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LEGAL ALERT

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INDEPENDENT CONTRACTORS: UNDER THE MICROSCOPE

By Rachel Brochert Roe, Attorney

Many businesses hire independent contractors for project-based assignments. Independent contractors are attractive to employers because they do not carry many of the financial burdens of a true employee, such as benefits and payroll taxes. Additionally, true independent contractors are not required to be covered by the workers compensation policy maintained by the business, nor are the contractors entitled to overtime pay if more than 40 hours are spent per week working for the business. Moreover, employment discrimination laws do not apply to independent contractors.

Before you rush out to convert all of your employees to independent contractors, beware!

Many businesses attempt to take advantage of the benefits of independent contractors by calling their workers independent contractors when in fact, they are employees. Whether a worker is an independent contractor or employee is a legal question, and not just a matter of what your contract with the worker states. The general rule is simple to articulate: does your business have the right to control or direct only the result of the work done by an independent contractor, and not the means and methods of accomplishing the result. In application, however, this test can be very complex to analyze, and has caught many well-intentioned businesses off guard when challenged.

According to the Michigan government, the "misclassification" of workers has risen to epidemic levels in the state. Improper classification of workers creates a drain on the state's tax base. Smith Haughey has seen a rise in the number of government challenges to the classification of workers coming from different government agencies. Sometimes, it is the unemployment insurance agency, when an "independent contractor" applies for unemployment benefits. Sometimes it is the Internal Revenue Service, who wonders why a taxpayer has received a 1099 instead of a W-2 from the same business for the past 3 years and that business is the sole "client" of the independent contractor. Sometimes, the "independent contractor" makes a complaint to the Michigan Department of Labor seeking compensation for unpaid overtime. Each of these situations raises a red flag and if a misclassification is found, the possible adverse consequences to the business include payment of back taxes and steep penalties.

Until now, however, the various government agencies did not share information about worker misclassification. This meant that, by way of example, if the Michigan Department of Labor received an overtime complaint from an improperly classified "independent contractor," that information would not be conveyed to the Michigan Unemployment Insurance Agency and other government agencies.

Enter Governor Granholm's Executive Order 2008-1, which creates a Task Force on Employee Misclassification. The task force consists of representatives of state agencies that administer employee programs such as the unemployment and workers' compensation systems. It is charged with a number of duties, including evaluating employee misclassification enforcement mechanisms already present in the law; creating a system for sharing information on suspected employee misclassification violations; and developing strategies for systematically investigating employee misclassification within those industries in which the practice is most common.

For those businesses that routinely use independent contractors, now is the time to have professional assistance evaluate whether these relationships are designed on paper and in practice to comply with applicable law.

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TITLE VII'S ANTI-RETALIATION PROVISION PROTECTS THE EMPLOYEE AS WELL AS THE EMPLOYEE'S FRIENDS AND FAMILY

By Maria T. Saez, Attorney

In deciding an issue of first impression, the Sixth Circuit Court of Appeals warns employers that the anti-retaliation provision provided in Title VII of the Civil Rights Act of 1964 may, in certain circumstances, protect employees who are not directly involved in protected activity but who are closely related to or associated with the employee who is directly involved.

In *Thompson v. North American Stainless, LP*, the plaintiff, Eric Thompson, worked as a metallurgical engineer for North American Stainless. Mr. Thompson met his wife at work and their relationship was known to their employer. At the time of Mr. Thompson's termination, he and his wife were engaged to be married. She filed a gender discrimination charge against North American Stainless with the Equal Employment Opportunity Commission ("EEOC"). Three weeks after North American Stainless learned of the discrimination charge filed by Mr. Thompson's wife, Mr. Thompson was terminated, allegedly for performance-based reasons. Mr. Thompson sued North American Stainless alleging that his relationship with his wife was the sole motivating factor in his termination. North American Stainless argued that Title VII's anti-retaliation provision only applies to employees who are directly involved in a statutorily protected activity.

Section 704(a) of Title VII prevents retaliation by employers for two types of activities: opposition and participation:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Although the Court acknowledged that a literal reading of the law suggests that it only applies to the employee who conducted the protected activity, to limit the scope of the law in that manner, the Court said, would defeat the "plain

purpose" of Title VII.

There is no doubt that retaliation in the form of discipline, demotion, discharge or the like would dissuade employees from bringing forth legitimate claims of discrimination. However, the EEOC Compliance Manual expressly states that a person claiming retaliation need not be the one who conducted the protected activity. Retaliation against a person's friends or family would discourage that person from exercising his or her statutory rights under Title VII.

The Sixth Circuit's *Thompson* decision has many important implications for employers, especially those who employ members of the same family or who have employees who are close associates of one another. Employers must be very careful when implementing human resource decisions after a discrimination charge has been filed by an employee. Any decisions regarding discipline, demotion, discharge, or a term or condition of employment should be fully and carefully documented. Employers should also be mindful when investigating charges of discrimination so as not to discriminate against associates or family members of the claimant. Additionally, employers might consider amending their employee handbooks to expand their anti-discrimination and retaliation policies to cover employees related to or associated with claimants of discrimination.

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