require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. What is the nature and degree of the employer's control?

Most attorneys will tell you that the last factor – control – has historically been the most important to the courts. If you control most aspects of the person's work, then you're more than likely an employer and not the

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Rotten Apple - A Good LLC Gone Bad

by Joshua A. Burkhardt

A limited liability company ("LLC") will only provide liability protection for its members when it is properly managed, operated, and maintained. Indiana law treats LLCs as separate legal entities—distinct from their owners. Unlike partnerships and sole proprietorships, members generally are not personally liable for the business's debts, obligations, or liabilities. See Ind. Code § 23-18-3-3(a). There are exceptions to the rule, however, where members can be liable for company obligations. The most common exceptions are the following: (1) members can be held responsible for their own actions; (2) debts which are personally assumed or guaranteed; and (3) debts imposed personally by statute, such as for the failure to collect, account for, and pay payroll taxes (IRC § 6672).

In the interest of preventing fraud or injustice, Indiana courts also can and do "pierce the corporate veil" to reach the personal assets of the members. "Piercing the corporate veil" is the equitable remedy courts use to disregard the LLC and hold the members personally liable for the company's obligations. Members of a business must pay particular attention to observing the corporate formalities in order to preserve the limited liability characteristics. Failure to observe corporate formalities creates potential avenues of attack for creditors to challenge the validity of the corporate form and successfully "pierce the corporate veil." Indiana courts examine eight factors to determine whether a corporate form is "so ignored, controlled or manipulated that it was merely the instrumentality of another." *Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1995).* Indiana courts will consider whether there is evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by members or directors; (4) use of the entity to promote fraud, injustice or illegal activities; (5) payment by the corporate entity of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other member acts or conduct ignoring, controlling or manipulating the corporate form. *Id. at 867-68; see Four Seasons Manufacturing, Inc. v. 1001 Coliseum, LLC, 870 N.E.2d 494, 504-506 (Ind. Ct. App. 2007).*

I recently became aware of a matter, which unfortunately is not uncommon, where an LLC failed to protect the assets of its members. The owners prepared and filed the articles of organization with the Indiana Secretary of State and paid the applicable fee. However, the company failed to operate the business as an LLC. There were insufficient records and meeting minutes. The LLC paid personal bills of the members from its business checking account. It failed to keep track, transfer, and title specific assets in the name of the LLC. It also failed to file business entity reports with the Indiana Secretary of State and was administratively dissolved. It deteriorated over time like an apple after it fell from a tree. A creditor subsequently filed suit and obtained a judgement. Afterwards, the creditor seized the LLC's assets and the members' personal assets until the judgement was paid.

How can you avoid having your LLC rot?

1. Carefully keep and maintain corporate records and documents;
2. Make sure your LLC is properly organized and has the appropriate documents, such as the articles of organization, operating agreement, record book and meeting minutes, member certificates, SS-4 application, and proper tax documents;
3. Set up a business account for your LLC for deposits and expenses, do not keep any of your personal funds in the business account (or your business funds in your personal account);
4. Make sure to adequately fund the LLC and initially invest a sufficient amount of funds to cover reasonably anticipated costs;
5. Do not use the assets of the LLC to pay for personal expenses of any member;
6. Observe the required formalities and hold at least an annual meeting of the members;
7. Document important transactions, such as capital infusions, loans, leases, significant purchases, etc.;
8. Follow the terms of the Operating Agreement and applicable Indiana law;
9. File the bi-annual business entity report with the Indiana Secretary of State to keep the entity from being involuntarily dissolved; and
10. Avoid any type of fraudulent or illegal activity.

It is important to maintain and keep good records. The documents an LLC should maintain include, but are not limited to: (1) the articles of organization, (2) any and all tax elections, (3) the list of members (past and present), (4) copies of the LLC's tax returns for at least the three most recent years, (5) the operating agreement with all amendments (and copies of prior operating agreements), (6) subscription agreements, (7) bank statements, (8) meeting minutes, (9) and resolutions authorizing activities that, either by law or under the terms of the operating agreement, require a vote of the members. See Ind. Code § 23-18-4-8.

Keeping good records and observing corporate formalities are good business practices that will help prevent your LLC from rotting. Beers Mallers Backs & Salin can help you maintain your business.

Department Of Labor Having A Busy And Business-Impacting Summer

(*Continued)*

beneficiary of work being done by an independent contractor.

The Department of Labor does not necessarily moot the "economic realities" test, but it does boil it down to this: Is the worker dependent on the employer for his livelihood? If yes, then the worker is more than likely an employee and not an independent contractor. Basically, the Department of Labor advocates the position that "most workers are employees" under the FLSA. Unless the person is really in business for him- or herself, making decisions to determine how much profit or loss is made on a particular job, working for numerous entities or individuals, and making his or her own decisions on how to and when to perform the work for you, then, according to the Department of Labor, they are employees.

Although the Administrator's Interpretation does not carry the force of law, it will be reviewed with deference by most courts. What do you need to do as an employer in light of this newly-released Interpretation? Now would seem a good time to perform an audit of your pay practices to try to nip any FLSA issues, including the employee/independent contractor issue. All signs point to the Department of Labor increasing enforcement in this area, and a voluntary, self-imposed audit just may help you avoid the Department's scrutiny.

The Department also recently issued new proposed regulations regarding the "white collar" exemptions to minimum wage and overtime under the FLSA. Unlike the Administrator's Interpretation also discussed in this issue of the Newsletter, the proposed regulations will carry the force of law once finalized. Presently, they have been released for public comment, though it is not expected that they will undergo much modification before becoming final.

In a nutshell, unless an employee is exempt from the requirement, an employer must pay employees overtime – at least one and one-half times the employee's "regular rate" - for every hour they work in excess of 40 hours per work week. The most common exemptions are the "white collar" exemptions which are the well-known executive, administrative, or learned professional exemptions. Presently, to qualify for one of these exemptions, an individual must perform certain duties (pass the "duties test") associated with the type of exemption and be paid a minimum weekly sum in the form of a salary.

The proposed rules promulgated by the Department of Labor do not presently seek to change the duties test for the "white collar" exemptions, rather the most notable change is to the minimum salary an employee must be paid to qualify for the exemption. For 2016, when the regulations are expected to take effect, the minimum salary amount is projected to increase from $455 per week to $970 per week. Importantly, the minimum salary rate is based on the 40th percentile of weekly earnings for full-time salaried workers as determined by the Bureau of Labor Statistics (BLS), and the minimum salary requirement will be indexed and updated annually by the BLS without the need to go through the rule-making process each year. So, the minimum salary may be a moving target each year.

The proposed regulations did not change much else. The new salary levels still do not apply to outside sales employees and to other professionals such as teachers, lawyers, and doctors. There is, however, an increase in minimum salary owed to highly compensated individuals.

In the short run, nothing is changing immediately. These rules are currently proposals and are undergoing a period of public comment. It is anticipated that the rule will be finalized sometime in 2016, but likely not until mid-year. This rule will, though, when finalized, have an impact. Many employees currently eligible for the exemption will lose the exemption with the increase in salary. What can you do? Start planning now for the future financial impact and consider participating in the public comment period allowed by the Department of Labor.